

May 2015

The President's Wartime Detention Authority : What History Teaches Us

Anirudh Sivaram
Yale University

Follow this and additional works at: https://elischolar.library.yale.edu/applebaum_award

 Part of the [Constitutional Law Commons](#), [Legal Commons](#), [National Security Law Commons](#), [President/Executive Department Commons](#), and the [United States History Commons](#)

Recommended Citation

Sivaram, Anirudh, "The President's Wartime Detention Authority : What History Teaches Us" (2015). *Harvey M. Applebaum '59 Award*. 8.
https://elischolar.library.yale.edu/applebaum_award/8

This Article is brought to you for free and open access by the Library Prizes at EliScholar – A Digital Platform for Scholarly Publishing at Yale. It has been accepted for inclusion in Harvey M. Applebaum '59 Award by an authorized administrator of EliScholar – A Digital Platform for Scholarly Publishing at Yale. For more information, please contact elischolar@yale.edu.

**THE PRESIDENT’S WARTIME DETENTION AUTHORITY:
WHAT HISTORY TEACHES US**

Anirudh Sivaram
Yale University

EP&E 491 – The Senior Essay
Advisor: Professor John Fabian Witt
Second Reader: Professor Stephen Skowronek

Submitted to the Department of Ethics, Politics & Economics in partial fulfillment
of the requirements for the degree of Bachelor of Arts

TABLE OF CONTENTS

1. Abstract	2
2. Acknowledgments	3
3. Introduction	4
4. Section I : <i>Youngstown</i> and detention standards	10
4.1. What constitutes detention	10
4.2. Sources and scope of Executive detention power	11
4.3. The <i>Youngstown</i> framework	14
4.4. A note on Executive Practice	15
4.5. The argument restated	16
5. Section II : The Early Republic and the War of 1812	18
5.1. Thomas Jefferson, the Burr Conspiracy and <i>Ex Parte Bollman</i>	18
5.2. James Madison and the War of 1812	22
5.3. <i>In re Stacey</i>	22
5.4. <i>Smith v. Shaw</i>	26
6. Section III : The Civil War and Reconstruction	30
6.1. Lincoln goes alone - <i>Ex Parte Merryman & Ex Parte Benedict</i>	30
6.2. <i>Ex Parte Merryman</i>	31
6.3. <i>Ex Parte Benedict</i>	37
6.4. Congress steps in	40
6.5. <i>Ex Parte Vallandigham</i>	41
6.6. <i>Ex Parte Milligan</i>	49
6.7. Reconstruction : Ulysses Grant and the Ku Klux Klan Act	52
7. Section IV : World War II and the Cold War	55
7.1. The Internment and Exclusion of Japanese-Americans	55
7.2. Curfews and Exclusion Orders - Gordon Hirabayashi and Fred Korematsu	56
7.3. Detaining loyal Americans : <i>Ex Parte Endo</i>	59
7.4. The Nazi Saboteur Case : <i>Ex Parte Quirin</i>	62
7.5. The forgotten detention of an Italian-American private : <i>In re Territo</i>	67
7.6. Non-Detention Act	70
8. Section V : The War on Terror	74
8.1. Detention as an incident of waging war : <i>Hamdi v. Rumsfeld</i>	76
8.2. Detention on American Soil : Jose Padilla	84
9. Section VI : Conclusion – What History teaches us	92
10. Bibliography	96

ABSTRACT

This thesis examines the extent of the President's wartime detention authority over citizens (in particular, detention authority pursuant to Article II of the U.S. Constitution) through a legal-historical lens. Some Presidents (Abraham Lincoln, Franklin Roosevelt, George W. Bush) have historically relied on Article II authority for detention, while others (Ulysses Grant, Barack Obama) have disclaimed the notion that such authority exists. Clarifying the scope and source of the Presidential detention authority over citizens bears both theoretical and real-world relevance. Theoretically, it lies at the confluence of two central American constitutional traditions – the separation of powers, and the protection of individual rights. As a practical matter, in an era of warfare between states and non-states actors, the U.S. must confront the prospect that it will have to detain its own citizens with significantly greater frequency.

This thesis argues that Article II of the Constitution provides the Executive branch with very limited authority to detain American citizens during times of war. Rather, the plenary detention power lies with Congress. This conception of the Executive's wartime detention authority is validated by a rigorous review of over 200 years of detention history in the United States, ranging from the incidents of the Burr conspiracy, to the more recent War on Terror related detentions. This examination relies heavily on the methodological framework on Presidential power proposed by Justice Robert Jackson in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579 (1952). Through a systematic historical examination built around the framework, history validates the notion that Article II of the U.S Constitution only contains a paucity of detention power, with Congress possessing the plenary authority to detain.

ACKNOWLEDGEMENTS

My senior essay would not be complete without acknowledging many of the people who helped make it possible.

Thank you to Amma, Appa, Thathas, Pattis and the rest of my family for supporting me all through my four years at Yale, and for providing me with constant encouragement and cheer-ups during this thesis writing process, despite not having a clue what my thesis was about!

