RECENT LEGISLATION

WAR POWERS — DETENTION OF PRISONERS — CONGRESS RENEWS RESTRICTIONS ON PRESIDENT'S POWER TO TRANSFER GUANTANAMO DETAINEES TO FOREIGN COUNTRIES. — National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1028, 126 Stat. 1632, 1914–17 (codified at 10 U.S.C. § 801 note (2012)).

Since the attacks of September 11, 2001, the federal government has detained alleged enemy combatants in the War on Terror at Guantanamo Bay Naval Base (Guantanamo) in Cuba. More than a decade later, half of the detainees currently at Guantanamo have been recommended for transfer by a presidential task force, yet they remain there.[1] Their continued detention has sparked a long-running debate over what to do with them, and the country remains closely divided.[2] In 2011 Congress asserted itself in the debate by restricting the President's power to transfer the detainees. Counterterrorism provisions in the Ike Skelton National Defense Authorization Act for Fiscal Year 2011[3] (FY2011 NDAA) and the National Defense Authorization Act for Fiscal Year 2012[4] (FY2012 NDAA) barred the use of military funds to move detainees who are not U.S. citizens or members of the U.S. military to the United States[5] or, unless the executive certifies certain security findings, to a foreign country.[6]

On January 2, 2013, Congress passed the National Defense Authorization Act for Fiscal Year 2013[7] (FY2013 NDAA). Section 1028 of the Act renews the limits on transferring detainees to foreign countries[8] and revives constitutional concerns about restrictions on the President's Commander-in-Chief power. Although Congress's war powers encompass the general regulation of war, its regulations may not impede the President's exclusive power to make tactical decisions — that

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[1] *See* Charlie Savage, *U.S. to Send 2 at Guantánamo Back to Algeria, Saying Security Concerns Are Met*, N.Y. TIMES, July 27, 2013, at A12.

[2] *27% Favor Moving Guantanamo Prisoners to a U.S. Prison*, RASMUSSEN REP. (May 28, 2013), http://www.rasmussenreports.com/public_content/politics/general_politics/may_2013/27_favor_moving_guantanamo_prisoners_to_a_u_s_prison (noting that 41% of likely U.S. voters support closing Guantanamo while 45% disagree).

[3] Pub. L. No. 111-383, 124 Stat. 4137 (codified as amended in scattered sections of the U.S. Code).

[4] Pub. L. No. 112-81, 125 Stat. 1298 (2011) (codified as amended in scattered sections of the U.S. Code).

[5] FY2012 NDAA § 1027, 125 Stat. at 1566–67; FY2011 NDAA § 1032, 124 Stat. at 4351.

[6] FY2012 NDAA § 1028, 125 Stat. at 1567–69; FY2011 NDAA § 1033, 124 Stat. at 4351–52. On the FY2012 NDAA, see generally Recent Legislation, 125 HARV. L. REV. 1876 (2012).

[7] Pub. L. No. 112-239, 126 Stat. 1632 (codified in scattered sections of the U.S. Code).

[8] *See id.* § 1028, 126 Stat. at 1914–17.

is, decisions related to "direct[ing] the conduct of campaigns."[9] Decisions about the release and exchange of prisoners can be tactical where they create leverage to achieve a military campaign's objectives. Some of the most prominent prisoner decisions in American history support this understanding. Moreover, the historical actors themselves shared this view, and earlier Congresses accordingly did not obstruct the President's prerogative to determine whether and when to release prisoners. In passing section 1028, however, the current Congress inhibited this prerogative, and the section would therefore be unconstitutional were it to deprive the President of the necessary flexibility to effect a prisoner decision bearing on a military objective.

