

Does Congress have the Power to Limit the President's Conduct of Detentions, Interrogations and Surveillance in the Context of War?

Shayana Kadidal¹

The current administration has invoked the Authorization for the Use of Military Force (AUMF) of September 18, 2001² as a Congressional sanction for expansive detention and surveillance authority in the so-called “Global War on Terror.” Those invocations have been controversial, eliciting widespread criticism in the academic literature³ and generating litigation that has produced mixed results for the administration.⁴ However important those debates are at present, the ordinary political process is capable of clarifying Congress’ intent and adjusting the rules before the next national crisis tests their limits. But putting to one side questions about how broadly the AUMF may be applied to trump various other statutes appearing to limit detention and surveillance powers, there is a more abstract question lurking behind the executive branch’s assertions of Congressional acquiescence. This question, raised as a fallback position by the administration before almost every court where it has defended these practices, may ultimately determine the limits future Congresses can place on assertions of executive war powers: does the constitution forbid Congress from placing restrictions on the way in which the President conducts detentions, interrogations, and surveillance in the context of war?

In a variety of fora—litigation, Office of Legal Counsel (OLC) memos, academic white papers—the President has argued that his power in these areas is unlimited, at least as to a core set of war powers—particularly powers to defend the nation from attack. The current administration has argued that the President may ignore—as unconstitutional—Congressional limitations placed on his power to conduct electronic surveillance by the Foreign Intelligence Surveillance Act (FISA); limitations placed on his power to detain individuals without judicial

¹ Senior Managing Attorney, Guantánamo Global Justice Initiative, Center for Constitutional Rights, New York City; J.D., Yale 1994. The views expressed herein are not those of the author’s employer, nor, if later proven incorrect, of the author. This piece grew out of the author’s comments at a symposium panel entitled “Guantánamo’s Impact on Domestic Issues” organized by the New York City Law Review of CUNY Law School and co-sponsored by the Center for International Human Rights (CUNY-John Jay College of Criminal Justice) and the Center for Constitutional Rights, held on March 23, 2007.

Many of the ideas in this article originated with my exposure to the many excellent posts by Georgetown Professor Martin S. Lederman on the Balkinization blog, <http://balkin.blogspot.com>. Professor Lederman, together with David J. Barron of Harvard, has recently published an article on these topics, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008), with a second part to follow in February, which promise to be the starting point for all future scholarly inquiries in this area for some time to come.

² Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

³ See, e.g., Brief Submitted on Behalf of the Center for Constitutional Rights, et al. as Amici Curiae Supporting Yaser Esam Hamdi’s request for Affirmance at 19, *Hamdi v. Rumsfeld*, 378 F.3d 426 (4th Cir. 2002) (No. 02-7338) (AUMF insufficient authority to trump 18 U.S.C. § 4001(a)); Amicus Brief of Professors of Constitutional Law, *Padilla v. Rumsfeld*, No. 03-1027 (U.S. filed Apr. 9, 2004) at 13-19 (AUMF does not trump § 4001(a) or authorize domestic detentions of citizens); Prof. Curtis A. Bradley et al., Letter to the Hon. Bill Frist et al. (Jan. 9, 2006) at 2 (criticizing argument that AUMF conveyed authority to executive to carry out NSA surveillance program).

⁴ See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774-75 (2006) (military commissions created by executive order outside UCMJ are unlawful; AUMF does not trump UCMJ); *ACLU v. NSA*, 438 F. Supp. 2d 754, 779-80 (E.D. Mich. 2006) (NSA program unlawful; not authorized by AUMF), *rev’d*, 493 F.3d 694 (6th Cir. 2007) (plaintiffs—and perhaps all persons—lack standing to challenge program); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (citizen’s military detention authorized by AUMF); *Padilla v. Hanft*, 423 F.3d 386, 393-97 (4th Cir. 2005) (same).

scrutiny in *habeas corpus* proceedings; limitations on his power to detain United States citizens created by the Non-Detention Act, 18 U.S.C. § 4001(a); limitations on executive power to torture detainees imposed by federal criminal law (the federal War Crimes Act, Torture Act, and Assault Statute); limitations originating in international law on his power to hold, torture, interrogate and try detainees, as exemplified by treaties ratified by the Senate (specifically the Geneva Conventions and Convention against Torture); and limitations on his power to create from whole cloth military commissions that violate those obligations, as codified by Congress in the Uniform Code of Military Justice. An as-yet-unleaked memo indicates the administration would argue that the Posse Comitatus Act does not apply to the extent that it limits the use of military force for the military purpose of preventing and deterring terrorism within the United States.⁵ Indeed, as one might guess from the laundry list of countries the administration claims it may attack under the aegis of the AUMF,⁶ the administration fundamentally doubts the ability of Congress to limit the president's power to wage war, at least in response to threats of attack on the United States, including attacks by private terrorist groups.

As a memo from the Office of Legal Counsel—"written," as Professor Lederman notes, "just one week after the AUMF was enacted"⁷—put it, Congress may not "place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response." "These decisions," OLC wrote, "under our Constitution, are for the President alone to make."⁸

These broad claims of executive power all derive from a single preconception: the notion that President should have the power to conduct tactical affairs on the battlefield free from Congressional micromanagement. From this principle, the administration's lawyers have claimed that its powers to detain and interrogate individuals with some relationship to a battlefield—however defined—are immune to Congressional regulation. Likewise, the administration claims that surveillance linked to the battle against Al Qaeda is outside Congress' purview. This article contends that that the problem with these arguments is that their initial premise is flawed: Congress in fact has the power to regulate all activities on the battlefield, to as great a level of detail as it cares to—limited only by practical concerns, not constitutional ones. The administration's contrary position finds no support in the caselaw and is at odds with the intentions of the Founders. With this cornerstone pulled away, the rest of the arguments in favor of uncheckable executive power over the battlefield founder, and the remainder of this article assesses the impact on the administration's legal arguments in the specific contexts of detention, torture and surveillance.

⁵ See Memorandum from Jay S. Bybee to William J. Haynes, II, General Counsel, Dep't of Def., *Re.: Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan* (Feb. 26, 2002) (citing as-yet-unleaked memo from John Yoo and Robert Delahunty, *Re.: Authority for Use of Military Force to Combat Terrorist Activities Within the United States* (Oct. 23, 2001)), reprinted in KAREN J. GREENBERG AND JOSHUA L. DRATEL, *THE TORTURE PAPERS* 163 n.16 (2005).

⁶ In August 2002, White House attorneys said the September 18 authorization allowed the president to invade Iraq without any other congressional approval, and in Senate testimony in October 2005, Secretary of State Condoleezza Rice cited the September 18 authorization as sufficient grounds to invade another country: Syria.

⁷ Marty Lederman, *Judge Posner and "Ad Hoc Initiatives"* (i.e., *Presidentially Sanctioned Felonies*), *Balkinization* blog (Dec. 21, 2005) (author's comment from Dec. 22, 2005), available at <http://balkin.blogspot.com/2005/12/judge-posner-and-ad-hoc-initiatives-ie.html>.

⁸ Memorandum from John C. Yoo, Deputy Asst. Att'y General, to Deputy Counsel for the President, *The President's Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them* (Sept. 25, 2001), reprinted in KAREN J. GREENBERG AND JOSHUA L. DRATEL, *THE TORTURE PAPERS* 24 (2005).

The Initial War Power Analysis: Does the President Have Uncheckable Power over Tactical Decisions on the Battlefield?

Before we begin exploring where these expansive claims of uncheckable presidential powers originate, it's important to highlight one important distinction: between permissive situations where Congress hasn't attempted to regulate a field—for example, foreign intelligence surveillance before 1978⁹—and situations where it has prohibited or regulated certain presidential actions. In the first, the president can act if the Constitution gives him some express or implicit power. In the second, he can only act in the face of a congressional prohibition or restriction if the Constitution consigns a power to him *exclusively*. So, for example, the president is thought to have the exclusive power to decide whether formally to recognize countries—as part of the power to “receive ambassadors” enumerated in Article II.¹⁰ I doubt Congress could regulate it.¹¹

Whatever one thinks of the complex question of the scope of Congressional power to initiate or stop wars, the president clearly has *some* inherent power to use force to defend the United States without prior Congressional approval: “If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”¹² This seems to accord with the intent of the Framers: Madison's notes from the

⁹ A number of cases in the Courts of Appeals recognized a foreign intelligence exception to the warrant requirement for surveillance occurring prior to the passage of FISA in October 1978. *See* *United States v. Truong*, 629 F.2d 908, 912–15 (4th Cir. 1980) (surveillance ending in Jan. 1978); *United States v. Buck*, 548 F.2d 871, 875–76 (9th Cir. 1977); *United States v. Butenko*, 494 F.2d 593, 604–05 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973); *United States v. Clay*, 430 F.2d 165, 170–71 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971). *But see* *Zweibon v. Mitchell*, 516 F.2d 594, 614 (D.C. Cir. 1975) (en banc) (plurality opinion) (“Absent exigent circumstances, all warrantless electronic surveillance is unreasonable and therefore unconstitutional.”).

¹⁰ Accordingly, Jefferson had insisted that “the transaction of business with foreign nations is executive altogether,” when French emissary Edmond-Charles Genet submitted his credentials in 1790 as the foreign representative of the first French Republic to Congress rather than President Washington. Thomas Jefferson, *Opinion on the Powers of the Senate* (1790).

Hamilton interpreted the power to receive ambassadors the same way, and felt that this express grant of power could affect the status of treaties previously approved by the Senate as well:

The right of the executive to receive ambassadors and other public ministers, may serve to illustrate the relative duties of the executive and legislative departments. This right includes that of judging, in the case of a revolution of government in a foreign country, whether the new rulers are competent organs of the national will, and ought to be recognized, or not; which, where a treaty antecedently exists between the United States and such nation, involves the power of continuing or suspending its operation. For until the new government is acknowledged, the treaties between the nations, so far at least as regards public rights, are of course suspended.

PACIFICUS NO. 1 (Alexander Hamilton) (Jun. 29, 1793).

¹¹ Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 establishes the “policy of the United States” and the “sense of the Congress” as to conditions for recognition of any future “transitional” Cuban government, but does not cast these conditions as mandatory. Pub. L. 104–114, §§ 201(13), 207(d), 110 Stat. 785, 805, 813 (1996).

¹² *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863). *See also* *Mitchell v. Laird*, 488 U.S. 611, 613 (D.C. Cir. 1973) (“[The] President . . . may respond immediately without [Congressional] approval to a belligerent attack[.]”); *Massachusetts v. Laird*, 451 F.2d 26, 31 (1st Cir. 1971) (Coffin, J.) (“The executive may without Congressional participation repel attack[.]”); *United States v. Smith*, 27 F. Cas. 1192, 1230 (No. 16,342)

Philadelphia convention show that they gave Congress the power to “declare” war in lieu of the power to “make” war in order to “leav[e] to the Executive the power to repel sudden attacks.”¹³

Now, can Congress regulate the manner in which force is used in any circumstances—whether during a “crisis” provoked by “invasion,” or otherwise? Clearly, it can: the Constitution expressly provides that Congress may “make Rules for the Government and Regulation of the land and naval Forces,”¹⁴ and “define and punish . . . Offences against the Law of Nations,”¹⁵ including law-of-war offenses. (Nothing contradicts the view that this latter power allows Congress to regulate our own forces as well as those of an enemy encountered on the battlefield.)