I owe special gratitude to my thesis advisor, Professor John Fabian Witt, and my second reader, Professor Stephen Skowronek for agreeing to supervise this project, and for their comments, insights and suggestions along the way. I am also grateful to the Ethics, Politics & Economics Department - in particular to Tatiana Neumann – for extensive feedback that improved this essay substantially. The research for this thesis would not have been possible without the immense assistance I received from the Yale Law School Library Reference Desk - countless opinions, briefs and speeches were located only with their help.

I feel very lucky to have had the opportunity to take some incredible classes taught by incredible professors in the fields of National Security Law and Constitutional Law. In particular, thank you to Professor Asha Rangappa, whose fantastic seminar piqued my interest in this subject and was the intellectual bedrock of this thesis.

Thank you to all my friends at Yale and elsewhere who've helped out with this project in innumerable ways - from getting me to finalize this topic to reading over preliminary drafts to being sounding boards for my ideas - I really appreciate everyone's help!

Finally, this thesis offered me the opportunity to engage with over 200 years of wartime detention in U.S. legal history. My research introduced me to some of the most courageous and ethical people I've studied about - from lawyers who fought for the rights of detainees, to activists who willingly accepted punishment to highlight the injustice of laws, to judges who strived to protect the principles of Constitution in the face of substantial political pressure. The stories of these brave men and women continue to inspire in me the belief that the law can indeed be a tool for social justice and the protection of civil rights.

“To bereave a man of life or by violence to confiscate his estate without accusation or trial would be so gross and notorious an act of despotism as must at once convey the alarm of tyranny throughout the kingdom. But confinement of the person by secretly hurrying him off to jail where his sufferings are unknown or forgotten is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.”

~ William Blackstone, *Commentaries on the Laws of England*

“It is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment”

~ Justice Robert Jackson, *Youngstown Sheet & Tube Co. v Sawyer*

**THE PRESIDENT’S WARTIME DETENTION AUTHORITY:
WHAT HISTORY TEACHES US**

On May 21st 2009, President Obama announced much expected changes to the United States’ policy of wartime detention of suspected enemy combatants at the Guantanamo Bay facility. He proclaimed that “[i]n our constitutional system, prolonged detention should not be the decision of any one man,”¹ and noted the importance of developing a legal regime built around the values enshrined by the U.S. constitution. A few months later, the then State Department Legal Advisor Harold Koh clarified the Obama administration’s position regarding the legal basis for the detention of American citizens in the war against Al Qaeda and its affiliates. He noted, “as a matter of domestic law, the Obama Administration has not based its claim of authority to detain.....on the President’s Article II authority as Commander-in-Chief. Instead, we have relied onthe 2001 AUMF[Authorization for the Use of Military Force]².”³ Koh’s comments were a striking reversal from the legal basis that the Bush administration had employed to detain American citizens at Guantanamo Bay. Both administrations had argued that the AUMF (a statute, passed by Congress, authorizing the President to use “all necessary and appropriate force” (AUMF §2(a)) against the agents that perpetrated 9/11) provided the necessary legal authority for detention. However, the Bush administration had also argued that the powers inherent in Article II of the Constitution (See U.S. Const. art. II, §2,cl.1, which gives

¹ Barack Obama, Remarks at the National Archives and Records Administration (May 21, 2009), *available at*, THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/index.php?pid=86166> (last visited Apr. 8, 2015)

² Authorization for the Use of Military Force, S.J. Res. 23, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter “AUMF ”]

³ Harold H. Koh, The Obama Administration and International Law, Annual Meeting of the American Society of International Law. (March 25, 2010) *available at* U.S. DEPT. OF STATE. <http://www.state.gov/s/l/releases/remarks/139119.htm>

the President the powers of the “Commander-in-Chief”) provided the President with the legal authority to detain American citizens,⁴ a claim that Koh had since stepped away from.

The important legal question that Koh’s remarks implicated - but did not fully resolve - was whether such a departure reflected the Obama administration’s belief that there was no legal authority inherent in Article II that allowed for the detention of American citizens in times of war. Despite over 200 years of jurisprudence, the question is still debated within the Executive branch and has produced divided opinions from U.S. Presidents past and present. If Obama believed that Article II did not provide the Executive with the authority for wartime detention of citizens, he would be following in the footsteps of many notable Commanders-in-Chief including Thomas Jefferson (who turned to Congress to suspend the writ of *habeas corpus* when dealing with the Burr conspiracy), James Madison (who released citizens that the military had held for trial on charges of espionage because he believed that he lacked the necessary authority to hold them captive during the War of 1812) and Ulysses Grant (who pleaded with Congress to statutorily authorize him to detain members of the Ku Klux Klan in efforts to curb their insurrectionary behavior in South Carolina). Contra Obama, Abraham Lincoln relied extensively on his inherent Presidential powers when unilaterally suspending the writ of *habeas corpus* during the Civil War. Similarly, Franklin D. Roosevelt initially relied on Executive Orders to authorize the internment of Japanese-Americans during World War II. Likewise, the George W. Bush administration persisted with the theory that the powers of the Commander-in-Chief authorized the President to detain American citizens in the battle against Al Qaeda and its affiliated groups. This issue has a long jurisprudential history, dating as far back as Chief Justice