Section 1028 bars, in the absence of a court order directing a detainee's release, the use of Department of Defense funds to transfer a Guantanamo detainee to a foreign country unless the Secretary of Defense, "with the concurrence of the Secretary of State and in consultation with the Director of National Intelligence," certifies a set of findings about the receiving country.[10] The Secretary must certify "not later than 30 days before the transfer"[11] that the receiving country: "is not a designated state sponsor of terrorism"; has control over the detention facility where the transferee will be detained (if his detention will continue); "is not . . . facing a threat" that could "substantially affect its ability to exercise control over the individual"; "has taken or agreed to take" actions "to *ensure*" that in the future the detainee "*cannot* take action to threaten the United States, its citizens, or its allies" and "*cannot* engage or reengage in any terrorist activity"; and has agreed to share all information related to the detainee and his associates that "could affect the security of the United States."[12] The information-sharing finding and the findings that the receiving country has taken or agreed to take effective actions to ensure that the detainees "cannot" threaten or attack the United States require the Secretary to provide strong assurances about difficult-to-verify variables. The Secretary's General Counsel described the almost identical requirements in the FY2011 NDAA as "onerous and near impossible to satisfy."[13]

Section 1028 is slightly less burdensome on the executive than its original counterpart in the FY2011 NDAA. Unlike the earlier restriction on detainee transfers to foreign countries, section 1028 in-

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[9] Hamdan v. Rumsfeld, 548 U.S. 557, 592 (2006) (quoting *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in the judgment)).

[10] FY2013 NDAA § 1028(a)–(b), 126 Stat. at 1914–15.

[11] *Id.* § 1028(a)(1), 126 Stat. at 1914.

[12] *Id.* § 1028(b)(1), 126 Stat. at 1915 (emphases added).

[13] Jeh C. Johnson, Gen. Counsel, Dep't of Def., Speech to the Heritage Foundation 7 (Oct. 18, 2011), *available at* http://www.lawfareblog.com/wp-content/uploads/2011/10/20111018_Jeh-Johnson-Heritage-Speech.pdf.

cludes a "National Security Waiver" provision, first introduced in the FY2012 NDAA,[14] that permits the Secretary of Defense to waive the findings that the receiving country has ensured that the detainee cannot engage in terrorism or take actions to threaten or harm the United States. The Secretary must determine that it "is in the national security interests of the United States" to do so and that "alternative actions will be taken" to "substantially mitigate [the] risks" of such threats or harm.[15] However, this waiver does not disturb the thirty-day waiting period[16] or the information-sharing requirement.

Given that these constraints remain, section 1028 has raised constitutional concerns. In a signing statement, President Obama restated his view from the previous year that the provision "would, under certain circumstances, violate constitutional separation of powers principles" because it might impede his "flexibility to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers."[17] More recently, Ahmed Adnan Ajam became the first Guantanamo detainee to challenge the constitutionality of his detention, partly on the same ground that section 1028 encroaches on the President's prerogative to conclude detainee transfers.[18]

The constitutional objections have merit. Congress may regulate war, but only the President may direct its tactics, which, history shows, can involve prisoner decisions. If section 1028 were to deprive the President of the flexibility to make tactical decisions about Guantanamo detainees, it would be unconstitutional.

Under the *Youngstown*[19] framework that forms the foundation of separation-of-powers analysis for foreign relations,[20] the President's power to transfer Guantanamo detainees is at its "lowest ebb"[21] because section 1028 expressly restricts him from doing so. But even at this "lowest ebb," the President retains his exclusive powers.[22] The

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[14] Pub. L. No. 112-81, § 1028(d), 125 Stat. 1298, 1568–69 (2011) (codified as amended in scattered sections of the U.S. Code).

[15] FY2013 NDAA § 1028(d), 126 Stat. at 1915–16. The Secretary of State must concur, and the Director of National Intelligence must be consulted. *Id.*

[16] *See id.* § 1028(d)(2), 126 Stat. at 1916.

[17] Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, 2013 DAILY COMP. PRES. DOC. 4, at 2 (Jan. 2, 2013), *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201300004/html/DCPD-201300004.htm; *see also* Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 978 (Dec. 31, 2011), *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201100978/html/DCPD-201100978.htm.

[18] *See* Petitioner's Motion for Leave to File Redacted Version of Memorandum of Law on Public Docket at 2–3, Ajam v. Obama, Civil Action No. 09-745 (RCL) (D.D.C. July 10, 2013).