Does this power to regulate the use of the armed forces have its limits? Could Congress tell the President he absolutely cannot respond to some conventional attack on the homeland, until he consults with Congress and gets authorization? Arguably the answer here is no: Article IV, sec. 4 says the United States *shall* protect the states against invasion and guarantee them “a Republican Form of Government.”¹⁶ Thus, the notion that the President is “bound to resist force by force.”¹⁷ The Republican Form of Government Clause is one of the few areas where the federal government has not merely authority to act but affirmative obligations to act—here, to defend the states.¹⁸

So, let us assume some level of duty to protect the states is part of the core war power of the President. Is there more to the idea of a core to the executive war power that the Congress cannot touch? Often people who believe in such a core believe that Congress cannot regulate the actual tactical decisions on the battlefield—field operational decisions, command and control

(C.C.D.N.Y. 1806) (Paterson, Circuit Justice) (“It [is] the duty . . . of the executive magistrate . . . to repel an invading foe.”).

The *Prize Cases* are often cited by the administration for the position that the immediate scope of the military response is within the President’s discretion. See *The Prize Cases*, 67 U.S. at 670 (“He must determine what degree of force the crisis demands.”); Memorandum from Jay S. Bybee to White House Counsel Alberto Gonzales (Aug. 1, 2002), reprinted in KAREN J. GREENBERG AND JOSHUA L. DRATEL, *THE TORTURE PAPERS* 172, 206 (2005) (citing *The Prize Cases*). However, as noted by Barron and Lederman, *supra* note 1, at 761 n. 213, the blockade in question in those cases was actually ratified by Congress (both ex ante and ex post) and the United States argued to the court that the president’s powers were “subject to established laws of Congress.” *Id.* (citing *Brief for the United States and Captors* at 22). Cf. *Hamdi*, 542 U.S. at 552 (Souter, J., dissenting in part) (“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” pursuant to inherent military powers without statutory authority, but such “an emergency power of necessity must at least be limited by the emergency.”).

¹³ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand, ed., Yale Univ. Press 1966) (1911) (characterizing comments by Madison and Gerry).

¹⁴ U.S. CONST. art. I, § 8, cl. 14.

¹⁵ *Id.* art. I, § 8, cl. 10.

¹⁶ *Id.* art. IV, § 4.

¹⁷ *The Prize Cases*, 67 U.S. at 668.

¹⁸ Effecting the Census is another affirmative obligation. Some argue that the Thirteenth Amendment obligates the federal government to search out and wipe out slavery and affirmatively wipe out its vestiges as well. See Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1380–81 (1992) (“A state has considerable flexibility in discharging this obligation . . . but the state may not simply turn a blind eye to slavery within its jurisdiction. . . . [O]nce any arm of the state knows of present, identifiable slavery within its territory, the state must take reasonable steps to end the enslavement. . . . Put another way, the Amendment requires state action under certain circumstances.”).

functions, or advance and retreat decisions. This is widely expressed as the idea that Congress cannot regulate the “movement of troops on the battlefield.”¹⁹

If one traces this assertion back to its roots, one finds a handful of offhand, not very authoritative sources. First is the statement from Chief Justice Chase’s concurrence in *Milligan* that, although Congress has authority to legislate to support the prosecution of a war, Congress may not “interfere[] with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief.”²⁰ The second source is an otherwise obscure memorandum from the future Justice Robert Jackson, at the time President Franklin Roosevelt’s Attorney General, concerning the legality of military assistance to Great Britain prior to America’s entry into World War II:

‘in virtue of his rank as head of the forces, [the President] has certain powers and duties *with which Congress cannot interfere*. For instance, he may regulate the movements of the army and the stationing of them at various posts. . . .’ Thus the President’s responsibility as Commander in Chief embraces the authority to command and direct the armed forces *in their immediate movements and operations* designed to protect the security and effectuate the defense of the United States (emphasis added).²¹

¹⁹ When I say “widely,” I mean both “commonly” and “on both sides of the political spectrum.” See, e.g., David Cole, *Reviving the Nixon Doctrine: NSA Spying, the Commander-in-Chief, and Executive Power in the War on Terror*, 13 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 17, 34 (2006) (“Similarly, Congress should not be constitutionally permitted to micromanage tactical decisions in particular battles. But short of such highly unlikely hypotheticals, Congress has broad leeway to govern and regulate the armed services”); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 103–04 (2d ed. 1996) (“Less confidently, I believe also that in war the President’s powers as Commander in Chief are subject to ultimate Congressional authority to ‘make’ the war, and that Congress can control the conduct of the war it has authorized. . . . It would be unthinkable for Congress to attempt detailed, tactical decision, or supervision, and as to these the President’s authority is effectively supreme. But, in my view, he would be bound to follow Congressional directives not only as to whether to continue the war, but whether to extend it”); Richard Hartzman, *Congressional Control of the Military in a Multilateral Context*, 162 MIL. L. REV. 50, 70–71 (1999) (“operational and tactical control” and “command function” are included in Commander in Chief powers); Saikrishna B. Prakash, *Regulating the Commander in Chief: Some Theories*, 81 IND. L.J. 1319, 1321 (2005) (“Many scholars . . . admit that Congress cannot regulate tactical decisions involving the retreat and advance of soldiers.”); see *id.* at 1322 n.13 (expressing skepticism about conventional wisdom: “Although the notion that the President must have exclusive tactical control of the movement of forces on the battlefield seems near universal, there is nothing obvious about it.”).

²⁰ *Ex parte Milligan*, 71 U.S. 2, 139 (1866) (Chase, C.J., concurring in judgment). The similar discussion in dicta in *Fleming v. Page*, 50 U.S. 603, 615 (1850), can be read to mean that a declaration of war ordinarily conveys this authority to the President:

[E]xpansion of U.S. territory can be done only by the treaty-making power or the legislative authority, and is not a part of *the power conferred upon the President by the declaration of war*. His duty and his power are purely military. As commander-in-chief, he is *authorized to direct the movements of the naval and military forces placed by law at his command*, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power. (emphasis added)

Id. Even had Chase’s opinion been the majority opinion, this language would have been dicta. See *Ex parte Milligan*, 71 U.S. 2, 139.

²¹ Training of British Flying Students in the United States, 40 U.S. Op. Atty. Gen. 58, 61–62 (1941), 1941 WL 1878.

The quoted language, Jackson’s sole authority, cites no direct authority for the point (and indeed seems to concede Congress’ power to restrict the President to “as great or as little choice of means and methods as [it] may see fit to confide to him”).²² The small handful of other historical sources ever cited to in the literature are rather inconclusive.²³

This is quite short authority for the vast claims of executive authority the current administration’s legal staff have made from it, at least viewed standing by itself. But is there some logic to the notion that tactical decisions about how to best implement the inherent executive power to protect the United States are immune from Congressional regulation?

Defenders of uncheckable presidential power over movement of troops and similar tactical decisions on the battlefield point to the Commander in Chief Clause as an “enumerated” source of that power. But the Commander in Chief Clause does not describe a “power” to be conveyed to the President—the clause simply says “[t]he President shall be commander in chief of the Army and Navy of the United States,” in contrast to four other express grants of power to the president in Article II.²⁴ The clause is best read as a negative of autonomous military

²² The full passage, taken from a treatise by the original author of *Black’s Law Dictionary*, does not support Jackson’s conclusion that the armed forces are exclusively under the President’s control:

Congress has power to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces. Under these grants of authority it may clearly regulate the enlistment of soldiers and sailors, prescribe the number, rank and pay of officers, provide for and regulate arms, ships, forts, arsenals, the organization of the land and naval forces, courts-martial, military offenses and their punishment, and the like. And all these laws and regulations the President is to carry into effect, not in his character as commander in chief, but as a part of his general executive duty, and with as great or as little choice of means and methods as congress may see fit to confide to him. But again, in virtue of his rank as the head of the forces, he has certain powers and duties with which congress may not interfere. For instance, he may regulate the movements of the army and the stationing of them at various posts. So also he may direct the movements of the vessels of the navy, sending them wherever in his judgment it is expedient. Neither here nor in a state of war is there any necessary conflict.

HENRY CAMPBELL BLACK, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW 114–15 (3d Ed. 1910).

²³ Hartzman notes that, in *The Federalist No. 23*, Hamilton states: “The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support,” but, that of all of these, the only one not paralleling language of grants in Article I is “direct their operation”—thus implying it was reserved for the Commander in Chief. Hartzman, *supra* note 15, 81 MIL. L. REV. at 75. Of course, that is at once quite an inferential leap—Hamilton might just as well have assumed it was part of one of the enumerated Article I powers—and says nothing to whether the hypothesized executive power to “direct” is exclusive to the executive or a field of concurrent authority. *See supra* note 21, ¶ 3 (noting the use of the phrase “directing their operation” in the Articles of Confederation and analyzing the significance of its exclusion from Article I).

Hartzman also cites three records of debates in state ratifying conventions: a Maryland objection that the President “should not command in person,” and similar arguments in the Virginia and North Carolina debates. Hartzman, *supra* note 15, 81 MIL. L. REV. at 74 n.78. Again, none is conclusive as to whether the power is exclusive to the executive or concurrent in both branches. As a general matter, these debates in the state ratifying conventions (and records of the public debates accompanying them, *e.g.*, *The Federalist*) are far more conclusive as sources of “legislative intent” with respect to constitutional provisions than the notes of the Philadelphia convention debates, since the states were the relevant legislators, and the delegates their drafters. *See generally supra* note 21 (describing the relevant historical sources).

²⁴ “The executive power shall be vested in a President” U.S. CONST. art. II, § 1, cl. 1; “power to grant reprieves and pardons for offenses against the United States,” *id.*, art. II, § 2, cl. 1; “power, by and with the advice and consent of the Senate, to make treaties,” *id.*, art. II, § 2, cl. 2; “Power to fill up all Vacancies that may happen

leadership of the armed forces—simply making clear that ultimate control over the military always rests with the civilian President—rather than as a grant of uncheckable power to the executive. As Hamilton put it:

The President is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British king extends to the *declaring* of war, and to the *raising* and *regulating* of fleets and armies; all which, by the constitution under consideration, would appertain to the legislature.²⁵

The history of the phrase “commander in chief,” as evidenced through historical practice in England, in America during the Revolution, in the Articles of Confederation, and in the various state constitutions using the phrase at the time overwhelmingly supports the notion that the Founders would have understood that the legislature could regulate the manner in which the commander in chief exercised his command.²⁶ As Richard Epstein has argued, the clause does

during the Recess of the Senate, *id.*, art. II, § 2, cl. 3. The Opinions clause might be included in this list as well, though it does not use the term “power”: “he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices,” *id.*, art. II, § 2, cl. 2.

Some scholars argue that the Commander in Chief Clause merely conveys a title, but that broad uncheckable executive war powers are conveyed by the Executive Vesting Clause (the first clause cited in the previous paragraph). See Prakash, *supra* note 19, at 1319 n.1.

²⁵ THE FEDERALIST NO. 69, at 352–53 (Alexander Hamilton) (Max Beloff ed., 1987).

²⁶ This history is admirably and comprehensively set forth by Barron and Lederman. Barron and Lederman *supra* note 1, at 772–800. To summarize it briefly here, in English historical usage, when Parliament appointed generals as commander in chief, it often did so expressly subject to directions that might be conveyed from Parliament in the future. *Id.* at 772–73. Such was the century of preceding practice against which General Washington was appointed “General and Commander in chief” by the Continental Congress in 1775. *Id.* at 773. The Continental Congress “did not hesitate” to instruct its commander in chief in great detail, even regarding tactical decisions, going so far as to send committees to the front, and countermanding some of his most strongly held judgments about tactics, particularly during the losing battle for New York City in 1776. *Id.* at 774–75. The Continental Congress also micromanaged his treatment of certain enemy prisoners of war. *Id.* at 776–77. While the Continental Congress ended up gradually granting more authority to Washington over the course of the war, this cession was not institutionalized in the subsequent Articles of Confederation, “ratified in 1781, toward the end of the war,” which provided that the Congress would effectively continue to be both the legislative and executive branch of government, and would have the “sole and exclusive right and power” to exercise the war powers that later were enumerated in Article I of the Constitution. *Id.* at 780.

