
RECENT LEGISLATION

SEPARATION OF POWERS — NATIONAL SECURITY — CONGRESS RESTRICTS GUANTÁNAMO TRANSFERS, PROMPTING CONSTITUTIONAL SIGNING STATEMENT OBJECTION. — National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011) (to be codified in scattered sections of the U.S. Code).

Despite the executive branch's leadership in the war on terror,¹ Congress has periodically passed legislation regarding military detention.² Congress's latest effort was the National Defense Authorization Act for Fiscal Year 2012³ (NDAA), which it passed on December 15, 2011, and which President Barack Obama signed into law later that month.⁴ In addition to affirming and potentially expanding the President's detention powers,⁵ the NDAA extends for another year restrictions on the President's ability to transfer Guantánamo Bay detainees to the United States and foreign countries.⁶ Although President Obama signed the bill into law, he issued a signing statement criticizing the restrictions on both policy and constitutional grounds, arguing that they could in certain circumstances violate the separation of powers.⁷ Although flawed as policy, the NDAA's detainee-transfer restrictions do not unconstitutionally infringe upon the President's Commander-in-Chief or foreign affairs powers.⁸ Rather, the restrictions are a welcome assertion of Congress's proper role in regulating wartime detention.

The NDAA's counterterrorism provisions take up fourteen of the Act's 507 sections.⁹ Section 1021 explicitly recognizes the President's

¹ See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND* 34–37 (2010).

² See, e.g., Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified at 42 U.S.C. §§ 2000dd to 2000dd-1 (2006)); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of the U.S. Code).

³ Pub. L. No. 112-81, 125 Stat. 1298 (2011) (to be codified in scattered sections of the U.S. Code).

⁴ *Bill Summary & Status — 112th Congress (2011–2012) — H.R. 1540*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01540:@@S> (last visited Mar. 25, 2012).

⁵ See National Defense Authorization Act §§ 1021–1022, 125 Stat. at 1562–64.

⁶ *Id.* §§ 1026–1028, 125 Stat. at 1566–69; see Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, §§ 1032–1034, 124 Stat. 4137, 4351–54 (to be codified in scattered sections of the U.S. Code) (implementing similar restrictions for 2011).

⁷ Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 201100978 (Dec. 31, 2011) [hereinafter NDAA Signing Statement].

⁸ One commentator has recently argued that the detainee-transfer restrictions in the 2011 defense authorization act were constitutional, but based his conclusions on Congress's "power of the purse to regulate military affairs" and the Law of Nations Clause. William M. Hains, Comment, *Challenging the Executive: The Constitutionality of Congressional Regulation of the President's Wartime Detention Policies*, 2011 BYU L. REV. 2283, 2313; see also *id.* at 2309–13.

⁹ National Defense Authorization Act §§ 1021–1034, 125 Stat. at 1562–73. The bulk of the NDAA sets 2012 funding levels for the military and Department of Defense. The most consequential counterterrorism provision other than those described below requires a hearing before a military judge and representation by military counsel for anyone for whom the writ of habeas

authority under the 2001 Authorization for Use of Military Force¹⁰ (AUMF) to detain, “pending disposition under the law of war,”¹¹ those who were directly involved in the September 11 attacks¹² or who are “a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners.”¹³ The section, however, expressly avoids taking a position on the contentious question of whether U.S. citizens, lawful resident aliens, and persons seized inside the United States may be detained.¹⁴ Section 1022 mandates military custody for individuals covered by section 1021 who are members of al-Qaeda or an “associated force” and who have participated in the planning, carrying out, or attempted carrying out of attacks against the United States or its allies.¹⁵ The section’s requirement for mandatory detention does not apply to citizens.¹⁶ The President can waive the mandatory detention requirement by certifying to Congress in writing that a waiver “is in the national security interests of the United States.”¹⁷ Together, sections 1021 and 1022 have fueled most of the criticism of the NDAA, with members of Congress, the media, and the legal academy arguing that, in addition to hurting counterterrorism efforts,¹⁸ the provisions expand the government’s detention authority¹⁹ and potentially authorize the indefinite detention of U.S. citizens.²⁰

corpus in federal court is not available. *Id.* § 1024(b)–(c), 125 Stat. at 1565. That such procedures are now required for detainees held at, for example, Bagram Air Force Base in Afghanistan has been recognized as a significant advance for detainee rights. See Benjamin Wittes & Robert Chesney, *NDAA FAQ: A Guide for the Perplexed*, LAWFARE (Dec. 19, 2011, 3:31 PM), <http://www.lawfareblog.com/2011/12/ndaa-faq-a-guide-for-the-perplexed/>.