⁴ See Brief for the Respondents at 13, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696); Brief for the Petitioner at 35, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027)

Marshall's opinion in *Ex Parte Bollman*, 8 U.S. 75 (1807) to the more recent conflicts captured in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) and *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

Clarifying the scope and source of this authority bears immense theoretical and real-world relevance. Theoretically, the question lies at the confluence of two central traditions of American constitutional jurisprudence - first, it implicates questions of fundamental rights - Article I of the United States Constitution implicitly provides for the writ of *habeas corpus* (See U.S. Const. art. I, §9, cl. 2) which allows citizens to force detaining officers to present them before a Court in order to appeal their detention. Similarly, the 5th Amendment (U.S. Const. amdt. V) guarantees that individuals may not be "deprived of life, liberty, or property, without due process of law." Second - and more importantly for this paper - it implicates questions of separation of powers between Congress and the President. Proponents of vesting the detention power in Congress defend their position by alluding to the interests of checks and balances on the Executive, and the greater degree of democratic accountability provided by vesting the power in Congress. Conversely, proponents of an inherent Executive power speak to the need for expedient actions during times of war, and suggest that the Executive is more suited for the decisive action demanded by war.

As a practical matter, more wars today are fought between states and non-state actors (whose ranks may comprise citizens taking arms against their home nation), and states must confront the prospect that they will have to detain their own citizens with significantly greater frequency. In the aftermath of 9/11, the United States Department of Defense has acknowledged holding 99 American citizens at Guantanamo Bay alone.⁵ In the near future, the increasing

⁵ DEP'T OF DEF., LIST OF INDIVIDUALS DETAINED BY THE DEPARTMENT OF DEFENSE AT GUANTANAMO BAY, CUBA FROM JANUARY 2002 THROUGH MAY 15, 2006 (Dep't of Def. 2006), <http://www.defense.gov/news/May2006/d20060515%20List.pdf>

likelihood that the United States will enter an armed conflict against the Islamic State guarantees that this question will remain relevant in the years to come.

This thesis examines the question of detention through a legal-historical lens. It argues that Article II of the Constitution provides the Executive branch with very limited authority to detain American citizens during times of war. Furthermore, it argues that the plenary detention power lies with Congress; when equipped with Congressional support, the Executive may exercise broad latitudes of detention authority. However, the Executive has no lawful detention authority when such detentions are contrary to Congressional statute or the implied will of Congress. Furthermore, this thesis demonstrates that a rigorous analysis of historical incidents of wartime detention validate the above hypothesis on the scope and nature of Presidential wartime detention authority. This thesis relies on the zones of Presidential authority identified by Justice Robert Jackson in his seminal concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579 (1952), to organize and classify historical incidents pertaining to detention. Finally, the aim of this thesis is to be as systematic and comprehensive as possible, and to that end it has attempted to discuss a number of instances over a wide historical period, rather than cherry-picking certain judicial precedents that are favorable.⁶

This thesis is structured as follows - Section I provides a brief overview of the *Youngstown* framework, and briefly advances a theory on the scope of the Executive's Article II detention authority is. The next four sections are dedicated to analyzing historical instances of detention from four specific periods – The Early Republic and War of 1812, The Civil War and Reconstruction, World War II and The Cold War, and The War on Terror. In each of these

⁶ In the event that there are incidents of note that are omitted, such omission is not deliberate. Rather it is due to time constraints associated with submission of this thesis or genuine oversight.

sections, the *Youngstown v. Sawyer* approach will be used to determine the scope of Presidential authority of detention. This paper concludes by suggesting that a rigorous interrogation of history supports the initial theory on the President's wartime detention authority laid out in Section I.

Section I - Youngstown and Detention Standards

What constitutes detention?

Wartime detention refers to any instance where an individual is captured or arrested and placed in confinement during periods of war or insurrection, on the grounds that doing so serves some vital national security interest. Instances of wartime detention are considered when they fall into one of the following two categories:

a) Pretrial detention: Detention may occur when an individual is detained pursuant to trial by some judicial forum. Most instances of pretrial detention considered herewith concern detention prior to trial by military commission or court martial. While instances of detention prior to civilian trial are not *prima facie* excluded from this paper, they do not receive consideration below for two reasons: first, civilian trials enshrine a series of constitutional protections which may or may not extend to military trials. The most prominent of these is the right to petition a court for a writ of *habeas corpus*. Within the civilian court system, there is no debate that an individual being held in pretrial detention prior has a right to file for a writ of *habeas corpus*; however, multiple administrations (and some Courts) have defended the position that detainees in pretrial confinement pursuant to military trial do not have the right to *habeas corpus*.⁷ Second, the vast majority of wartime pretrial detentions have been pursuant to trial by military commissions and court martial, and not civilian court.⁸