Ten of the post-Declaration of Independence state constitutions named the governor as “commander in chief” of the state’s militia, but none indicate that this conveyed “preclusive authority” over tactics in the field, and five of them specifically stated that the governor had to exercise this role “in conformity with state law.” *Id.* at 781–82. So, Virginia’s Constitution allowed the governor to “alone have the direction of the militia” and to “embody the militia with the advice of the Privy council,” and the Massachusetts Constitution of 1780, the “likely . . . model for the federal Commander in Chief Clause in 1787,” stated that even the many substantive executive war powers it enumerated must be exercised by the commander in chief “agreeably to . . . the laws of the land, and not otherwise.” *Id.* at 782–83. While one can argue that less weight should be given to the experience under the Continental Congress and Articles of Confederation because they did not embody a separately-elected executive distinct from the legislative body, that argument cannot be made with the state constitutional schemes involving a popularly-elected governor (such as Massachusetts). *Id.* at 781–83. Even one of the popular critics of the drafts of the 1780 Massachusetts constitution who argued for greater executive war powers, the pamphleteer who published the *Essex*

nothing more than convey “the powers of the first general or admiral,” potentially subject to “a dense fabric of rules that lay in the hands of Congress” pursuant to its enumerated powers to make rules for regulation of the armed forces.²⁷

Could uncheckable authority over the battlefield derive from the idea that the presidency was intended by the Framers to exercise discretion in interpreting and enforcing the laws? The textual source typically cited for this is the Vesting Clause: “The executive Power shall be vested in a President of the United States of America.”²⁸ The Vesting Clause could easily be seen as simply stating that the President has power to exercise all discretionary choices left to him by Congress. However, the Clause is seen by advocates of executive power as implying inherent executive powers not enumerated in the Constitution, owing to the differences between it (“The executive Power”) and the Legislative Vesting Clause (“All legislative powers herein granted”).²⁹ Alexander Hamilton was likely the first to make such an argument,³⁰ and James Madison perhaps the first to refute it.³¹

Opponents of Hamilton’s reading point to the Take Care Clause,³² mandating that the President “shall take care that the laws be faithfully executed.” These Madisonians believe the President’s primary role is to faithfully execute laws passed by the “most dangerous branch,” not to act unilaterally. And he has no *exclusive* inherent powers, over war or anything else; put another way, there is no unenumerated power vested in the federal government over which

Result, agreed that it was wise that “the legislative body may controul” the governor’s decisions as to troop deployment outside the state. *Id.* at 784.

As to the drafting of the federal Constitution, one quiver in the opposing argument is that the Constitution’s Government and Regulation Clause, Article I, Section 8, Clause 14, omitted a phrase that had been included in the equivalent part of the Articles of Confederation, whose Article IX stated Congress had the power of “making rules for the government and regulation of the . . . land and naval forces, and directing their operations.” However, as Barron and Lederman note, the Articles also did not include a structural requirement of bicameralism and presentment for legislation—as the Congress was a deliberating executive body under the Articles—and thus, under the new scheme of separated governmental powers, the notion of “direction” *other than by statute* might have seemed unworthy of inclusion in the text of Article I. *Id.* at 789. Nothing in the state ratifying debates militates strongly to the opposing view, *id.* at 792–94, and Alexander Hamilton’s public defenses of the proposed constitution expressly stated that the new Commander in Chief would simply have the powers akin to those of the Massachusetts governor. *Id.* at 789, 797 (citing THE FEDERALIST NO. 69 (Alexander Hamilton)). As noted above, Hamilton’s defenses—perhaps the most valuable clues to the historical understanding we have—primarily expressed concern with the notion of a multiply-headed executive, not with the notion that the Commander in Chief should be subject to regulation by statute. *Id.* at 797–99 (quoting THE FEDERALIST NO. 70 (Alexander Hamilton): “It is one thing [for the executive] to be subordinate to the laws, and another to be dependent on the legislative body. The first comports with, the last violates, the fundamental principles of good government . . .”).

²⁷ Richard Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 Hofstra L. Rev. 317, 324–25 (2005).

²⁸ U.S. CONST. art. II, § 1.

²⁹ *Id.* art. I, § 1.

³⁰ Pacificus [Alexander Hamilton], *Gazette of the United States* (Jun. 29, 1793) [Pacificus No. 1] (“The second article of the Constitution of the United States, section first, establishes this general proposition, that ‘the EXECUTIVE POWER shall be vested in a President of the United States of America.’ . . . The general doctrine of our Constitution . . . is that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications, which are expressed in the instrument.”), *available at* <http://www.teachingamericanhistory.org/library/index.asp?document=429>.

³¹ Helvidius [James Madison], *Gazette of the United States* (Aug. 31, 1793) [Helvidius No. 2] (“A concurrent authority in two independent departments, to perform the same function with respect to the same thing, would be as awkward in practice, as it is unnatural in theory.”), *available at* <http://www.teachingamericanhistory.org/library/index.asp?document=429>.

³² U.S. CONST. art II, § 3.

Congress is foreclosed from legislating. To the extent any such unenumerated federal powers exist,³³ they are fields of concurrent authority between the political branches,³⁴ and when Congress does legislate in such a field it occupies the field and binds the President to “faithfully execute” its decisions.³⁵

This reading has the advantage that it is “consistent with the two dominant principles of constitutional interpretation: separation of powers and checks and balances.”³⁶ It also has the advantage of elegance, holding the executive, legislative and judicial functions as well-separated between branches as possible. Moreover, if one assumes, sensibly, that Congress may freely delegate some of these regulatory powers to the President, this reading also has the advantage of not making permanent any particular policy choices about the wisdom of placing certain war powers in one branch or another. Given how much of an experiment the Founders were undertaking in removing from the executive war powers that had traditionally been monarchical prerogatives, building in some such flexibility would be wise.

If the President is in fact responsible merely for executing the law as pronounced by the other two branches, then the authority to regulate the movement of troops on the battlefield becomes quite clear. Congress cannot micromanage the conduct of war by actually displacing the President’s executive function of implementing its rules for the conduct of the war any more than it can micromanage prosecutorial discretion to enforce the criminal laws in the most efficient way the President deems fit.³⁷ So, for example, Congress could not appoint, by statute, an “ersatz” commander in chief to run the war, immune from removal by the President.³⁸ But

³³ According to modern doctrine, such powers do exist. For instance, nowhere in the Constitution is federal power to control immigration enumerated. (See U.S. Const., Art. I Sec. 8 Cl. 2–3 (“To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; To establish a uniform rule of naturalization...”). The express power enumerated is over naturalization, not immigration, and while one might plausibly read the International Commerce Clause to subsume this power, the Supreme Court has not taken this view. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 99–112, 123–63 (2002).

³⁴ Cf. Barron & Lederman, *supra* note 1, at 726 (describing a “reciprocity model” under which “the war powers of each political branch are presumed to be extensive and, for that reason, blended and overlapping with those of the competing branch,” which, the authors believe, is suggested by Justice Jackson in *Youngstown*).

³⁵ Nothing in this discussion implies that Congress’ powers in such fields are not delegable to the executive, adding complication to any discussion of these matters that attempts to ground its conclusions in historical practice. See, e.g., Prakash, *supra* note 19, at 1320 n.5.

³⁶ Epstein, *supra* note 27, at 320.

³⁷ This comparison was made in the Working Group memo: “although Congress may define federal crimes that the President, through the Take Care Clause, *should* prosecute, Congress cannot compel the President to prosecute outcomes taken pursuant to the President’s own constitutional authority.” Working Group Memo (Apr. 4, 2003), *reprinted in* KAREN J. GREENBERG AND JOSHUA L. DRATEL, *THE TORTURE PAPERS* 304 (2005) (emphasis added).

³⁸ See Prakash, *supra* note 19, at 1320 (assuming President’s Commander in Chief power is not delegable to Congress, “Congress could neither act as a plural CINC nor appoint an ersatz CINC to make decisions committed to the actual CINC”); Cole, *supra* note 19, at 34 (“If Congress sought to place authority to direct battlefield operations in an officer not subject to the president’s supervision, for example, such a statute would likely violate the president’s role as Commander-in-Chief.”); Epstein, *supra* note 27, at 321 (“the principle of checks and balances is at work here. The power to make general rules is checked in effect by the inability of Congress (given the Vesting Clause) to oust the President from office, or from his role of commander in chief.”).

Interestingly, historical practice recognizes the right of Congress to create binding rules about appointments of lower-level field commanders. So, for instance, Lincoln was greatly hindered in the task of finding competent top-level generals for the Union army by “legislated seniority rules that prevented certain generals from serving under other generals, thereby restricting the President’s discretion to appoint theater commanders.” Hartzman, *supra* note 19, at 99.

Congress can regulate the conduct of warfare (or of one specific war) in ways that do not displace the President's role as chief magistrate in implementing and enforcing the rules set by Congress.

This is my preferred interpretation, and it leads to the conclusion that there is no unregulable core to the war powers, even on the battlefield itself. There, the President has final decisionmaking authority to implement the decisions Congress makes, but there is no limit to the degree of detail that Congress can specify for the conduct of war. Thus, for example, Congress could pass a law prohibiting shelling on a foreign battlefield within one-hundred yards of a school under any circumstances.³⁹ That would be constitutionally acceptable, even if it puts American troops at grave risk—Congress might have made the judgment that the cost-benefit calculus still comes out positively, and should be allowed to make such policy determinations.⁴⁰ The President gets to actually carry out the implementation of those regulations—so, for instance, if there was reasonable leeway in the interpretation of “school” that might be left to the President's discretion—but not trump the legislation outright.⁴¹

As a practical matter, such a reading has the benefit of preserving uniformity of command—a major concern of the Framers, as it was sorely lacking under the Articles of Confederation (which did not provide for an executive branch)⁴²—but without conveying an uncheckable discretion in the executive that seems counter to the spirit of the entire document. (Perhaps it was these concerns for having a single general in charge of all the nation's armed forces—animated by specific experience with multiply-headed command during the Revolutionary War—that Hamilton had in mind when he wrote, in *Federalist* 74, that “[o]f all

³⁹ Barron and Lederman cite the “common idea” that it would be impermissible for Congress “to instruct the President to take a certain hill.” Barron & Lederman, *supra* note 1, at 753; *id.* at 755 (giving examples: “Take Hamburger Hill”; “Land at Utah Beach”). Of course, as a *practical* matter, these sorts of situations rarely arise within the context of a larger war because legislation is a slow process—the requirements of bicameralism and presentment preclude Congress from legislating rapidly enough to countermand executive tactical decisions in this level of detail. *See id.* at 760 (describing narrow circumstances under which such regulatory opportunities might occur if President announced in advance, *e.g.*, his intent to “firebomb an urban setting”). However, I find little to distinguish such a hypothetical from a more typical Congressional command—to defeat Imperial Japan, or to destroy Al Qaeda and all who harbored it. *Cf. id.*, at 752 (setting forth arguments that would distinguish between impermissible “affirmative commands and negative prohibitions”). *But see id.*, at 755 (criticizing arguments as untenable). As another pair of scholars put it, “[i]t is not for want of constitutional power that Congress has not controlled the movement of troops more frequently; it is because the problems of military management do not lend themselves to legislative decision.” FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR* 115–16 (2d ed. 1989).