¹⁰ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

¹¹ National Defense Authorization Act § 1021(a), 125 Stat. at 1562.

¹² *Id.* § 1021(b)(1), 125 Stat. at 1562.

¹³ *Id.* § 1021(b)(2), 125 Stat. at 1562.

¹⁴ *Id.* § 1021(e), 125 Stat. at 1562 (“Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.”). *But see* Joanne Mariner, *The NDAA Explained: Part Two in a Two-Part Series of Columns on the National Defense Authorization Act*, VERDICT (Jan. 2, 2012), <http://verdict.justia.com/2012/01/02/the-ndaa-explained> (questioning whether section 1021(e) excludes U.S. citizens).

¹⁵ National Defense Authorization Act § 1022(a)(1)–(2), 125 Stat. at 1563.

¹⁶ *Id.* § 1022(b)(1), 125 Stat. at 1563. Detention is also not mandatory for “lawful resident alien[s] of the United States on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States.” *Id.* § 1022(b)(2), 125 Stat. at 1563.

¹⁷ *Id.* § 1022(a)(4), 125 Stat. at 1563.

¹⁸ See, e.g., Brian Michael Jenkins, *The NDAA Makes It Harder to Fight Terrorism*, FOREIGN AFF. (Feb. 1, 2012), <http://www.foreignaffairs.com/articles/137070/brian-michael-jenkins/the-ndaa-makes-it-harder-to-fight-terrorism>.

¹⁹ See, e.g., David Cole, *A Bill of Rights for Some*, NYRBLOG (Dec. 16, 2011, 2:46 PM), <http://www.nybooks.com/blogs/nyrblog/2011/dec/16/bill-rights-some/>.

²⁰ See, e.g., Editorial, *Politics over Principle*, N.Y. TIMES, Dec. 16, 2011, at A38. For the contrary view that the NDAA largely preserves the status quo, see Wittes & Chesney, *supra* note 9.

Congress has also constrained the President's ability to transfer detainees out of Guantánamo. Sections 1026 and 1027 prohibit the use of Department of Defense (DoD) funds to build any facilities outside Guantánamo Bay for housing noncitizen Guantánamo detainees²¹ or to transfer to or release in the United States Khalid Sheikh Mohammed²² or any other noncitizens who were held at Guantánamo on or after January 20, 2009, the date of President Obama's inauguration.²³ Section 1028 prohibits the use of DoD funds to transfer noncitizen Guantánamo detainees to foreign countries.²⁴ The prohibition can be waived if the Secretary of Defense, the Secretary of State, and the Director of National Intelligence (DNI) submit a certification waiver to Congress at least thirty days before the detainee transfer.²⁵ The certification requires, among other things, that the foreign government: is not a state sponsor of terrorism,²⁶ ensures that the detainee does not take future action to threaten the United States or its allies or engage in terrorism generally,²⁷ and shares information with the United States that is related to the detainee or his associates and "could affect the security of the United States" and its allies.²⁸ Certain certification factors can be waived if it is impossible to certify that the risks addressed by the factors will be eliminated but that "alternative actions will be taken"²⁹ to "substantially mitigate [the] risks."³⁰

Despite having previously threatened to veto the NDAA unless Congress removed the mandatory military detention requirement and detainee-transfer restrictions,³¹ President Obama dropped the veto threat shortly after the final version of the NDAA emerged from conference committee.³² He noted in his signing statement that Congress had "revised provisions that otherwise would have jeopardized the

²¹ National Defense Authorization Act § 1026, 125 Stat. at 1566.

²² Mohammed was the "mastermind" of the 9/11 attacks. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 83 (2004).

²³ National Defense Authorization Act § 1027, 125 Stat. at 1566–67.

²⁴ *Id.* § 1028(a)(1), (e)(2)(A), 125 Stat. at 1567, 1569. The prohibition does not apply to orders issued by courts or "competent tribunal[s]" (for example, military commissions), *id.* § 1028(a)(2)(A), 125 Stat. at 1567, or to pretrial agreements in military commissions cases prior to the enactment of the NDAA, *id.* § 1028(a)(2)(B), 125 Stat. at 1567.