⁷ See e.g. officers of the Madison administration in *In re Stacey*, 10 Johns. 328 (NY Sup. Ct. 1813), the Lincoln administration in *Ex Parte Milligan*, 71 U.S. 2 (1866), the Bush administration in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)

⁸ In one of the few detention cases that culminated in civilian trial (*United States v. Lindh*, 227 F.Supp.2d 565 (E.D. Va. 2002)), the legality of the detention was never litigated. Such a view of confining the detention question to military trials is also echoed by Justice Scalia's dissent in *Hamdi v. Rumsfeld*. See *Hamdi v. Rumsfeld*, 542 U.S. 507,573 (Scalia,J., dissenting) (“ It follows from what I have said that Hamdi is entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus”)

b) Detention for its own end: In many instances, individuals are detained not with the aim of trying the detainee, but rather to serve an incapacitative function. In most cases, such detentions are undertaken to prevent enemy combatants from returning to the battlefield; however, in some instances, the Executive branch has also detained civilians who it believes pose a national security threat. Usually, such detentions do not have any maximum time period before their authority lapses, however, they are generally conceived of as being lawfully authorized while a state of war or hostilities persist.⁹

One last clarification is that this essay only deals with detention at a Federal level - it does not consider acts of detention by States Governors or State Legislatures.¹⁰

Sources and scope of the Executive detention power

Before delineating the scope of the Executive's detention power, it is necessary to devise an approach that accounts for the different factual situations, exigencies and particulars of each case, while still being broadly applicable to any specific instance of wartime detention. There are four criteria that affect the scope of detention authority in any given instance:

- a) Whether the detention is pre-trial detention or detention for its own ends
- b) Whether the detainee is an enemy combatant or a civilian
- c) Whether Congress is in session or not in session
- d) Whether Courts are open or closed

Consequently, this paper advances the following theory on the separation of powers in the context of wartime detention: first, Congress maintains plenary power over detention in all circumstances. The Captures Clause (U.S. Const art I, §8, cl. 11) and the Habeas Corpus

⁹ See e.g. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *In re Territo*, 156 F.2d 142 (9th Cir. 1946)

¹⁰ This explains the exclusion of cases such as *Moyer v. Peabody*, 212 U.S. 78 (1909)

Suspension Clause (U.S. Const art I, §9, cl. 2) lend credence to the proposition that the Constitution structurally endows Congress with detention powers. Such powers may be delegated to the Executive branch during times of conflict in order to assist with the successful waging of the war effort. However, when the Executive exercises the said powers, it does so pursuant to Congressional delegation, and not as a function of its intrinsic powers.

Second, unlike Congress, the Executive's constitutional war power is significantly more constrained. Article II does not specifically speak to the power of detention, and therefore all Executive power to detain must be inferred. Most Presidents have relied on the Commander-in-Chief Clause (U.S. Const. art II, §2, cl.1) to support claims of an inherent Executive power to detain. Therefore, the powers of detention must be derived from the President's independent authority to use force under the Commander-in-Chief clause.¹¹ The President's power to use force has generally been understood in a defensive context i.e. to repel attack and invasion upon the United States¹². Hathaway et al.¹³ devise two conditions that need to be fulfilled for the Article II's authority to use force to imply a constitutional power to detain: first, detention must occur pursuant to a specific military operation as an incident of force, and second, the aim of detention must be to prevent the return of a citizen to the battlefield (*Id.* at 147). Hathaway's conditions interact with the aforementioned criteria in the following ways: first, the Article II

¹¹ Oona Hathaway et al., *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 *Yale J. Int'l L.* 123, 146 (2013) ("It follows that the scope of the President's independent Article II detention authority cannot exceed the scope of his power to engage in military operations.")

¹² See e.g. Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means By "Declare War"*, 93 *Cornell L. Rev.* 45, 57 (2007) ("early Presidents repeatedly distinguished between purely defensive war operations and offensive operations designed to take the war to the enemy" which reflects the understanding that the war power is defensive); *The Prize Cases*, 67 U.S. 635, 668 (Grier, J., majority) ("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")

¹³ Oona Hathaway et al., *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 *Yale J. Int'l L.* 123, 146 (2013)

powers of detention apply only to enemy combatants (and not civilians), and second, they must be narrowly tailored in the purpose they serve. In addition to the Hathaway's conditions, this paper suggests another important limitation on Article II detention authority - a temporal dimension.¹⁴ Such a limit on the President's authority to use force is already contemplated by statutes such as the War Powers Resolution (50 U.S.C. §§1541-1548). This paper adopts Section 5(b)'s sixty day clock as a sunset on the President's independent authority to use force; subsequently, the Article II detention authority faces a sixty day sunset once Congress is in session and capable of acting.