[19] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[20] Medellín v. Texas, 552 U.S. 491, 524 (2008) (noting that Justice Jackson's concurrence in *Youngstown* "provides the accepted framework for evaluating executive action" in foreign relations).

[21] *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

[22] *See id.*

Constitution is silent about prisoners of war.[23] However, it dictates that the President is "Commander in Chief of the Army and Navy"[24] and that Congress has powers to "declare War," to "grant Letters of Marque and Reprisal," to "make Rules concerning Captures on Land and Water," 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."[25] Scholars disagree over whether anything the President does as Commander in Chief is insulated from Congress's purview — at least as a matter of law.[26]

However, the constitutional text, the original understanding of the war powers, and precedent support the view that although Congress may issue general regulations regarding war, the President has exclusive power to direct it.[27] Whereas the Articles of Confederation granted Congress "the sole and exclusive right and power of . . . making rules for the government and regulation of . . . land and naval forces, *and directing their operations*,"[28] the Constitution gave Congress only the more limited power to "make Rules for the Government and Regulation of the land and naval Forces."[29] Thus, the Articles distinguished between a general rulemaking power and the power to direct operations, only the former of which was granted to Congress by the Constitution.[30] Blackstone had described a similar division of military pow-

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[23] Congress's power to "make Rules concerning Captures on Land and Water," U.S. CONST. art. I, § 8, cl. 11, refers to the taking of property, not persons. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1172, at 64 (Leonard W. Levy ed., 1970) (1833). *But see* Aaron D. Simowitz, *The Original Understanding of the Capture Clause*, 59 DEPAUL L. REV. 121 (2009) (arguing that Justice Story's canonical view misstated the original understanding).

[24] U.S. CONST. art. II, § 2, cl. 1.

[25] U.S. CONST. art. I, § 8, cls. 11–14.

[26] *See* Recent Legislation, *supra* note 6, at 1880–81. *Compare generally* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) (arguing that nothing the President does as Commander in Chief is beyond legislative control), *and* Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299 (2008) (same), *with* Michael D. Ramsey, Response, *Directing Military Operations*, 87 TEX. L. REV. SEE ALSO 29 (2009), http://www.texaslrev.com/wp-content/uploads/Ramsey-87-TLRSA-29.pdf ("[T]he President alone has power to direct battlefield operations." *Id.* at 29.).

[27] For the arguments in support of this view, see Ramsey, *supra* note 26. Because the regulation/tactics distinction can be fuzzy, some object that it "merely restates the legal controversy" over the partition of military prerogatives. Barron & Lederman, *supra* note 26, at 753. However, the occasional fuzziness of the distinction should not detract from the fact that it reflects the best interpretation of the constitutional text, original understanding, and precedent. Moreover, even in difficult cases, the distinction at least sharpens a consideration of seven military powers listed in the Constitution to a more manageable differentiation between generally applicable regulations and the direction of a military campaign in response to contingent developments.

[28] ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4 (emphasis added).

[29] U.S. CONST. art. I, § 8, cl. 14.

[30] Ramsey, *supra* note 26, at 30.

er.[31] And the *Federalist Papers* referred to this division in defending the allocation of the command of war to the President alone: "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand."[32] Finally, in *Hamdan v. Rumsfeld*,[33] the Supreme Court adopted the view famously stated in Chief Justice Chase's concurrence in *Ex parte Milligan*[34] that only the President, and not the Congress, may "direct the conduct of [military] campaigns."[35]

Prominent examples in American history show how prisoner decisions can bear on a military campaign by creating leverage to achieve the campaign's objectives. For example, in the summer of 1863, President Abraham Lincoln halted all prisoner exchanges with the Confederacy after the latter refused to release captured black soldiers and their captured white officers.[36] Most historians agree that President Lincoln's primary motivation was to create leverage to force the Confederacy to treat black troops similarly to white soldiers.[37] Lincoln's decision to freeze prisoner exchanges thus advanced what, by mid-1863, had become one of the war's central objectives: racial justice.[38] The decision also had "strategic implications" bearing directly on the more concrete objective of winning battles.[39] Halting the prisoner exchanges kept Confederate prisoners from returning to the battlefield and thus augmented the Northern forces' numerical superiority.[40]

As another example, the "management of prisoners" was "pivotal" to the War of 1812's objectives.[41] The United States launched the war, in part, to resist the British practice of impressing American seamen

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[31] *Id.* at 30–31 (discussing 1 WILLIAM BLACKSTONE, COMMENTARIES *254–55, *400–09).