²⁵ *Id.* § 1028(a)(1), (b)(1), 125 Stat. at 1567.

²⁶ *Id.* § 1028(b)(1)(A), 125 Stat. at 1567.

²⁷ *Id.* § 1028(b)(1)(D)–(E), 125 Stat. at 1567.

²⁸ *Id.* § 1028(b)(1)(F), 125 Stat. at 1567–68.

²⁹ *Id.* § 1028(d)(1)(A), 125 Stat. at 1568.

³⁰ *Id.* § 1028(d)(1)(B), 125 Stat. at 1568. Heightened certification-waiver standards apply to detainees who were previously transferred from Guantánamo and have "subsequently engaged in any terrorist activity." *Id.* § 1028(c)(1), 125 Stat. at 1568; *see id.* § 1028(d)(1), 125 Stat. at 1568.

³¹ *See* OFFICE OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATION POLICY: S. 1867 — NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2012, at 3 (Nov. 17, 2011).

³² *See* Charlie Savage, *Obama Drops Veto Threat over Military Authorization Bill After Revisions*, N.Y. TIMES, Dec. 15, 2011, at A26.

safety, security, and liberty of the American people.”³³ However, he expressed “serious reservations” about some of the detention provisions.³⁴ First, he argued that section 1021 merely codified the existing federal court interpretation of the AUMF and that the administration would interpret the section as not authorizing the “indefinite military detention without trial of American citizens.”³⁵ Second, he objected to section 1022 as “ill-conceived” and stated his intention to interpret it to give him maximum discretion to waive the military custody requirement.³⁶ Third, he objected to sections 1027 and 1028, stating that they “would, under certain circumstances, violate constitutional separation of powers principles.”³⁷ Section 1028 in particular, which remained largely unchanged from the preconference versions,³⁸ would “hinder[] the executive’s ability to carry out its military, national security, and foreign relations activities.”³⁹ Thus, the administration would interpret the detainee-transfer restrictions to “avoid the constitutional conflict.”⁴⁰

President Obama’s signing statement contemplates detainee transfers that would violate the NDAA’s restrictions. Such actions would constitute “measures incompatible with the . . . will of Congress,” placing the President’s power “at its lowest ebb.”⁴¹ To prevail in this situation, the President’s power to transfer detainees would have to be “preclusive” — one that Congress could not constitutionally limit.⁴² The most likely

³³ See NDAA Signing Statement, *supra* note 7, at 1.

³⁴ *Id.* The signing statement also expressed President Obama’s opposition to other noncounterterrorism NDAA provisions on constitutional grounds. *See id.* at 3.

³⁵ *Id.* at 1–2.

³⁶ *See id.* at 2. True to his word, President Obama ultimately issued implementing regulations that contained such broad waivers that they, in the words of one observer, “render[ed] the mandatory military detention provision mostly moot.” Sari Horwitz & Peter Finn, *Obama Orders Waivers to New Rules on Detaining Terrorism Suspects*, WASH. POST (Feb. 28, 2012), http://www.washingtonpost.com/world/national-security/guantanamo-detainee-would-likely-serve-no-more-than-25-years-under-plea-deal/2012/02/28/gIQAcbeggR_story.html (quoting a senior Human Rights Watch official) (internal quotation marks omitted).

³⁷ NDAA Signing Statement, *supra* note 7, at 3. President Obama also objected to similar restrictions in the 2011 defense authorization bill, but solely on policy grounds, omitting any mention of constitutional difficulties. *See* Statement on Signing the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, 2011 DAILY COMP. PRES. DOC. 201100010 (Jan. 7, 2011).

³⁸ Compare National Defense Authorization Act § 1028, 125 Stat. at 1567–69, with National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1033 (as passed by Senate, Dec. 1, 2011), and National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1040 (as passed by House, May 26, 2011).

³⁹ NDAA Signing Statement, *supra* note 7, at 3.

⁴⁰ *Id.* President Obama also raised policy concerns about sections 1023 through 1026 and 1029. *See id.* at 2–3.

⁴¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *see also* *Medellín v. Texas*, 128 S. Ct. 1346, 1368 (2008) (“Justice Jackson’s familiar tripartite scheme provides the accepted framework for evaluating executive action . . .”).