Variations in the above four criteria do not implicate just the substantive scope of detention powers, but also the methodological process for determining the scope of authority. The latter process is described below with respect to each of the four criteria:

a) If an instance of detention represents pretrial detention, then it is imperative to determine whether the judicial forum for the trial is lawfully constituted. This answer is obvious in the case of civilian courts, but is more complicated in the case of courts martial and military commissions. If the judicial forum has the authority to try the detainee for the alleged offense, then the detention is lawful as long as it serves as pre-trial detention.¹⁵ If the judicial forum is unlawful, then the question collapses into an independent determination on the legality of the detention (which is the same determination to be made in cases of detention for their own end).

b) If the detainee is an enemy combatant, then broader powers of detention apply based on the Article II considerations outlined above. If the detainee is a civilian, more limited Article

¹⁴ Hathaway et al. recognize that statutes such as War Powers Resolution may place limits on the President's War Power authority, but do not suggest it reaches a temporal dimension

¹⁵ This means that if a lawfully constructed military tribunal is capable of convening, but has not commenced the trial of a detainee, then the detention might be unlawful. In such a circumstance, a merits determination on whether or not the Executive possesses sufficient independent detention authority becomes necessary

II powers are available.

c) If Congress is closed and has not met or is incapable of meeting, the sixty day sunset mentioned earlier does not begin, to prevent a situation where the President is unable to act when the sixty days expires, but Congress is *de facto* unable to authorize further detention since it is unable to meet. Once Congress is in session, the President's sixty day clock begins.

d) The status of courts does not affect the lawfulness of the Executive's detention of a citizen. However, if Courts are closed, the detainee has no access to a remedy to relieve him/her from unlawful detention.

The *Youngstown* Framework

To determine the contours of Executive power represented by each historical instance, this paper relies on Justice Jackson's famous three tiered approach to Presidential power laid out in his concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 634. The seminal nature of Jackson's framework is echoed by Jack Goldsmith and Curtis Bradley, who note that while "courts have been understandably reluctant to address the scope of that constitutional authority, especially during wartime, when the consequences of a constitutional error are potentially enormous," *Youngstown* represents an instance where the Judiciary confronted this question head-on, and designed a pliable metric, applicable to a broad range of situations.¹⁶ In his concurrence, Jackson argued that the Executive's authority to act could be determined based on which one of the following zones it fell into:¹⁷

a) Zone I : When the Executive acts pursuant to express or implied authorization from Congress, its authority to act is the greatest

¹⁶ Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2048, 2051 (2005) (*see* Note 11 in the Article)

¹⁷ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 636-639 (Jackson, J., concurring)

b) Zone II : When the Executive acts in the absence of Congressional denial or approval, it can rely only upon its independent powers to act. However, there exists a zone of twilight in which both the President and Congress share concurrent authority.

c) Zone III : When the Executive acts in a manner that is incompatible with the expressed or implied will of Congress, its power is at its weakest, since he/she can rely only upon the Executive's inherent constitutional powers

This thesis will rely on *Youngstown* as a mechanism to classify all the historical instances of detention that are encountered, and then to understand the scope of power within each Zone.

A note on Executive practice

For a historical theory of detention to be thorough, it must account for Executive and Congressional practice in addition to Court jurisprudence. This is necessary for two reasons: first, it helps prevent selection bias, since the instances of lawful detention are unlikely to be litigated; nonetheless, such instances ought to be interrogated to determine where the lawful authority originated from. Second, in the U.S. constitutional system, all three branches play a role in interpreting the constitution. In this regard, the actions of the past Presidents that did not reach a courthouse may nonetheless speak directly to the constitutional question of detention.

A resulting concern is determining what weight Executive practice ought to be given, and deciding which Executive practices speak more directly to the constitutional question than others. The seminal work on the same comes from Curtis Bradley and Trevor Morrison,¹⁸ who argue that as a structural issue, the Executive branch is much more capable of defending its own constitutional prerogatives than Congress is,¹⁹ since it is relatively harder to build consensus to

¹⁸ Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 412 (2012).

¹⁹ *Id.* at 442-443

assert a constitutional privilege in Congress than within the Executive branch.²⁰ Furthermore, the Executive has specialized agencies, such as the Office of Legal Counsel that are solely committed to the protection of Executive constitutional powers. Finally, when Congress defers to the Executive, it is equally likely to be for partisan reasons as constitutional ones.²¹

In light of the above, Bradley and Morrison leave us with two important conclusions - first, that when the Executive voluntarily disclaims authority, it is of high consequence since it knows that such disclaiming can be read as a conceding the constitutional authority to act. Therefore, when determining the constitutional allocation of powers on a given issue, voluntary relinquishing of power is particularly important to consider.²² Second, Morrison and Bradley set the threshold for Congressional acquiescence quite high, in particular suggesting that silence cannot equal acquiescence on grounds of the structural limitations on Congress' ability to act noted above.²³