[32] THE FEDERALIST NO. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 2003). On the institutional competence rationale underlying the division of military powers, see Noah Feldman & Samuel Issacharoff, *Declarative Sentences: Congress Has the Power to Make and End War — Not Manage It*, SLATE (Mar. 5, 2007, 1:36 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2007/03/declarative_sentences.html.

[33] 548 U.S. 557 (2006).

[34] 71 U.S. (4 Wall.) 2 (1866).

[35] *Hamdan*, 548 U.S. at 592 (quoting *Milligan*, 71 U.S. (4 Wall.) at 139 (Chase, C.J., concurring in the judgment)).

[36] *See* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM 792–800 (1988); JOHN FABIAN WITT, LINCOLN'S CODE 258–63 (2012).

[37] *See, e.g.*, MCPHERSON, *supra* note 36, at 799–800; WITT, *supra* note 36, at 260–63.

[38] *See* ERIC FONER, THE STORY OF AMERICAN FREEDOM 95–97 (1998) (describing how freedom for blacks became an objective of the war).

[39] WITT, *supra* note 36, at 261.

[40] *See* Letter from Lieutenant-Gen. Ulysses S. Grant to Major-Gen. Benjamin F. Butler (Aug. 18, 1864), *reprinted in* 7 U.S. WAR DEP'T, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, SERIES II, at 606–07 (Washington, D.C., Gov't Printing Office 1894–1899) [hereinafter OFFICIAL RECORDS]; RICHARD F. HEMMERLEIN, PRISONS AND PRISONERS OF THE CIVIL WAR 110–13 (1934) (noting that General Grant saw the moratorium as "a means at his disposal to win the war," *id.* at 113).

[41] ALAN TAYLOR, THE CIVIL WAR OF 1812, at 353 (2010).

who were British born yet had become naturalized U.S. citizens.[42] During the "Queenston Twenty-Three" episode, one of the war's central events, the British sent twenty-three American prisoners taken during the October 1812 Battle of Queenston to England to be tried for treason because they were ostensibly Irish born.[43] The United States retaliated by taking British prisoners in May 1813, and further retaliations sparked "a game of international bluff-poker, played with prisoners of war as the chips."[44] The management of prisoner exchanges was essential to the country's attempts to create the leverage to free the Queenston Twenty-Three and to accomplish one of the war's central objectives: securing British acknowledgment that naturalized citizens were free from British authority.[45]

Not only have decisions about prisoners in fact been tactical, but the historical actors themselves have also understood them to be tactical and, accordingly, have deferred to the President to make them. Historical precedent is not a perfect guide to the Constitution, but the Court often looks to it for "a gloss on 'executive Power'" in foreign relations,[46] given that constitutional questions over war powers are more frequently resolved in the courts of public opinion than in federal courts. During the Civil War, the decision to cease prisoner exchanges was made by the executive alone.[47] Despite the decision's intense unpopularity in the North,[48] Congress did not intervene. The Senate "direct[ed]" the Lincoln Administration to keep it updated on the prisoner negotiations, but it did not try to order the President to restart the exchanges.[49] Nor did critics of the decision call upon Congress to do

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[42] *Id.* at 102–06, 411.

[43] *See id.* at 358–79; CLIVE L. LLOYD, A HISTORY OF NAPOLEONIC AND AMERICAN PRISONERS OF WAR, 1756–1816, at 55–56 (2007).

[44] LLOYD, *supra* note 43, at 56.