⁴⁰ *Cf.* William Van Alstyne, *Symposium: The President's Powers as Commander-in-Chief Versus Congress' War Power and Appropriations Power*, 43 U. MIAMI L. REV. 17, 43 (1988) (SPEAKER: . . . Would you limit in any way Congress' authority to impose [geographic deployment] restrictions on the Army? VAN ALSTYNE: Absolutely not. Congress may furnish no Army and Navy at all, or it may provide one that consists solely of a battalion of people carrying slingshots. The President may feel tremendously frustrated. Too bad. He will command nothing more than a battalion of slingshots.”).

⁴¹ Enforcement—at least judicial enforcement—of such regulation could present a variety of difficult challenges outside the scope of this paper.

⁴² *See* Hartzman, *supra* note 19, at 72–77; *id.* at 77 n. 90 (documenting Framers' concerns over having fragmented national military command over armed forces and militia); *id.* at 85, 87 (explaining that there was no executive branch).

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.”⁴³)

This interpretation is consistent with the limited caselaw: In *Little v. Barreme*,⁴⁴ the Supreme Court held unlawful a seizure pursuant to Presidential order of a ship during the “Quasi War” with France. President Adams had ordered seizure of vessels “bound to or from French ports.” The Court unanimously found that Congress had authorized the seizure only of ships going *to* France, and therefore the President could not unilaterally order the seizure of a ship coming *from* France.⁴⁵

My interpretation is also consistent with a frequently ignored component of the political branches’ war powers: the Militia clauses. As Richard Epstein has pointed out, the Commander in Chief Clause states that “[t]he President shall be Commander in Chief” not only of the federal armed forces but also “of the Militia of the several States, when called into the actual Service of the United States.”⁴⁶ The qualifier “when called into the actual service” of the federal government is a reference back to Article I, Section 8, Clauses 15 and 16.⁴⁷ Clause 15 gives Congress the power to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions,” and the text “makes it clear that Congress itself does not have the power to call forth the militia, but in fact must pass some statute which will decide how and when the militia shall be called into the [service of the] United States. It would be odd if it could devolve that power onto itself, so the clear implication is that it can set by rules and regulations the conditions under which the President may, as commander in chief, call the militia into actual service.”⁴⁸ The authority to set such conditions on presidential command of the militia is granted to Congress in the following clause:

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]⁴⁹

This seems to parallel Article I, Section 8, Clause 14’s grant of power to “make Rules for the Government and Regulation” for the federal armed forces.⁵⁰ The entire scheme reinforces two aspects of my preferred interpretation of power over the standing federal armed forces: first, that Congress may pass regulatory legislation without limitation; second, that the Framers had reason

⁴³ See Barron & Lederman, *supra* note 1, 121 Harv. L. Rev. at 798 (“Hamilton was inveighing against the notion of a multiple executive”). As the authors note, it is easy to conclude that the “commander-in-chief” title is “purely a hierarchical designation.” *Id.* at 729.

⁴⁴ 6 U.S. (2 Cranch) 170 (1804).

⁴⁵ Interestingly, the Court implied that in the absence of such a limiting provision in the statute, the President might have had the power to enforce his order as an implementation of Congress’ neutrality Act. 6 U.S. at 177–78. The Act itself contained sections constraining movement of naval forces: “it shall be the duty of the commander of such public armed vessel, to seize every such ship or vessel engaged in such illicit commerce, and send the same *to the nearest port in the United States*” (emphasis added). 1804 U.S. Lexis 255 at *3.

⁴⁶ Richard A. Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 HOFSTRA L. REV. 317 (2005).

⁴⁷ See *id.* at 321.

⁴⁸ *Id.* at 321–22.

⁴⁹ U.S. CONST., art. I, § 8, cl. 16.

⁵⁰ *Id.* art. I, § 8, cl. 14.

to contemplate a military scenario where the President's power over forces under his command was entirely derived from statute, since the President presumably has no inherent power over state militias. (Even the constitutional duty of the executive to defend the states under the Guaranty (of Republican Government) Clause does not convey inherent powers over the militias since the text clearly mandates that Congress must act before the President may command militias to "suppress Insurrections and repel Invasions.")⁵¹

The practical implications of the opposing position would be extreme in terms of disrupting settled practice. Modern law of war treaties implement quite detailed regulations about the conduct of war, prisoner detention and treatment, and so forth, and it is difficult to imagine that Congress lacks the power to implement those treaties—many of which are at the level of customary international law if not *jus cogens*—or provide punishment for violations of treaty provisions that are self-executing with legislation that binds the President.⁵² Through the historical Articles of War Congress has defined war crimes (punishable by criminal sanctions), thus regulating the bounds of permissible executive conduct of warfare. Statutes as far back as the War of 1812 regulate the treatment of Prisoners of War.⁵³ As Professor Prakash points out, the implications might be extreme for peacetime practice as well, for Congress has historically ordered the shifting of troops during times of peace, and in theory little distinguishes (for example) the closure of military bases from ordering the retreat of soldiers on the battlefield.⁵⁴ Indeed, the historical record contains many instances where Congress has "directed or limited the movement of troops" in both peacetime and at war.⁵⁵

* * *

With all that said, the conduct of war on the battlefield is not my chief concern. Since 9/11, we've seen a number of false analogies to this idea of a core power to defend the United States in any way the President sees fit, immune from regulation in any way by Congress (with these limits on Congress's powers not bounded by the narrow terms of the Protection or Republican Form of Government clauses). There are three areas where this administration has claimed that Congress lacks the power to regulate the president's activities, at least where they

⁵¹ *Id.* art. I., § 8, cl. 15.

⁵² As one pair of noted scholars have remarked, if "the Constitution permanently incorporate[d] the common law of war of 1789," as opposed to "giv[ing] the President a nonstatutory authority which can be altered by statute," then "the President's power as commander in chief cannot be limited by statute or treaty. In that case such a treaty as the Hague Convention of 1907, which limited the ... conduct of war in a large number of ways"—and has the status of *jus cogens*—"is invalid because it encroaches on the President's constitutional authority." FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR* 113 (2d ed. 1989). For a treatment on the *jus cogens* nature of the 1907 conventions, *see, e.g.*, Alexander R. McLin, Note, *The ICRC: An Alibi for Swiss Neutrality?*, 9 *DUKE J. COMP. & INT'L L.* 495, 507 (1999).

⁵³ *See* text accompanying *infra* note 55.

⁵⁴ *See* Prakash, *supra* note 19, at 1322 n.13 ("Whether or not we are at war, one might seem a regulation of soldiers as much as the other. Moreover, the President is CINC whether we are at war or not, and the text of the Constitution gives us little reason to suppose that the President has more CINC power during wartime."); *see also* Barron & Lederman, *supra* note 1, at 771 n.260 ("the Commander in Chief Clause does not distinguish between war and peace. ... not many would argue that Congress cannot regulate the way in which, for instance, affairs at the Pentagon are arranged in peacetime.").

⁵⁵ FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR* 115, 322 (2d ed. 1989) (citing 1 Stat. 403 (1794) (stationing militia in Western Pennsylvania following Whiskey Rebellion); 5 Stat. 29, 30 (1836) (moving fort from Indian territory to Arkansas); 54 Stat. 885, 886 (1940) (barring any draftee from being stationed outside Western hemisphere); 83 Stat. 469, 487 (1969) (restricting troops in Indochina); 84 Stat. 1942 (1971); 84 Stat. 2020 (1971); 85 Stat. 716 (1971); 87 Stat. 130 (1973) (terminating employment of troops in Indochina)); *see also id.* at 108–09 (citing examples of Continental Congress ordering movements of troops and equipment).

relate to a core war power: detention of “enemy combatants,” torture (typically as part of the interrogation of “enemy combatants”), and electronic surveillance.

Detention

Prior to 9/11, authority to detain United States citizens was thought to be governed by the Non-Detention Act, 18 U.S.C. § 4001(a) (“NDA”), which provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” The Non-Detention Act was enacted specifically to ensure that the internment of Japanese-Americans following the bombing of Pearl Harbor would not be repeated.⁵⁶ (Recall that large numbers of the interned had been born in the United States and were U.S. citizens.) Section § 4001(a) was intended, as an initial matter, “to repeal the Emergency Detention Act of 1950.”⁵⁷ Under the Emergency Detention Act, the Executive was authorized in time of war or national emergency to detain persons as “to whom there is reasonable cause to believe will engage in acts of espionage or of sabotage.”⁵⁸ Presumably, Congress intended to force resort to criminal charges pursuant to federal criminal statutes (“an Act of Congress”) and attendant pre-trial detention (with all its protections, e.g. the probable cause requirement) any time a citizen was “detained by the United States.” For citizens fighting against United States armed forces on a foreign battlefield, presumably an appropriate criminal charge would be supplied by the treason statute: “Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, ... within the United States or elsewhere, is guilty of treason....”⁵⁹

The NDA was thus at the center of the legal dispute between the government and Yaser Hamdi, a born citizen of the United States allegedly captured post-9/11 on the battlefield in Afghanistan.⁶⁰ The government advanced several different arguments in favor of the conclusion that the NDA should not bar Hamdi’s continued detention. First, the government argued that the NDA was never intended to reach military detentions, and applies only to detention by civilian authorities.⁶¹ This argument seems belied by the broad wording of the statutory text, which applies to any detention “by the United States,” and is not limited to detention by civilian authorities. Relatedly, the government argued that the NDA did not apply to detentions that took place on active battlefields, whether at home or abroad. The legislative history of the final, 1970 act (which by and large was the only legislative history cited in the briefs in the case) spoke to the Japanese-American internments during World War II. While those detentions took place

⁵⁶ See Abner Mikva, *Dangerous Executive Power*, WASH. POST, July 16, 2004, at A21, available at <http://www.washingtonpost.com/wp-dyn/articles/A53586-2004Jul15.html> (stating that the Act “has served as a bulwark against the United States’ ever again establishing internment camps for citizens--as it did during World War II--without the acquiescence of Congress” and characterizing the Act’s purpose as clearly to “prevent the executive from detaining U.S. citizens without explicit statutory authority.”).

⁵⁷ H.R. Rep. No. 92-116, at 2 (1971). For example, a precursor bill that the Senate passed in 1970, S. 1872, 91st Cong. (1969), simply would have repealed the EDA. S. REP. NO. 91-632 (1969). (The version that passed as Section 4001(a) originated as an amendment to H.R. 234, 92nd Cong. (1971).)

⁵⁸ Internal Security Act of 1950, Pub L. No. 831 at §103, (1950), reprinted in H.R. REP. NO. 92-116 at p. 9 (1971).

⁵⁹ 18 U.S.C. § 2381 (2000).

⁶⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004); The NDA was also central to petitioner’s arguments in the *Padilla* case, also before the Supreme Court during the October 2003 Term, where the Court ultimately declined to reach the merits. See *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

⁶¹ Brief for the Respondents at 21, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 724020; see also Brief for the Petitioner at 46, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), 2004 WL 542777 (citing legislative history of a different bill, H.R. Rep. No. 1599, 91st Cong., 2d Sess. 7 (1970)).

during wartime, the victims were displaced from the West Coast of the United States, rather removed from any active battlefield, and this has led critics to claim that the NDA's authors must not have contemplated battlefield detentions, and thus could not have intended the NDA to apply to such detentions. However, the legislative history of the first versions of the act spoke of the fear that urban Guerilla warfare would lead to widespread military detentions in American inner cities.⁶² Clearly, Congress had considered the possibility of domestic battlefield detentions and decided to make explicit that they were outside the scope of executive authority.