The argument restated

Based on the above theory of detention powers, each *Youngstown* zone possesses the following levels of detention authority: in Zone I, the Executive possesses plenary detention authority pursuant to delegation by Congress through treaty or statute. In Zone II, the Executive's power of detention is limited, and exists only pursuant to its Article II authority. Therefore, the only circumstances in which the Executive can detain is pursuant to the framework laid out by Hathaway et al., and even then the President is bound by a sixty day sunset clause. In Zone III, faced with Congressional disapproval, the President lacks any

²⁰ *Id.* at 440-4441

²¹ *Id.* at 443

²² *Id.* at 453-455

²³ *Id.* at 448-449

authority to detain. The sections that follow interrogate how the history of detention in the United States interacts with this paper's theory - does history vindicate this paper's *Youngstown* distribution, or is it impossible to reconcile history with this theory of detention authority? In particular, it seeks to understand if there is a clear pattern that emerges in history that vindicates the aforementioned *Youngstown* classification of powers.

Section II: The Early Republic and the War of 1812

“Freedom of the person under the protection of habeas corpus I deem [one of the] essential principles of our government.”²⁴

~ Thomas Jefferson (1801)

Often overlooked by the scholarship on detention, the cases and controversies from the Early Republic and the War of 1812 era provide significant guidance on what the Framers thought of the question of Executive detention authority. The relevant episodes in this period come from the Presidencies of Thomas Jefferson and James Madison, whose actions in dealing with the Burr conspiracy and the War of 1812 provide early evidence on the paucity of the Presidential detention power when not supported by Congress.

Thomas Jefferson, the Burr Conspiracy and *Ex Parte Bollman*

The Burr conspiracy was one of the first instances that raised questions over the President’s detention authority. The episode arose out of claims that former Vice President Aaron Burr and his cohorts were attempting to lead a colonization movement to create an independent state in Southwest United States, around the current locations of Texas and Mexico.²⁵ In addition to foreign support, it was alleged that Commanding General of the Army, James Wilkinson - a close friend of Burr’s - was a co-conspirator. However, unbeknownst to

²⁴ Thomas Jefferson, Inaugural Address (March 4, 1801), *available at* THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/index.php?pid=25803&st=&st1=> (last visited Apr. 8, 2015)

²⁵ *The Burr Conspiracy*, in NAT'L COUNTERINTELLIGENCE CTR., A COUNTERINTELLIGENCE READER: AMERICAN REVOLUTION TO WORLD WAR II (Frank J. Rafko ed., Nat'l Counterintelligence Ctr.), <http://fas.org/irp/ops/ci/docs/ci1/ch1d.htm> (last visited Apr. 8, 2015).

Burr, Wilkinson was also serving as double-agent to Burr's political enemy, President Thomas Jefferson.²⁶

On January 22nd, 1807, Jefferson addressed Congress on the Burr Conspiracy, relying on evidence relayed to him by Wilkinson. He cast Burr as the leader of the "agitation in the Western country unlawful and unfriendly to the peace of the Union"²⁷, accusing him of treasonous plans to split the Union through the Allegheny mountains and to wage war on Mexico. Jefferson exposed Burr's alleged plans to assemble in New Orleans, plunder the wealth of the city, and use it to fund his colonization mission.²⁸ To defend the city and scupper Burr's plans, Jefferson turned to General Wilkinson, who took steps to impose military control over the city of New Orleans, raising some of the earliest questions on detention powers in the process.²⁹

The most notable case of detention from New Orleans concerned Erick Bollman and Samuel Swartwout, civilians and alleged co-conspirators of Burr who were arrested and imprisoned by Wilkinson in New Orleans, on the grounds that they were engaged in treasonable activities against the United States.³⁰ After detention, Bollman and Swartwout were sent to a military guard in Washington, where they petitioned a Federal Court for a writ of *habeas corpus*. The Supreme Court ultimately granted their petition and heard the resulting case (*Ex Parte Bollman*, 8 U.S. 75(1807)) in February 1807.

The majority of Chief Justice John Marshall's opinion in *Ex Parte Bollman* conducts a

²⁶ *Id.*

²⁷ Thomas Jefferson, Message to Congress to Congress on the Burr Conspiracy (Jan. 22, 1807), available at THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=65721> (last visited Apr. 8, 2015)

²⁸ *Id.*

²⁹ *Id.*

³⁰ Charles F. Hobson, The Aaron Burr Treason Trial 1,3 (Fed. Judicial Ctr. 2006), <http://www.fjc.gov/history/docs/burrtrial.pdf> (last visited Apr. 11, 2015).

merits evaluation of whether or not charging Bollman and Swartwout with treason is viable.³¹

However, towards the end of his opinion, Marshall made one very important pronouncement concerning the suspension of the writ of *habeas corpus*. He noted,

“If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for *the legislature to say so*. That question depends on political considerations, on which the legislature is to decide. *Until the legislative will be expressed, this Court can only see its duty, and must obey the laws*” (emphasis added) (*Id.* at 101)