[45] TAYLOR, *supra* note 41, at 359 (calling the episode "the central controversy in a war fought over the distinction between a subject and a citizen").

[46] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring) (quoting U.S. CONST. art II, § 1, cl. 1).

[47] *See* Letter from Sec'y of War Edwin M. Stanton to Major-Gen. Benjamin F. Butler (Nov. 17, 1863), *reprinted in* 6 OFFICIAL RECORDS, *supra* note 40, at 528 (rejecting Confederate proposals to exchange prisoners "except blacks and officers in command of black troops"); Letter from Lieutenant-Gen. Ulysses S. Grant to Major-Gen. Benjamin F. Butler (Apr. 17, 1864), *reprinted in* 7 OFFICIAL RECORDS, *supra* note 40, at 62–63 (instructing General Butler, the Union's agent for prisoner exchanges, regarding the Union's policy to halt prisoner exchanges). Congress had played a role in initiating the prisoner exchanges at the beginning of the Civil War through a joint resolution on December 11, 1861. *See* Joint Resolution Adopted by the House of Representatives (Dec. 11, 1861), *reprinted in* 3 OFFICIAL RECORDS, *supra* note 40, at 157. But this resolution merely "requested" the President to act, and neither ordered nor authorized him to do so. *Id.* Moreover, the resolution acknowledged that exchanges had already taken place without congressional action. *Id.*

[48] *See* WITT, *supra* note 36, at 258–61.

[49] Resolution Adopted by the U.S. Senate (June 23, 1862), *reprinted in* 4 OFFICIAL RECORDS, *supra* note 40, at 53.

so.[50] Moreover, whereas Congress debated the constitutionality of many of President Lincoln's controversial wartime decisions, it did not similarly raise constitutional objections to his prisoner decisions.[51]

Like the Lincoln Administration during the Civil War, the Madison Administration unilaterally orchestrated prisoner tactics in the War of 1812 and negotiated the exchange that resolved the prisoner crisis.[52] Congress did not sit entirely on the sidelines.[53] Several months into the prisoner standoff, Congress passed an Act that "authorized" the President to retaliate against the British.[54] However, the Act was superfluous and intended to threaten Britain, rather than to provide necessary authorization. First, Congress had previously passed acts to establish regulations and appropriations for the taking of prisoners (without restricting whether or when the President could release them), which implies that Congress already recognized the President's authority to take prisoners.[55] Second, the President delayed his retaliation until May 1813 due not to a perceived lack of authorization before March 1813 but rather to a tactical consideration — he had been waiting for the war to shift in the United States' favor.[56] President Madison approached decisions about whether and when to release prisoners as his prerogative, and Congress respected that prerogative.[57]

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[50] *Cf.* MCPHERSON, *supra* note 36, at 798–99 (describing petitions to President Lincoln, but not to Congress, to resume prisoner exchanges).

[51] *Cf.* 1 ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION 292–95 (7th ed. 1991) (discussing the constitutional controversy over some of President Lincoln's major wartime decisions).

[52] *See* LLOYD, *supra* note 43, at 55–56; TAYLOR, *supra* note 41, at 358–79.

[53] Scholars have pointed to the War of 1812 to argue that Congress assumed significant control over prisoners of war during the country's earliest conflicts. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. 941, 977 & n.121 (2008); Prakash, *supra* note 26, at 303 & nn.15–16; Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 95 & n.195 (2007). In addition to passing prisoner-of-war legislation, Congress offered bounties for British soldiers brought in by American privateers during the War of 1812. *See* LLOYD, *supra* note 43, at 54. However, the bounty system did not impede tactical decisions about whether and when President Madison could exchange the British prisoners.

[54] Act of Mar. 3, 1813, ch. 61, § 1, 2 Stat. 829, 829–30.

[55] *See* Act of July 6, 1812, ch. 128, 2 Stat. 777, 777 ("authoriz[ing]" the President "to make such regulations and arrangements for the safe keeping, support and exchange of prisoners of war as he may deem expedient" and appropriating $100,000 for this purpose); Act of June 26, 1812, ch. 107, § 7, 2 Stat. 759, 761 (directing American privateers to deliver prisoners found on board captured vessels to U.S. custody).