Next, the government argued that the AUMF constituted "an Act of Congress" authorizing Hamdi's detention within the terms of the NDA. This argument eventually prevailed in the Supreme Court, albeit with fractured opinions offering little clarity on the scope of the authority conveyed to the executive under the AUMF.⁶³

The fact that the *Hamdi* plurality bought into the statutory authorization argument meant that the Court never addressed⁶⁴ the ultimate argument made by the government: that, to the

⁶² This part of the legislative history was largely not explored in the briefs in the Supreme Court. *See, e.g.*, S. REPT. NO. 91-632 (1969) (letter from cosponsor of INA detention provision repeal, Senator Daniel Inouye, to Chairman of Senate Judiciary Committee) ("I introduced this measure when I became aware of the widespread rumors circulated throughout our Nation that the Federal Government was readying concentration camps to be filled with those who hold unpopular views and beliefs. These rumors are widely circulated but are believed in many urban ghettos as well as by those dissidents who are at odds with many of the policies of the United States."); H. REPT. NO. 91-1599 (1970) (Congressman Louis Stokes):

This irrefutable history still weighs heavily upon members of racial minority groups when they view Title II. More recent years have not helped calm these apprehensions. For example, on May 6, 1968, the predecessor to this committee issued a report [H. REPT. NO. 90-1351] entitled 'Guerilla Warfare Advocates in the United States,' in which it was suggested that detention camps, 'might well be utilized for the temporary imprisonment of warring guerillas.' Shortly thereafter, the chairman of the committee at that time [Mr. Willis] was publicly quoted as stating that this reference was to 'mixed Communist and Black Nationalist elements across the nation.' . . . The fears that such statements and other related materials have created in the black communities in our country, have reached epidemic proportions. . . . The younger, more militant blacks are particularly concerned.

Id.

⁶³ *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality op.) ("We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."). The plurality offered no guidance as to what types of executive actions would be considered "fundamental and accepted" incidents of warfare so as to be authorized by the AUMF (or any future authorization for the use of force), and two years later, in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (2006), the Supreme Court would sharply limit the availability of this argument in other contexts. In *Hamdan*, the government argued that the AUMF authorized the president to create a military commissions system to try violators of the law of war outside of the careful scheme Congress had previously established by statute in the Uniform Code of Military Justice. The Court rejected this argument, noting that "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the [Uniform Code of Military Justice]." In the absence of such "specific, overriding authorization," *id.*, the Court found that Congress had not displaced the limits on the President's authority to constitute military commissions that it had previously established with the passage of the Uniform Code of Military Justice, a comprehensive scheme subjecting such commissions to the laws of war, including the Geneva Conventions.

⁶⁴ *See Hamdi*, 542 U.S. at 516-17 (plurality op.) ("The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF."); *Hamdi*, 542 U.S. at 587 (Thomas, J., concurring) ("Although the President very well may have inherent

extent the NDA restricted the President's power to detain persons on the battlefield, it trenched upon the President's inherent war powers and was thus unconstitutional.⁶⁵ While the government couched this line of argument in terms of constitutional doubt in *Padilla* and *Hamdi*, in its most aggressive version, it claims that Congress lacks the authority to regulate prisoner of war captures at all, and that thus such battlefield detentions aren't governed by *Youngstown* at all—that is, that battlefield detentions are not within an area of overlapping (or simply unenumerated) powers, but instead are within a sphere of exclusive executive authority.⁶⁶

Indeed, the administration made the same argument with respect to the habeas statute,⁶⁷ construing it to apply to the Guantánamo detainees “would directly interfere with the Executive's conduct of the military campaign against al Qaeda and its supporters,” and would raise “grave constitutional problems.”⁶⁸ All nine Justices in *Rasul* ultimately rejected this position. Even the dissenters believed that it was *within Congress' power* to extend the habeas statute to aliens accused of being members of al Qaeda and held at Guantánamo—they simply believed Congress had not in fact intended to do so.⁶⁹

Nonetheless, months later, the Administration argued in the *Hamdan* case that interpreting the Uniform Code of Military justice “to reflect congressional intent to limit the President's authority” over trial of detainees by military commissions would “create[] a serious constitutional question.”⁷⁰

Compare this attitude to President Jefferson's understanding: in his first annual message to Congress, Jefferson related that he had sent warships to defend American commercial shipping after receiving threats from Tripoli, one of the Barbary states. Tripolitan pirates in fact did attack American shipping, and after ferocious fighting, their vessel and its crew were captured, but as the Navy was “[u]nauthorized by the constitution, [and] without the sanction of Congress, to go out beyond the line of defence, the [Tripolitan] vessel being disabled from

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.”)

⁶⁵ See Brief for Respondents at 22, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 724020; see also Brief for Petitioner at 48-49, *Padilla v. Rumsfeld* (542 U.S. 426), (No. 03-1027), 2004 WL 542777 (“The court of appeals' construction [that NDA applied to Padilla's detention] would raise serious constitutional questions concerning whether Congress can constrain the basic power of the Commander in Chief to seize and detain enemy combatants in wartime.”).

⁶⁶ See, e.g., *Hamdi v. Rumsfeld*, 316 F.3d 450, 473 (4th Cir. 2003) (“any inquiry” in the circumstances of Hamdi's detention “must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch.”).

⁶⁷ 28 U.S.C. § 2241 (2002).

⁶⁸ Brief for Respondents, *Rasul v. Bush*, Nos. 03-334/343, 2004 WL 425739 (Mar. 3, 2004) at 42, 44.

⁶⁹ See *Rasul v. Bush*, 542 U.S. at 506 (Scalia, J., dissenting). While not authoritative as precedent, the *Hamdi* plurality rejected all these arguments, at least as to the rights of *citizens*: “[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality op.).

⁷⁰ Brief for Appellants at 56-57, *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir., filed Dec. 8, 2004); see also Brief for Respondents at 23, *Hamdan v. Rumsfeld*, No. 05-184 (U.S., filed Feb. 23, 2006) (quoting *Quirin*, 317 U.S. at 25) (“the detention and trial of petitioners—ordered by the President in the declared exercise of the President's powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress.”). For another post-*Rasul* example of such an assertion, see Barron & Lederman, *supra* note 1 (quoting administration policy statement on bill H.R. 1591, 110th Cong. § 1904 (2007)).

committing further hostilities, was liberated with its crew.”⁷¹ Even while defending against an enemy (arguably) attacking in violation of the laws of war, Jefferson believed the Navy lacked authority to hold prisoners any longer than absolutely necessary to the defensive effort without the sanction of Congress. Similarly, Yaser Hamdi argued that only Congress could authorize prolonged detention of American citizens—that is, that affirmative authority from Congress was required to allow executive detention of citizens (at least outside the immediate battlefield).⁷²

Hamdi’s argument raises an interesting final question: where exactly is Congress’ constitutional authority to regulate wartime detention found? There is seemingly no provision in the Constitution directly authorizing Congressional power over POWs. Although to modern ears the text of the Captures Clause (granting Congress the power to “make Rules concerning Captures on Land and Water”⁷³) appears to authorize prisoner detentions, the clause read in historical context does not necessarily convey such power.⁷⁴ The central purpose of this provision was to allow Congress to recognize or declare the law that applied to prizes seized by American forces—particularly ships and their cargoes captured by American privateers.⁷⁵

However, Congressional legislation concerning prisoner of war detentions is likely authorized by the panoply of war-related Congressional powers that are enumerated in the Constitution, including also the powers to “raise and support Armies,”⁷⁶ to “define and punish ... Offences against the Law of Nations,”⁷⁷ and “To make Rules for the Government and Regulation of the land and naval Forces.”⁷⁸ Taken individually, none of these addresses by name the power to detain and try enemy soldiers. But it’s easy to argue that such a power derives from the latter two clauses. And the historical uses and context of these several clauses, especially taken together, clearly support such a power. Congress passed at least two statutes regulating custody of prisoners of war during the War of 1812.⁷⁹

⁷¹ President Thomas Jefferson, First Annual Message to Congress, Dec. 8, 1801, *available at* <http://www.yale.edu/lawweb/avalon/presiden/sou/jeffmes1.htm>.

⁷² See Brief for Petitioners at 29, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 378715 (“Executive enjoys the authority to detain citizens seized in areas of actual fighting without specific statutory authority or judicial review for only a limited period of time as required by military necessity. Once the citizen is removed from the area of actual fighting, the Constitution requires statutory authorization to hold that citizen indefinitely.”); *see generally id.* at 28-38.

⁷³ U.S. CONST. art. I, § 8, cl. 11

⁷⁴ There is active debate on this point. Compare John C. Yoo, *Symposium: The Changing Laws of War: Do We Need a New Legal Regime after September 11?: Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1201-02 (2004) (Congress may not regulate prisoner detentions under Captures Clause), with Lederman & Barron, *supra* note 1, at 735-36 & 735-36 (founders, early caselaw considered “captures” to include persons), and *id.* at 733.

⁷⁵ See, e.g., An Act Concerning Letters of Marque, Prizes, and Prize Goods, ch. 107, 2 Stat. 759, 759-60 (1812). (The Clause was modeled on the Articles of Confederation art. 9 (1777) (conveying power of “establishing rules for deciding in all cases what captures on land or water shall be legal”). See *generally* A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?*, 35 COLUM. J. TRANSNAT’L L. 379, 406 (1997).

⁷⁶ U.S. CONST. art. I, § 8, cl. 12

⁷⁷ *Id.* at cl. 10.

⁷⁸ *Id.* at cl. 14.

⁷⁹ See An Act for the Safe Keeping and Accommodation of Prisoners of War, 2 Stat. 777, 12th Cong., 1st Sess. (1812) (authorizing president to “make such arrangements for the safe keeping, support, and exchange of prisoners of war as he may deem expedient, until the same shall be otherwise provided for by law”); An Act Concerning Letters of Marque, Prizes, and Prize Goods, ch. 107, § 7, 2 Stat. 759, 761 (regulating custody and safekeeping of prisoners captured on prize vessels by ships operating under executive commission, and safekeeping and support in subsequent custody of United States marshals). See also Yoo, 79 NOTRE DAME L. REV. at 1208 (quoting Act of July 9, 1798, § 8, 1 Stat. 580 (“All French persons ... who shall be found acting on board any French armed vessel ... shall be reported to the collector of the port in which they shall first arrive, and shall be delivered to the custody of

Torture (interrogation)⁸⁰

Prior to 9/11,⁸¹ the federal criminal torture statute applied to prohibit torture (as defined in 18 U.S.C. § 2340) committed by military interrogators:

(a) **Offense.**— Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) **Jurisdiction.**— There is jurisdiction over the activity prohibited in subsection (a) if—

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.⁸²

Now-Judge Jay Bybee’s August 1, 2002 “Torture Memo” for the Office of Legal Counsel argued:⁸³

In order to respect the President’s inherent constitutional authority to manage a military campaign, Section 2340A must be construed as not applying to interrogations undertaken pursuant to his commander in chief authority. As our office has consistently held during this Administration and previous Administrations, Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander-in-Chief to control the conduct of operations during a war.