⁴² 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, 694 & n.6 (2008). A presidential power can be preclusive even if it requires congressional appropriations for

sources for such authority are the President's Commander-in-Chief and foreign affairs powers. Neither constitutional text nor historical practice, however, supports a claim of preclusive presidential authority over detainee transfers. And though the NDAA's specific provisions have serious policy flaws, Congress's engagement with detainee policy has long-term value.

The Constitution provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States."⁴³ However, the Constitution gives Congress general warmaking responsibility, such as the power to declare war and to raise, maintain, and regulate the military.⁴⁴ Scholars have long debated whether the Commander-in-Chief power nevertheless has preclusive scope. Some at one end of the spectrum argue that all of the Commander-in-Chief powers are preclusive.⁴⁵ Assuming that military detention falls under the Commander-in-Chief power, the detainee-transfer restrictions would be unconstitutional under this position. However, the strong preclusive view is a minority position among legal scholars and has found little support on the Court.⁴⁶ Recent scholarship at the other end of the spectrum contends that the only preclusive Commander-in-Chief power is that of superintendence: Congress may not vest ultimate military decisionmaking power in anyone but the President, though it may limit the scope of that power.⁴⁷ Under this

its exercise. *See id.* at 739. Thus, even though the NDAA's restrictions are appropriations provisions, Congress's power of the purse is not dispositive of whether the restrictions are constitutional.

⁴³ U.S. CONST. art. II, § 2, cl. 1.

⁴⁴ *Id.* art. I, § 8, cls. 11–14; *see also* CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 207 (4th ed. 2011). The Constitution also gives Congress the explicit power to "make Rules concerning Captures on Land and Water." U.S. CONST. art. I, § 8, cl. 11. If the Captures Clause includes people as well as property, then the detainee-transfer restrictions fall squarely within Congress's authority. Indeed, a concurring D.C. Circuit opinion cited the Captures Clause for the proposition that "the President must comply with legislation regulating or restricting the transfer of detainees." *Kiyemba v. Obama*, 561 F.3d 509, 517 (D.C. Cir. 2009) (Kavanaugh, J., concurring). However, the Supreme Court has never directly addressed whether the Captures Clause extends to people, *see* Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683, 1686 (2009), and the original meaning of the clause remains a point of scholarly controversy, *compare id.* at 1735 (arguing that the Captures Clause generally does not include people), *with* Aaron D. Simowitz, *The Original Understanding of the Capture Clause*, 59 DEPAUL L. REV. 121, 139 (2009) (arguing that it does). This ambiguity counsels looking to other constitutional sources of Congress's war power over detainees.

⁴⁵ *See, e.g.*, Robert H. Bork, Address, *Erosion of the President's Power in Foreign Affairs*, 68 WASH. U. L.Q. 695, 699 (1990); *cf.* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 174 (1996) (arguing that, as a matter of original constitutional understanding, "Congress could express its opposition to executive war decisions only by exercising its powers over funding and impeachment").

⁴⁶ *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion) (citing *Mistretta v. United States*, 488 U.S. 361, 380 (1989)) (noting that, in the context of war, the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake").

⁴⁷ *See* Barron & Lederman, *supra* note 42, at 696–97; Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 410–12 (2008).

view, the detainee-transfer restrictions do not infringe upon any preclusive Commander-in-Chief powers.⁴⁸

Between these two poles is the traditional view that identifies only certain Commander-in-Chief powers as preclusive — for example, making tactical battlefield decisions.⁴⁹ This view seems to come closest to the Supreme Court’s own position⁵⁰ and is the likely basis for President Obama’s Commander-in-Chief objections, which argued that the detainee-transfer restrictions would be unconstitutional only “under certain circumstances.”⁵¹ But even under this view, the NDAA likely passes constitutional muster. Guantánamo, as Justice Kennedy has observed, is not the conventional battlefield; rather it “is in every practical respect a United States territory, . . . one far removed from any hostilities.”⁵² And the Supreme Court has upheld at least some congressional regulation over Guantánamo detainees.⁵³

The constitutionality of the NDAA’s regulation of detainee treatment (which includes transfers) also draws support from historical practice.⁵⁴ For instance, during the Quasi-War with France from 1798 to 1800, Congress passed a law that “required” the President “to cause the most rigorous retaliation” against French citizens who had imprisoned Americans on French ships,⁵⁵ without raising any constitutional concerns.⁵⁶ Likewise, Congress passed a law in 1834 requiring the humane treatment of

⁴⁸ Although section 1028’s certification provisions delegate authority to subordinate officers — thus arguably violating the President’s prerogative to maintain ultimate military decisionmaking authority — these officers are likely removable at will. See 10 U.S.C. § 113 (2006 & Supp. IV 2011) (describing the Secretary of Defense’s appointment process without including removal restrictions); 22 U.S.C. § 2651A (2006 & Supp. IV 2011) (same with respect to the Secretary of State); 50 U.S.C. § 403 (2006) (same with respect to the DNI).