[56] *See* TAYLOR, *supra* note 41, at 360.

[57] Scholars seeking to establish that Congress "made clear its power to control the treatment of prisoners" during the country's early period have looked not only to the congressional enactments passed during the War of 1812 but also to several acts from the Quasi-War with France pertaining to the imprisonment of French persons aboard vessels captured by American privateers. Wuerth, *supra* note 53, at 95; *see also* Barron & Lederman, *supra* note 53, at 971 & n.91; Prakash, *supra* note 26, at 339 & nn.217–22; Wuerth, *supra* note 53, at 95 n.195. However, the Quasi-War statutes served limited purposes unrelated to releasing prisoners. First, they authorized force, including the force of detention, against French vessels during an undeclared war. *See* Act of Mar. 3,

Section 1028's thirty-day waiting period and findings requirements, however, restrict the flexibility that Presidents have historically retained to negotiate and conclude prisoner releases. The provision might initially look like a general regulation given that it deals with appropriations and introduces general rules for all prisoners held at Guantanamo. However, functionally it targets a specific tactical option — the release of detainees to their home countries — and seeks to burden the President's flexibility to select that option, regardless of any contingent developments in the war.[58] The President might need to negotiate with a foreign country over the exchange of a Guantanamo detainee for an American prisoner of war. Such prisoner negotiations are not curiosities of the past; rather, they have occurred during the War on Terror.[59] The President might also determine that releasing particular Guantanamo detainees even without an exchange would win international goodwill and thereby reduce the threat of terrorism, thus contributing to one of the War on Terror's objectives. In either scenario, if section 1028's thirty-day waiting period and findings requirements were to hamper the flexibility and speed needed to leverage the detainees, the section would be unconstitutional.

For a country divided over Guantanamo, history can stoke reflection on the nature of prisoner decisions and how previous generations interpreted the Constitution to allocate the decisionmaking power. This history suggests that some prominent prisoner decisions have been tactical and left to the President's discretion, which supports the view that it would be the President's constitutional prerogative to release Guantanamo detainees for tactical purposes. Section 1028 would be unconstitutional if it were to impede the President's flexibility to exercise this power.

1799, ch. 45, 1 Stat. 743, 743 ("empower[ing] and requir[ing]" the President to retaliate against the French for the impressment of any Americans on board French vessels); Act of June 28, 1798, ch. 62, § 4, 1 Stat. 574, 575 (declaring that "it shall be lawful" for the President "to . . . confine[]" captured French persons "in any place of safety within the United States, in such manner as he may think the public interest may require"). Second, they provided general instructions for American privateers who took custody of a crew aboard a captured French vessel. *See* Act of July 9, 1798, ch. 68, § 8, 1 Stat. 578, 580 (directing privateers to deliver French persons on board captured French vessels to U.S. custody); Act of June 25, 1798, ch. 60, § 4, 1 Stat. 572, 573 ("authoriz[ing]" the President to establish instructions for American privateers and directing the privateers to deliver any persons on board a captured ship to U.S. custody). One Act from the Quasi-War did "authorize[]" the President "to exchange or send away" captured French citizens. Act of Feb. 28, 1799, ch. 18, 1 Stat. 624, 624. But this Act deferred to the President's tactical judgment by clarifying that he could exchange prisoners "as he may deem proper and expedient," *id.*, and the Act did not infringe on his power to determine whether and when to exchange them.

[58] The Court's Free Exercise doctrine has long cautioned that regulations that appear general can, in fact, "target[]" particular conduct if they are designed "to infringe upon or restrict" that conduct. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

[59] *See, e.g.*, Elisabeth Bumiller & Matthew Rosenberg, *Parents of P.O.W. Reveal U.S. Talks on Taliban Deal*, N.Y. TIMES, May 10, 2012, at A1 (discussing Obama Administration talks with the Taliban over exchanging Guantanamo detainees for an American prisoner).