In no unequivocal terms, Marshall concludes that the power to suspend *habeas corpus* is entrusted only to Congress. From a *Youngstown* perspective, Marshall’s conclusion suggests that detention pursuant to suspension of *habeas corpus* can only occur in Zone I. In light of the same, the source for Wilkinson’s detaining authority is dubious at best. The unwillingness of legislative bodies to suspend *habeas corpus* had been demonstrated not once, but twice. A few days prior to Jefferson’s address to Congress, Wilkinson had unsuccessfully attempted to convince the Territory of Orleans to suspend the writ of *habeas corpus*, which they had refused to do, noting that such an act would violate the Constitution.³² Furthermore, at a Federal level, Jefferson’s Senate leader had moved Congress to suspend the writ of *habeas corpus* for a period of three months.³³ The avowed reason given was to prevent Bollman and Swartwout from escape prior to their trial. In the Senate, the bill faced opposition from many quarters, but was nonetheless rammed through. However, the Bill to suspend *habeas corpus* faced insurmountable hurdles in the House, and was ultimately defeated. In the face of legislative disapproval for detention

³¹ See *Ex Parte Bollman*, 8 U.S. 75, 113-118 (Marshall, CJ.,majority) (1807)

³² BELCHER FOUND., CONSTITUTION, LAW AND POLITICS IN UNITED STATES V. AARON BURR, Belcher Found., http://www.belcherfoundation.org/us_vice_president_aaron_burr.htm

³³ Louis Fisher, *Jefferson and the Burr Conspiracy: Executive Power Against the Law*, [45 no. 1] *Presidential Stud. Q.* 157, 160-161 (2015)available at <http://onlinelibrary.wiley.com/doi/10.1111/psq.12175/epdf>

powers, Wilkinson declared martial law, and attempted to derive the power to detain Bollman and Swartwout from the powers of martial law.³⁴

Marshall's theory for detention authority in Zone I and Zone III cases initiates a pattern that is continuously repeated in history. On the basis of his opinion, Zone I suspensions of *habeas corpus* are always lawful insofar as the power is explicitly delegated to Congress. Therefore when the Executive detains citizens pursuant to the Congressional suspension of *habeas corpus*, such detentions are also lawful. Conversely, in Zone III, where Congress has explicitly refused to suspend *habeas corpus*, the President's constitutional powers do not provide sufficient authority for the suspension of the writ. Therefore, such Executive detention is unlawful since it not pursuant to the will of the legislature. Subsequently, the detentions of Bollman and Swartwout were illegitimate.

Finally, the practices of the Executive branch also merit discussion – in particular, Jefferson's decision to turn to Congress for the suspension of *habeas corpus*. While such a move might have been political, and pursued in order to consolidate support in Congress in his favor, it is more likely a recognition that the President lacked the unilateral authority to suspend *habeas corpus*. Given the vast distrust of Executive power that was expressed by many members of Congress, and Jefferson's own belief in the importance of the writ of *habeas corpus*,³⁵ it is likely

³⁴ Some authors have suggested that the power to impose martial law is not an Article II prerogative, but must rather be delegated to the Executive branch by Statute. See e.g. Stephen I. Vladeck, Note, Emergency Power and the Militia Acts, 114 Yale L.J. 114 (2004) (discussing the power to use military force in responding to domestic crises, including the imposition of martial law as originating in the Militia Acts); Charles Fairman, The Law of Martial Rule and the National Emergency, 55 Harv. L. Rev. 1253 (1942) (suggesting that the imposition of martial law may be pursuant to Acts of Congress). Wilkinson's imposition of martial law was certainly not pursuant to any statute. Furthermore, it is not readily apparent that the power to impose martial law carries with the power to suspend *habeas corpus*, especially when Congress has explicitly ruled out that possibility.

³⁵ See e.g. Chapter 14, Document 46: Thomas Jefferson to James Madison, in Thomas Jefferson, 1 The Papers of Thomas Jefferson (Julian P. Boyd et al. ed., Princeton Univ. Press 1950), <http://press-pubs.uchicago.edu/founders/documents/v1ch14s46.html> (Jefferson shared his belief that the protections of *habeas corpus* should be part of the Bill of Rights in the Constitution.); Thomas Jefferson, Inaugural Address (March 4,

that Jefferson agreed with the analysis of Executive detention power laid out by Chief Justice Marshall in *Ex Parte Bollman*.

James Madison and The War of 1812

Sackett's Harbour in the Great Lakes region was of particular military importance in the War of 1812- it served as a key fortification and warehousing store for the larger conquest, and was an important cog in the distribution of supplies to other encampments.³⁶ Maintaining control over Sackett's Harbour was therefore essential to success in the campaign against the British. Given its military importance, it is unsurprising that two of the pre-eminent detention cases of the War of 1812 emerged from there.