⁴⁹ See David M. Golove, *Against Free-Form Formalism*, 73 N.Y.U. L. REV. 1791, 1855 (1998).

⁵⁰ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 592 (2006) (“Congress cannot direct the conduct of campaigns . . .” (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring))).

⁵¹ NDAA Signing Statement, *supra* note 7, at 3.

⁵² *Rasul v. Bush*, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring in the judgment); see also *Boumediene v. Bush*, 128 S. Ct. 2229, 2253 (2008) (“[T]he United States . . . maintains *de facto* sovereignty over [Guantánamo].” (citing *Rasul*, 542 U.S. at 480 (majority opinion); *id.* at 487 (Kennedy, J., concurring in the judgment))). Given Guantánamo’s unique status, similar restrictions applied to the front lines of Afghanistan or other active war zones could still be unconstitutional.

⁵³ See *Hamdan*, 548 U.S. at 592–93, 613 (holding that, while the Uniform Code of Military Justice (UCMJ) constituted authorization for the President to try a Guantánamo detainee in military commissions, the commissions were governed by the UCMJ).

⁵⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (arguing that historical practice may serve as a “gloss” on executive power); see also *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (adopting Justice Frankfurter’s approach).

⁵⁵ Act of Mar. 3, 1799, ch. 45, 1 Stat. 743.

⁵⁶ See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — A Constitutional History*, 121 HARV. L. REV. 941, 970–72 (2008).

Native Americans in military detention.⁵⁷ Congressional regulation of the treatment of military detainees continues today.⁵⁸

Just as the Commander-in-Chief power is not preclusive with respect to detainee transfers in general (sections 1026 through 1028), the President's foreign affairs powers are also not preclusive with respect to transfers to foreign countries (section 1028). The Court has long recognized that the President's foreign affairs powers go beyond those explicitly granted in the Constitution and that the President has a unique role as "the sole organ of the federal government in the field of international relations."⁵⁹ Yet the Court has not held that the President enjoys preclusive power over the whole foreign affairs arena;⁶⁰ nor has it ever invalidated an act of Congress as infringing upon the President's foreign affairs power.⁶¹ Even strong foreign affairs presidentialists concede that Congress retains those powers granted by the constitutional text.⁶² Congress's constitutionally granted foreign affairs powers include not only those facially related to foreign affairs — such as ratifying treaties, confirming ambassadors, and regulating foreign commerce⁶³ — but also those that clearly affect foreign relations, such as declaring and regulating war.⁶⁴ History and custom also support the constitutionality of congressional restrictions on detainee transfers to foreign states.⁶⁵ Congress has long helped shape immigration and deportation policies,⁶⁶ and — most relevant for the detainee-transfer con-

⁵⁷ See Act of June 30, 1834, ch. 161, § 23, 4 Stat. 729, 733.

⁵⁸ The UCMJ prohibits members of the armed forces from mistreating or assaulting prisoners. See 10 U.S.C. §§ 893, 928 (2006); see also Barron & Lederman, *supra* note 42, at 707 & n.49. More recently, the Detainee Treatment Act prohibits "cruel, inhuman, or degrading treatment or punishment" of anyone in U.S. custody. 42 U.S.C. § 2000dd(a) (2006).

⁵⁹ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

⁶⁰ In *Youngstown*, for example, Justice Jackson characterized *Curtiss-Wright's* broad language as dictum that was, in any event, limited to situations in which Congress had not disapproved of the executive action at issue. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring). This has not stopped executive branch lawyers from invoking *Curtiss-Wright* to defend expansive conceptions of the President's foreign affairs powers. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 94 (1990) ("Among government attorneys, [*Curtiss-Wright's*] lavish description of the president's powers is so often quoted that it has come to be known as the "*Curtiss-Wright*, so I'm right" cite' . . .").