.... Congress may no more regulate the President’s ability to detain and interrogate enemy combatants *than it may regulate his ability to direct troop movements* on the battlefield.

the marshal, or of some civil or military officer of the United States ... who shall take charge for their safe keeping and support, at the expense of the United States.”); *see also* Barron & Lederman, *supra* note 1, at 774-75 (citing Brian Logan Beirne, *George vs. George vs. George: Commander-in-Chief Power*, 26 YALE L. & POL’Y REV. 265 (2007) (describing Continental Congress’ regulation on treatment of enemy prisoners)).

⁸⁰ This section is indebted to Professor Lederman’s posts at the *Balkinization* blog, particularly <http://balkin.blogspot.com/2005/10/beware-augmented-mccain-amendment.html>.

⁸¹ The Military Commissions Act may affect the applicability of the criminal torture statute to persons involved in the torture of “enemy combatants.” *See* Habeas Corpus 28 U.S.C. § 2241(e)(2) (2007).

⁸² 18 U.S.C. § 2340A (2001). Amusingly, the current version of the statute contains a section (c) subsuming “conspiracy” to carry out torture; this was added by the USA PATRIOT Act in order to allow more leeway for prosecution of terrorist conspirators. *See* H.R. REP. NO. 107-236 at 70 (2001).

⁸³ Memorandum from Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogations under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002), reprinted in KAREN J. GREENBERG AND JOSHUA L. DRATEL, *THE TORTURE PAPERS* 203 (2005) (emphasis added), *superseded by* Memorandum from Daniel Levin to James B. Comey, Deputy Att’y Gen., *Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A* (Dec. 30, 2004), available at <http://news.findlaw.com/hdocs/docs/terrorism/dojtoriture123004mem.pdf>.

Again, note the scope of the claim here: the Bybee Memo does not argue that Congress is prohibited from taking on the executive task of interpreting and implementing “terms and conditions” set forth in statute; instead, Congress is prohibited from setting those “terms and conditions” in the first place.

This argument is capable of extension to many other criminal prohibitions on abuse of detainees. Beyond the War Crimes Act⁸⁴ and the Torture Statute, the federal assault statute⁸⁵ and the Uniform Code of Military Justice (10 U.S.C. §§ 893, 928)⁸⁶ could apply to abusive practices by military interrogators. The torture statute seems only to have been the subject of the most concern.

The OLC’s arguments appear to have become more aggressive as time has passed, consistently emphasizing Congress’ lack of constitutional authority to regulate the President in his core power to direct battlefield operations. Interestingly, the argument appears to have developed slowly, as if the analogy between exclusive control of troop movements and exclusive power to decide on the use of torture was not initially perceived as bulletproof. So, in a January 2002 memorandum, DOJ lawyers concluded that “restricting the President’s plenary power over military operations (including the treatment of prisoners)” would be “constitutionally dubious” and to read any statute in such a manner would require that “Congress clearly demonstrates such an intent.”⁸⁷ By August that year the Bybee Memo was written, and through December 2003 and possibly longer, the White House’s official position was that “Congress lacks authority” to regulate its treatment of prisoners.⁸⁸ At some point in December 2003, John Yoo’s replacement at OLC, Jack Goldsmith, instructed the Department of Defense to no longer rely on the advice contained in this “Working Group” memo, and follow-up letters⁸⁹ indicated that DOD stopped using the techniques that had been approved pursuant to the memo well before Goldsmith’s office issued a formal withdrawal of the Working Group Memo (in December 2005) or a formal memo rescinding Bybee’s (in December 2004). Of course, the most brutal atrocities committed

⁸⁴ 18 U.S.C. § 2441 (2006)

⁸⁵ 18 U.S.C. § 113 (2002). The assault statute applies by its own terms to geographic locations within the special maritime and territorial jurisdiction of the United States (generally including Guantánamo even according to OLC, *See* <http://balkin.blogspot.com/Philbin071404.pdf>), and to actions by members of the armed forces or accompanying personnel under the terms of the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-67 (2001).

⁸⁶ *See* 10 U.S.C. § 893 (prohibiting engaging in “cruelty ... oppression or maltreatment”); 10 U.S.C. § 928 (prohibiting assault and the threat of assault).

⁸⁷ Memorandum from John C. Yoo and Robert J. Delahunty to William J. Haynes II, General Counsel, Dep’t of Def., *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 9, 2002), *reprinted in* KAREN J. GREENBERG AND JOSHUA L. DRATEL, *THE TORTURE PAPERS* 47 (2005).

⁸⁸ *See, e.g.*, Memorandum to Secretary of Defense Donald Rumsfeld, *Working Group Report on Detainee Interrogations in the Global War on Terrorism* (Mar. 6, 2003) *reprinted in* KAREN J. GREENBERG AND JOSHUA L. DRATEL, *THE TORTURE PAPERS* 256 (2005) (“In order to respect the President’s inherent constitutional authority to manage a military campaign, 18 U.S.C. § 2340A (the prohibition against torture) must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority. Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander-in-Chief to control the conduct of operations during a war.”); *id.* at 259-60 (“Any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President. ... Congress can no more interfere with the President’s conduct of the interrogation of enemy combatants than it can dictate strategy or tactics on the battlefield.”).

⁸⁹ *See* Letter from Daniel Levin, Assistant Att’y Gen. to William J. Haynes II, General Counsel Dep’t of Def., *Re: Memorandum from John Yoo, Deputy Assistant Att’y Gen., Office of Legal Counsel to William J. Haynes, General Counsel of the Dep’t of Def., Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (Mar. 14, 2003) 1 (Feb. 4, 2005) (on file with author?).

by the military's detainee operations occurred during this period, both in Guantanamo and Abu Ghraib.

Despite the formal repeal by OLC of the Bybee and Working Group Memos, the argument that there exists an uncheckable executive power to torture seems to be alive and well within the highest levels of the administration. In a January 27, 2006 interview with CBS News, President Bush said "I don't think a president can order torture."⁹⁰ Several weeks earlier, Congress had agreed: in the Detainee Treatment Act of 2005, Senator McCain included an amendment stating that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment"⁹¹ and "[n]o person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation."⁹² While the President signed the Detainee Treatment Act, including the McCain Amendment, his signing statement of Oct. 17, 2006 included this qualification:

The executive branch shall construe [the McCain Amendment] Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.

Surveillance

In December 2005 the *New York Times* revealed⁹³ that, acting pursuant to Presidential order, the NSA had since shortly after 9/11 been conducting surveillance of calls and emails where one party to the communication was thought to be located outside the United States.⁹⁴ The

⁹⁰ "I don't think a President can order torture, for example.... There are clear red lines." Eric Lichtblau & Adam Liptak, *Bush and His Senior Aides Press On in Legal Defense for Wiretapping Program*, N.Y. TIMES (Jan. 28, 2006) at A13.

⁹¹ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(a), 119 Stat. 2739 (2005).

⁹² Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1003(a), 119 Stat. 2739 (2005). The section quoted above is notable for exempting the CIA from the restrictions placed on the Department of Defense. See Arsalan M. Suleman, *Recent Developments: Detainee Treatment Act of 2005*, 19 HARV. HUM. RTS. J. 257, 260 (2006).

Congress attempted to remedy this loophole by passing the Intelligence Authorization Act of 2008, which would make the interrogation restrictions placed on the Department of Defense applicable to the CIA. Dan Eggen, *Senate Passes Ban on Waterboarding, Other Techniques*, WASH. POST, Feb. 14, 2008, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/13/AR2008021302888.html>. However, the Bush Administration quickly vetoed the bill weeks later, rendering the restrictions placed on CIA interrogation tactics void. See Johanna Neuman, *House Unable to Override Bush's Veto of Waterboarding Ban*, LA TIMES, Mar. 12, 2008, available at <http://www.latimes.com/news/nationworld/washingtondc/la-na-torture12mar12,1,7672720.story>.

⁹³ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

⁹⁴ George W. Bush, *President's Radio Address* (Dec. 17, 2005) (hereinafter *Bush Radio Address*), transcript available at <http://www.whitehouse.gov/news/releases/2005/12/20051217.html> ("In the weeks following the terrorist attacks on our nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations."); James Taranto, *A Strong Executive: Does Watergate's Legacy Hinder the War on Terror?*,

Program targeted persons thought to have some affiliation with terrorism, as determined by NSA staffers—judges had not (to that point, prior to January 2007⁹⁵) been involved in reviewing the process, or individual targeting decisions, in any way.

The sort of surveillance carried out by the NSA admittedly fell within the definition of “electronic surveillance” governed by the Foreign Intelligence Surveillance Act (FISA), as Attorney General Gonzales confirmed in the first press briefing on the Program.⁹⁶ It was thus barred by the clause FISA added to the United States Code in 1978, specifying in essence that the two major wiretapping statutes, FISA and the Wiretap Act of 1968, “shall be the exclusive means by which electronic surveillance, as defined in [FISA, 50 USCS § 1801(f)], and the interception of domestic wire, oral, and electronic communications may be conducted,” 18 U.S.C. § 2511(2)(f), unless it was somehow authorized by some other subsequent congressional statute, somehow within an exemption to the statute, or the FISA statute itself was *ultra vires*—

WALL ST. J., Jan. 28, 2006, *available at* <http://www.opinionjournal.com/editorial/feature.html?id=110007885> (Quoting Cheney stating that the program allows “the interception of communications, one end of which is outside the United States, and one end of which, either outside the United States or inside, we have reason to believe is al-Qaeda-connected.”).

⁹⁵ For a brief period of time, the administration alleges, the Program operated pursuant to a series of orders issued by a single FISA judge. On January 17, 2007, two weeks before the first time the legality of the Program would be heard by an appeals court (in *ACLU v. NSA*), Attorney General Gonzales sent a letter to Senators Leahy and Specter, which said:

I am writing to inform you that on January 10, 2007, a Judge of the Foreign Intelligence Surveillance Court issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. As a result of these orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program [NSA Program] will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court.

... These orders are innovative, they are complex, and it took considerable time and work for the Government to develop the approach that was proposed to the Court and for the Judge on the FISC to consider and approve these orders.

See Letter from Attorney General Alberto Gonzales to Senators Leahy and Specter, Jan. 17, 2007 [hereinafter Gonzales Letter], *available at* http://graphics8.nytimes.com/packages/pdf/politics/20060117gonzales_Letter.pdf; It did not, however, take long for two other FISA judges to reject the “innovative” January 10th orders when they were up for renewal after 90 days, per the terms of the FISA statute. *See* Greg Miller, *New Limits Put on Overseas Surveillance*, L.A. TIMES, Aug. 2, 2007, at A16 (reporting that second FISA judge rejected “basket warrants,” allowing surveillance without particularized suspicion, that had been previously approved by first judge). I believe the previous orders were very likely unlawful under FISA. *See* Shayana Kadidal, *Reports of the NSA Program’s Death: Greatly Exaggerated?*, THE HUFFINGTON POST, Jan. 17, 2007, *available at* http://www.huffingtonpost.com/shayana-kadidal/reports-of-the-nsa-progra_b_38903.html, at ¶7.

⁹⁶ *See* Alberto Gonzales, *Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence*, Dec. 19, 2005, *transcript available at* <http://whitehouse.gov/news/releases/2005/12/20051219-1.html> (“Now, in terms of legal authorities, the Foreign Intelligence Surveillance Act provides—requires a court order before engaging in this kind of surveillance that I’ve just discussed and the President announced on Saturday, unless there is somehow—there is—unless otherwise authorized by statute or by Congress. That’s what the law requires.”). The fact that the surveillance the program engaged in constituted “electronic surveillance” within the terms of FISA was reinforced when the administration later claimed that the FISA court had issued orders enabling identical sorts of surveillance (with added “guidelines and rules”). *See* “Gonzales Letter”; Tony Snow, *White House Press Briefing*, Jan. 17, 2007, *available at* <http://www.whitehouse.gov/news/releases/2007/01/20070117-5.html> (“The Foreign Intelligence Surveillance Court has put together its guidelines and its rules”).

that is, beyond Congress' constitutional authority to restrict the President. CCR brought suit over the Program on January 17, 2006, and filed a motion for summary judgment seven weeks later.