⁶¹ BRADLEY & GOLDSMITH, *supra* note 44, at 197. The Court had an opportunity to do so this term, but failed to reach a decision on the merits. See *Zivotofsky v. Clinton*, No. 10-699, slip op. at 5, 12 (U.S. Mar. 26, 2012) (holding that the lower courts erred in dismissing the case on political-question grounds and remanding for a decision on the merits).

⁶² See, e.g., Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 235 (2001).

⁶³ U.S. CONST. art. II, § 2, cl. 2; *id.* art. I, § 8, cl. 3.

⁶⁴ See *supra* note 44 and accompanying text.

⁶⁵ Cf. Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 110-12 (1984) (discussing the importance of history in foreign affairs cases).

⁶⁶ See, e.g., Alien Enemy Act, ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21-24 (2006)); Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974).

text — has regulated extradition, both by treaty and by legislation.⁶⁷ As the Court has recognized, extradition is “not confided to the Executive in the absence of treaty or legislative provision.”⁶⁸

Despite Congress’s constitutional authority to regulate detainee transfers, President Obama’s policy criticisms of the specific restrictions in the NDAA were valid. The statute eliminates the flexibility to try Guantánamo detainees in civilian courts (a practice used to great effect by the Bush administration with other terrorism suspects⁶⁹), makes it impossible to close Guantánamo Bay,⁷⁰ and abandons many of the detainees whom the administration no longer views as dangerous but is barred by statute from transferring.⁷¹

Nevertheless, Congress’s general involvement in detention policy may be positive for its own sake, even if it missteps in individual cases. Congress not only legitimates and helps make accountable executive branch actions,⁷² but it is also the only branch capable of fashioning a comprehensive legal regime for military detention of terrorist suspects.⁷³ In addition, institutional constraints such as the bicameralism requirement and the presidential veto⁷⁴ limit the potential damage of congressional meddling in tactical wartime decisions.⁷⁵ Although the President is right to work with Congress to repeal the problematic NDAA provisions,⁷⁶ he should respect its role in this policy arena and neither ignore the restrictions nor interpret them out of existence in the name of avoiding constitutional difficulties.⁷⁷ Just because a congressional policy choice is wrong does not make it unconstitutional.

⁶⁷ See, e.g., Act of Aug. 12, 1848, ch. 167, 9 Stat. 302; Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., art. XXVII, Nov. 19, 1794, 8 Stat. 116, 129.

⁶⁸ *Valentine v. United States*, 299 U.S. 5, 8 (1936).

⁶⁹ See Jim Comey & Jack Goldsmith, Op-Ed., *Holder’s Reasonable Decision*, WASH. POST, Nov. 20, 2009, at A23. These non-Guantánamo suspects included members of al-Qaeda. See *id.*

⁷⁰ See Jeh C. Johnson, Gen. Counsel, Dep’t of Def., Speech at the Heritage Foundation (Oct. 18, 2011), at 7, available at <http://media.miamiherald.com/smedia/2011/10/18/16/22/119Nv5.S0.56.pdf> (noting that no Guantánamo detainees had been certified since the “onerous and near impossible to satisfy” requirements of a similar provision in the 2011 NDAA had been imposed).

⁷¹ See Carol Rosenberg, *Why Obama Can’t Close Guantánamo*, FOREIGN AFF. (Dec. 14, 2011), <http://www.foreignaffairs.com/articles/136781/carol-rosenberg/why-obama-cant-close-guantanamo>.

⁷² See VICTOR M. HANSEN & LAWRENCE FRIEDMAN, *THE CASE FOR CONGRESS* 129–30 (2009).

⁷³ See BENJAMIN WITTES, *LAW AND THE LONG WAR* 131–50 (2008).

⁷⁴ U.S. CONST. art. I, § 7, cls. 2–3.

⁷⁵ See Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 378–79 (2008). Indeed, the final NDAA version, drafted in the shadow of the President’s veto threat, significantly watered down mandatory military detention. See Robert Chesney, *The Conference Version of the NDAA: Mandatory Military Detention Is Not Very Mandatory*, LAWFARE (Dec. 13, 2011, 10:44 AM), <http://www.lawfareblog.com/2011/12/the-conference-version-of-the-ndaa-mandatory-military-detention-is-not-very-mandatory/>.

⁷⁶ See NDAA Signing Statement, *supra* note 7, at 4.

⁷⁷ See Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1235 (2006) (“There is a risk that executive actors will abuse the avoidance canon by employing it in circumstances where, by its own terms, it does not apply.”).