As with the NDA in the detention context, the administration first argued that FISA was not intended to apply in war,⁹⁷ and next that the AUMF constituted statutory authority to ignore FISA as to surveillance that had a sufficient nexus to the intended targets⁹⁸ of the AUMF. While the “exclusive means” provision makes no reference to an exemption for surveillance otherwise authorized by statute, any subsequent statute *actually intending* to repeal the exclusive means provision could accomplish that effect. But how much evidence of Congressional intent should a court demand given the circumstances? We argued that the AUMF was simply too generic a “statute” to accomplish such a major revision of a detailed, carefully-considered statutory scheme such as FISA. The government countered that the section of FISA creating criminal sanctions for government officials contemplates such an exemption because it states that it is a crime to “engage[] in electronic surveillance under color of law *except as authorized by statute.*”⁹⁹ Thus, according to the government, FISA § 1809 “strongly suggests that *any* subsequent authorizing statute, not merely one that amends FISA itself, could legitimately authorize surveillance outside FISA’s standard procedural requirements.”¹⁰⁰

However, the Supreme Court’s ruling in *Hamdan* swept the ground from under the government’s argument.¹⁰¹ In the absence of “specific, overriding authorization” in the AUMF,¹⁰² the Court found that Congress had not displaced the limits on the President’s authority

⁹⁷ One can quibble as to whether the administration only argued that the AUMF authorized surveillance outside of FISA or whether it made the broader argument that, even without the AUMF, the existence of a state of war or the invocation of executive war powers was sufficient to allow such an exemption, but I believe the latter is the better reading. *See, e.g.,* Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) [hereinafter *White Paper*] at 17, available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf> (“the President has the authority to conduct warrantless electronic surveillance against the declared enemy of the United States in a time of armed conflict. That authority derives from the Constitution, and is reinforced by the text and purpose of the AUMF. . .”).

Of course, FISA itself contemplated a state of war, and contains a limited exemption for surveillance in the very first days of a declared war: “Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress.” 50 U.S.C. § 1811 (2000). The purpose of this exemption was not to embody a policy decision that all restrictions should be lifted during wartime, but rather simply the notion that fifteen days would be adequate time for both houses to consider and pass any amendment to FISA that might be required by the exigencies of wartime. *See* H.R. Conf. Rep. No. 95-1720, at 34 (1978) (fifteen-day period intended to “allow time for consideration of any amendment to [FISA] that may be appropriate during a wartime emergency.”).

⁹⁸ The AUMF states “[t]hat 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.” Thus the scope of surveillance that could conceivably be authorized by it would be limited to surveillance against persons or groups with some nexus to the 9/11 attacks. This takes some of the steam out of the argument that because Congress made small technical adjustments to FISA several times in the years since 9/11, it must not have intended wholesale revision of FISA. The technical adjustments—for instance, the revision of the “emergency surveillance” period in 50 U.S.C. § 1805(f) from twenty four to 72 hours, which was changed by section 314(a)(2)(B) of the Intelligence Authorization Act for FY2002, Pub. L. 107-108, 115 Stat. 1394 (2001)—changed FISA itself and thus would affect FISA surveillance against *any* targets, even those not associated with the 9/11 attacks.

⁹⁹ 50 U.S.C. § 1809(a)(1) (emphasis added).

¹⁰⁰ *See White Paper supra* note 96 at 20.

¹⁰¹ *Hamdan*, 126 S. Ct. 2749.

¹⁰² *Id.* at 2775.

to constitute military commissions that it had previously established with the passage of the Uniform Code of Military Justice, a comprehensive scheme subjecting such commissions to the laws of war, including the Geneva Conventions.¹⁰³ FISA is a similarly comprehensive scheme regulating wiretapping for foreign intelligence surveillance, and there is similarly “nothing . . . even hinting” at a Congressional intent to change that scheme in the text or legislative history of the AUMF.¹⁰⁴

So, once again, the government was left with its ultimate argument: that FISA is unconstitutional to the extent that it purports to regulate the core presidential surveillance powers that are implicit in his Article II powers to defend the nation against attack:

[T]he NSA activities . . . are primarily an exercise of the President’s authority as Commander in Chief during an armed conflict that Congress expressly has authorized the President to pursue. . . . The core of the Commander in Chief power is the authority to direct the Armed Forces in conducting a military campaign.

.....

Indeed, if an interpretation of FISA that allows the President to conduct the NSA activities were not “fairly possible,” FISA would be unconstitutional as applied in the context of this congressionally authorized armed conflict. In that event, FISA would purport to *prohibit* the President from undertaking actions necessary to fulfill his constitutional obligation to protect the Nation from foreign attack in the context of a congressionally authorized armed conflict with an enemy that has already staged the most deadly foreign attack in our Nation’s history.¹⁰⁵

The argument linking surveillance powers to the battlefield roughly runs as follows: the President has unregulable powers over tactical decisions (such as movement of troops) on the battlefield. One such tactical decision is how to carry out surveillance of the enemy’s military communications in the theater of battle. (Even if it were not one of the core tactical powers, such surveillance is so necessary to the decisions about how to move the troops around that it should be considered part and parcel of the unquestioned core power over troop movement.) As such, Congress may not regulate it in any fashion.

There is no direct precedent for the position that the President has inherent unregulable surveillance powers. The most frequent citation offered by the government¹⁰⁶ in support of the general proposition that FISA may be unconstitutional insofar as it trenches on some inherent executive surveillance power is the following dicta from the Foreign Intelligence Surveillance Court of Review:¹⁰⁷ “We take for granted that the President does have that authority [to conduct

¹⁰³ See *id.* (“there is nothing in the text or legislative history of the AUMF even hinting that Congress intended [such] authorization”).

¹⁰⁴ *Id.* at 2755.

¹⁰⁵ See *White Paper* at 31, 35.

¹⁰⁶ See, e.g., *White Paper* at 31; Memorandum of Points and Authorities in Support of the United States’ Assertion of the Military and State Secrets Privilege; Defendants’ Motion to Dismiss, et al. at 33-34, *Ctr. for Constitutional Rights v. Bush*, No. 06-313 (S.D.N.Y. filed May 26, 2006).

¹⁰⁷ The Foreign Intelligence Surveillance Court of Review is the court to which the government may take appeals from negative decisions of the eleven district court judges of the Foreign Intelligence Surveillance Court who have

warrantless searches to obtain foreign intelligence information] and, assuming that is so, *FISA could not encroach on the President's constitutional power.*¹⁰⁸ Like much of the “authority” for an uncheckable power over troop movements, this brief dictum is a weak foundation for the claims laid upon it.¹⁰⁹

Citing a less tendentious source, the government notes that the scope of Congressional power to regulate intelligence gathering was a matter of debate during the enactment of FISA:

Indeed, when it enacted the FISA, Congress itself recognized that it was proceeding on fragile and unsettled ground, noting that it was seeking to press its own constitutional powers to their limit, that it was unsettled what that limit was, and that the Supreme Court might therefore find that it has unconstitutionally intruded on the President's powers.¹¹⁰

I closed our discussion of detention powers, above, with some thoughts on the location within the Constitution of Congress' power to regulate prisoner of war detentions. Similar questions are posed by Congress' assertions of power to regulate electronic surveillance.¹¹¹ Even more starkly than with the detention power, the argument that FISA may be unconstitutional as applied to a core part of an inherent executive war power is made possible in part by the fact that the Constitution nowhere mentions surveillance powers. Assuming the federal government is vested with such powers, there is ambiguity as to whether such power is assigned to the executive, the legislature, or shared between them. There are several alternative places the courts might look to locate a Congressional power to regulate surveillance. The most obvious, and the most likely correct,¹¹² is the Commerce Clause. The Commerce Clause, for instance, was the

the power to approve or disapprove surveillance orders sought pursuant to FISA. *In re Sealed Case* is the only opinion the court has issued in its history.

¹⁰⁸ *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002) (per curiam) (emphasis added).

¹⁰⁹ See Barron & Lederman, *supra* note 1, at 761 n.212 (“the FISA Court of Review did not provide any justification of that dictum”). Note that Judge Laurence Silberman, at the time one of the three judges on the Foreign Intelligence Surveillance Court of Review, was in 1978 a former DOJ staffer who gave testimony to the same effect arguing against the passage of FISA when the bill was under consideration by Congress. See *Foreign Intelligence Electronic Surveillance: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the Permanent Select Comm. on Intelligence, 95th Cong. 221 (1978)* (“... the judiciary is neither theoretically nor actually more neutral than the executive, or for that matter, the Congress, in reaching answers to the difficult questions which national security electronic surveillance presents. It can as easily be argued that the judiciary will overweigh the interests of individual privacy claims because it is, after all, the protection of those claims on which judicial authority is based. . . . And since judges are not politically responsible, there is no self-correcting mechanism to remedy their abuses of power.”).

¹¹⁰ Memorandum of Points and Authorities in Support of the United States' Assertion of the Military and State Secrets Privilege; Defendants' Motion to Dismiss, et al. at 31, *Ctr. for Constitutional Rights v. Bush*, No. 06-313 (S.D.N.Y. filed May 26, 2006).

¹¹¹ The government has not pressed the point in litigation, but did raise it initially in the White Paper. See *White Paper* at 30 (“Even outside the context of wartime surveillance of the enemy, the source and scope of Congress's power to restrict the President's inherent authority to conduct foreign intelligence surveillance is unclear.”); *id.* at 33 (Congress's authority to enact FISA is less “clear” than was the power of Congress to act in *Youngstown* and *Little v. Barreme*).

¹¹² Clive B. Jacques and Jack M. Beermann, *Section 1983's “and Laws” Clause Run Amok: Civil Rights Attorney's Fees in Cellular Facilities Siting Disputes*, 81 B.U. L. Rev. 735, 772 (2001) (“There is no doubt under current constitutional standards that the Commerce Clause grants Congress the power to regulate...most telecommunications activity because most such activity affects interstate commerce.”); Douglas B. McFadden, *Antitrust and Communications: Changes After the Telecommunications Act of 1996*, 49 FED. COMM. L.J. 457, 469

source of authority for the Telecommunications Act of 1934,¹¹³ regulating the power of the executive to obtain electronic communications from carriers.¹¹⁴ In no case that I can find has anyone directly challenged the constitutionality of the 1934 Act, and many cases seem to accept the Act's constitutionality.¹¹⁵ Although the Act's wiretapping restrictions were motivated by concerns for the privacy of domestic communications,¹¹⁶ the Commerce Clause gives Congress the power to regulate both international and domestic commerce.¹¹⁷

There are other potential sources of authority as well. As regards regulation of surveillance carried out specifically *by the NSA*, an arm of the Defense Department, one might also point to the clauses enumerating Congressional power to regulate the armed forces, or indeed to the Necessary and Proper Clause¹¹⁸—which, it is often forgotten, allows Congress to make laws for “carrying into execution the foregoing [Article I] Powers, and all other Powers

(1997) (“It is likely that Congress, acting under the Commerce Clause of the Constitution, has power to regulate telecommunications that are connected to the switched nationwide network.”).

¹¹³ 47 U.S.C. § 151 (1934) (Act was “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio....”).

¹¹⁴ See, e.g., 47 U.S.C. § 151 (1934) (Act was “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio....”); 47 U.S.C. § 605 (1934) (“No person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof ... to any person other than the addressee[, his agents, or the like] ... [except] in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority.”).

¹¹⁵ See, e.g., *Hurst v. Tex. Dep't of Assistive & Rehabilitative Servs.*, 482 F.3d 809, 813 (5th Cir. 2007) (“In 1996[, when it amended the 1934 Act,] Congress exercised its constitutional authority to create a national regulatory scheme for telecommunications.”); *AT&T Commc'ns of the S. Cent. States, Inc. v. BellSouth Telecomm., Inc.*, 43 F. Supp. 2d 593, 599 (M.D. La. 1999) (“Clearly, the Commerce Clause is the source of congressional power which was relied upon to enact the Telecommunications Act of 1996...”); *MCI Telecomms. Corp. v. BellSouth Telecomm., Inc.*, 9 F. Supp. 2d 766, 771 (E.D. Ky. 1998) (“[1996] Act was passed pursuant to Congress' power to legislate under the Commerce Clause...”); see also *Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115 (1989) (holding part of Telecommunications Act of 1996 constitutional—that is, that it did not violate the First Amendment); *id.* at 125 (“we hold today that there is no constitutional stricture against Congress' prohibiting the interstate transmission of obscene commercial telephone recordings”). Note that in *Olmstead v. United States*, 277 U.S. 438 (1928), the Court had invited Congress to regulate such surveillance by creating an exclusionary rule pursuant to *its power to legislate federal rules of evidence*, *id.* at 465-66, but the resulting Act both went further (prohibiting interception) and less far (creating no exclusionary rule) than the Court's invitation.

¹¹⁶ The 1934 Act was seemingly passed in reaction to the Supreme Court's 1928 *Olmstead* decision. See Shaun T. Olsen, *Reading between the Lines: Why a Qualified "Clean Hands" Exception Should Preclude Suppression of Wiretap Evidence under Title III of the Omnibus Crime Control and Safe Streets Act of 1968*, 36 VAL. U.L. REV. 719, 729 (2002).

¹¹⁷ U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes....”). See also Barron & Lederman, *supra* note 1, at 736 n. 143 (citing *Weiss v. United States*, 308 U.S. 321, 327 (1939) as authority for regulating intrastate calls as well, and setting forth arguments for Congressional authority to enact FISA).

¹¹⁸ See Curtis A. Bradley, et. al., *Letter to Senator Bill Frist et al.* (July 14, 2006), available at <http://balkin.blogspot.com/NSA.Hamdan.July14.FINAL.pdf>, at 7:

FISA is also properly viewed as a statute “necessary and proper for carrying into execution . . . powers vested by this Constitution in the Government of the United States, or in . . . any officer thereof.” Art. I, § 8, cl. 18. Just as the Necessary and Proper Clause empowered Congress to create the NSA in the first instance, *cf. M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), it authorizes Congress to set the terms under which that agency shall operate. Finally, as the NSA is part of the Department of Defense, FISA's application to that agency is also an exercise Congress's power “[t]o make Rules for the Government and Regulation of the land and naval Forces.” Art. I, § 8, cl. 14.

vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”¹¹⁹ More generally, Congress has been given power to provide for common lines of communication throughout the Union—the power “[t]o establish Post Offices and post Roads”¹²⁰—and I believe one could reasonably draw analogies to close regulation of common lines of electronic communications and related communications infrastructure.¹²¹ All of this is putting to one side the Fourth Amendment¹²² and Congress’ power to provide provisions for the issuance of warrants complying with the Amendment’s requirements of particularity and probable cause.¹²³

Either way, there doesn’t seem to be much of an argument for the idea of a core executive surveillance power that is not amenable to regulation by Congress. After all, Congress needs to gather information too in the course of carrying out its “core” legislative activities, and no one argues that Congress can conduct electronic surveillance without statutory authority.¹²⁴

* * *

If the notion of a general AUMF authorization defense is the first line of defense for the government—greatly weakened by *Hamdan*—and the second defense rests on the unconstitutionality of Congressional regulation of surveillance germane to the core presidential

¹¹⁹ U.S. CONST. art. I, § 8, cl. 18.

¹²⁰ *Id.* at art. I, § 8, cl. 7.

¹²¹ Both the fiber optic backbones of the major phone carriers and their switching stations are effectively shared resources among various carriers, especially given the advent of digital telephony, which moves phone calls along random routes through the global telecom network in much the same manner as internet packets are moved. *See* JAMES RISEN, *STATE OF WAR* 50 (2006).

¹²² The Supreme Court has definitively held that, at least as to domestic national security surveillance, Congress has such power to legislate in furtherance of the Fourth Amendment. *See* *United States v. United States District Court for the E. Dist. Mich.*, 407 U.S. 297, 323–24 (1972) (“We do not attempt to detail the precise standards for domestic security warrants any more than our decision in *Katz* sought to set the refined requirements for the specified criminal surveillances which now constitute Title III. We do hold, however, that prior judicial approval is required for the type of domestic security surveillance involved in this case and that such approval may be made in accordance with such reasonable standards as the Congress may prescribe.”).

¹²³ The administration might counter that the federal government’s power to *conduct* surveillance (as opposed to the power to regulate it) is an unenumerated power, and thus partially executive. While everyone learns in law school that the federal government has no unenumerated powers, that obviously isn’t true—the immigration power is one clear example, the Constitution specifying only that uniform rules of *naturalization* can be made by Congress. Immigration was basically a state concern prior to 1875; after it became a federal concern through the passage of the first national immigration legislation, the Supreme Court eventually accepted that it was a federal power grounded in inherent powers sovereign states as recognized by international law. *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

Powers “inherent in sovereignty” are at least arguably shared between the political branches, especially where Congress has not spoken at all to a matter. Is there a core of such power that is exclusive to the executive branch? Again, I’d argue that there isn’t. Note the language of the necessary and proper clause: Congress can “make all laws which shall be necessary and proper for carrying into execution ... all ... powers vested by this constitution in the government of the United States.” U.S. Const. art. I, § 8, cl. 18. Presumably this includes the unenumerated powers as well as the enumerated. Thus the notion in Jackson’s *Youngstown* concurrence recognizing that some powers may be assumed by the executive in the face of Congressional silence, but, if Congress has spoken to a subject and is not *foreclosed* by the constitution from regulating it, the President’s powers may shrink to nothing.

¹²⁴ Congress, of course, has information-gathering (subpoena) and investigatory powers (*e.g.* inherent contempt) in furtherance of this core legislative power. *Eastland v. United States Servicemen’s Fund*, 421 U.S. 491, 503-07 (1975) (Speech and Debate Clause bars judicial inquiry into validity of Congressional subpoenas); *see* *Anderson v. Dunn*, 19 U.S. (1 Wheat.) 204 (1821) (inherent contempt power); *see also* *McGrain v. Daugherty*, 273 U.S. 135 (1927) (inherent contempt power; power of inquiry, with the accompanying process to enforce it, is “an essential and appropriate auxiliary to the legislative function.”).

power to defend the nation from hostile attack, each of these defenses is accompanied by a corresponding meta-defense based on the state secrets privilege.

As to the AUMF, this meta-defense runs as follows: In both our case and the ACLU's similar case, the government claims that it could explain how the program fits into what Congress authorized in the AUMF—namely, the “use [of] 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” and those who harbored them—but to do so it would have to explain to the court how the Program works, particularly *who* it was targeting and what kinds of communications it was intercepting, and the sensitivity of that information about how the Program works in practice means that it cannot do that, even *ex parte in camera*. Thus, the government argues, the State Secrets Privilege forecloses the ability to litigate these questions.¹²⁵

As to the FISA-is-unconstitutional defense, the meta-defense argues that for the government to explain to the court how the Program fits into the core of the President's inherent power to defend the nation—that (limited) core aspect of the war power that is so fundamentally executive as to be immune to regulation from Congress—would require disclosing state secrets to the court. Since FISA might be unconstitutional to the extent that it restricts such a hypothetical core, unregulable part of the executive war power, the court cannot rely on FISA in enjoining the President from carrying out such surveillance:

any assessment of whether the exercise of Presidential authority at issue in this case is lawful would require a detailed exposition of the activities authorized—including the specific nature of the intelligence information, sources, and methods underlying the TSP and, in particular, information demonstrating why the normal FISA process would not be sufficient and would therefore intrude on the President's responsibility to protect the Nation.¹²⁶

According to the government, the issue of whether FISA forecloses all executive surveillance is thus unlitigable.

Conclusions

To some extent these arguments justifying executive power to detain, torture and surveil all rise and fall together.¹²⁷ If we accept that the essential design of the constitution—the general

¹²⁵ Memorandum of Points and Authorities in Support of the United States' Assertion of the Military and State Secrets Privilege; Defendants' Motion to Dismiss at 30, *Ctr. for Constitutional Rights v. Bush*, No. 06-313 (S.D.N.Y. filed May 26, 2006) (“Defendants obviously believe that Plaintiffs are wrong in contending that the President lacked statutory and constitutional authority to authorize the [NSA Program]. To demonstrate why this is so, however, is not possible based on the highly limited facts Plaintiffs put forward [namely, the public admissions about the Program], but instead would require review of highly classified information about what the President has done and why.”).

¹²⁶ Defendants' Reply in Support of Motion to Dismiss at 37, *Ctr. for Constitutional Rights v. Bush*, No. 06-313 (S.D.N.Y. filed Aug. 11, 2006).

¹²⁷ *Cf. Prakash, supra* note 19, at 1323 (“The critics of the Bybee memo have never reconciled their ready willingness to concede that the President has the sole authority to make tactical battlefield decisions with their unremitting hostility to the Bybee memo's view that Congress cannot regulate the interrogation of enemy soldiers. Perhaps this is so because they suppose that coercive techniques will occur far from the battlefield. But this just assumes away the obvious question: what if the President orders the use of coercive techniques on the battlefield? If

tenor of the whole document—is for every branch’s power to be checked, then none of these arguments fit with that design, and they all should be rejected. In that event, however, it also makes no sense to concede that the President has an uncheckable right to control all tactical and operational decisions on the battlefield. Such a power must also be subject to regulation by Congress. Should Congress choose not to regulate tactical decisions—as it could do and has done in the past by legislating rules of engagement, war crimes, or specific orders to retreat forces—the President may perhaps be able to fill the gaps, either because Congress is presumed to have delegated its regulatory powers to him or because he has concurrent power over tactical decisions on the battlefield. But in no event does it make sense to allow the President’s power over battlefield tactics and operations to be uncheckable, for reasons the last six years of Administration legal arguments have made all too clear: the principle is subject to mission creep into the areas of detention, interrogation and surveillance.¹²⁸

the President has the sole authority over battlefield advances and retreats, why does he lack the sole authority over battlefield interrogations?”).

¹²⁸ The surveillance version of the Administration’s argument demonstrates how, in combination with the State Secrets Privilege, the penumbra of this war power is capable of being extended much further than some “core” closely linked to the battlefield. According to the government, if it can hypothesize a legitimate invocation of privilege as to a surveillance power linked to battlefield operations, it is excused from defending its policies in court even where it is actually casting its net much further. Similarly, we have become accustomed to thinking of detentions at black sites and interrogation camps like Guantanamo as occupying geographically-limited “legal black holes,” but the principles the Administration has used to defend those detentions have been equally invoked in domestic detention facilities against U.S. citizens. Following flawed principles from the battlefield to their ultimate conclusions lets the penumbra swallow the sun, and lets the black holes swallow the entirety of the law.