In re Stacey

Sackett's Harbour was under the control of Commodore Isaac Chauncey and Major General Morgan Lewis.³⁷ On June 30th, 1813, Samuel Stacey a resident of St. Lawrence County, was arrested and brought to Sackett's Harbour for detention on Chauncey's orders. While Stacey attested that he was "wholly ignorant of the cause of his arrest and detention" (*Id.* at 329), Chauncey had authorized Stacey's detention on grounds that he was a spy for the British, who was assisting them in overpowering Sackett's Harbour.³⁸ In particular, Chauncey held Stacey

1801), available at THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/index.php?pid=25803&st=&st1=> (noting that "freedom of person under the protection of the habeas corpus, and trial by juries impartially selected" were central to reaffirming the United States' strong commitment to democracy."). While this is not conclusive proof that Jefferson was acting purely out of political interest, it offers sufficient insight into Jefferson's convictions regarding *habeas* to allow us to conclude that he would be committed to following the most appropriate path for its suspension.

³⁶ Ingrid B. Wuerth, The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War, 98 Nw. U. L. Rev.1, 18 (2003) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=467344 [hereinafter "Wuerth"]

³⁷ *In re Stacey*, 10 Johns. 328 (NY Sup. Ct. 1813) (Kent, CJ., majority)

³⁸ Letter from Commodore Issac Chauncey to Secretary of the Navy Jones, July 4, 1813, 2 THE NAVAL WAR of 1812: A DOCUMENTARY HISTORY (William S. Dudley ed., Naval Historical Ctr. 1992) at 521; available at http://ibiblio.org/anrs/docs/E/E3/dh_1812_v02.pdf ("I therefore thought it my duty to detain this Man for trial. I can prove his frequent intercourse with the Enemy, at any rate I shall deprive the Enemy of the information which he would have conveyed to him which is all important at this time") (originally seen in Wuerth at 18)

responsible for an intelligence leak, which had almost resulted in the British capturing Sackett's Harbour on May 29th, 1813.³⁹ Correspondence between Chauncey and Secretary of the Navy William Jones indicated that Stacey's military captivity was viewed as both lawful and necessary to successfully wage war against the British.^{40 41} Stacey disagreed, and on 21st July 1813, he petitioned the Supreme Court of the State of New York for a writ of *habeas corpus*, which was duly issued by a Commissioner of the Court. However, Chauncey and Lewis refused to comply with the writ, and continued to detain Stacey.⁴²

Lewis and Chauncey's insubordination was short lived, as the Supreme Court of New York rejected their uncompromising approach to Stacey's *habeas* petition in the case *In re Stacey*, 10 Johns. 328 (NY Sup. Ct. 1813). The legality of Stacey's detention must be discussed at two levels: first, whether his detention was justified pursuant to a lawful military trial, and second, whether Stacey's detention was justified as an end in and of itself. As the details below attest, Stacey's case lies in both Zone II (latter) and Zone III (former) of the *Youngstown* framework.

³⁹ *In re Stacey*, 10 Johns. 328, 329-330 (NY Sup Ct. 1813) (Kent, CJ., majority) (From affidavit of Amos Benedict - "Sir, Sackett's Harbour, July 18, 1813, Samuel Stacy [sic], who has been under my charge, was* arrested by a verbal order from Commodore Chauncey, and under suspicion, as he believed, of having connexion in some way with the enemy, since the declaration of war") (From affidavit of Justin Butterfield - "[That] the said Stacy had been guilty of treasonable practices, in carrying provisions and giving information to the enemy, and that he believed a court-martial was the proper tribunal to try the said Stacy, though he was a citizen."),

⁴⁰ See *supra* note 24

⁴¹ Letter from Secretary of the Navy Jones to Commodore Isaac Chauncey, (July 14, 1813), 2 THE NAVAL WAR OF 1812: A DOCUMENTARY HISTORY (William S. Dudley ed., Naval Historical Ctr. 1992) at 503; available at http://ibiblio.org/anrs/docs/E/E3/dh_1812_v02.pdf ("You were perfectly correct in arresting Mr. Sam. Stacy, as a spy; and you will hold him, until the President shall direct the course to be pursued with him, which I will ascertain tomorrow. It is indeed time that traitors were brought to punishment")

⁴² *In re Stacey*, 10 Johns. 328, 331 (NY Sup Ct. 1813) (Kent, CJ., majority) ("he [Royal Torrey, Stacey's jailer] then gave the deponent the writ and the above return, and said that he had conversed with General Lewis, who believed that Stacy[sic] was guilty, and that he should make no other return; and that if the deponent would go and convince General Lewis that Stacy was innocent, that General Lewis would discharge him.")

Since the military establishment at Sackett's Harbour had detained Stacey with the intention of trying him by court martial, it is apposite to consider detention pursuant to military powers first. The relevant statutory framework for military trials is found in the Articles of War, 2 Stat. 359 (1806) [hereinafter "Articles of War (1806)"], which codified rules and regulations concerning the conduct expected by members of the military. However, Section 2 of the Articles of War (1806) - the only section that deals with military jurisdiction over civilians during wartime - authorized the military to subject only non-American citizens to military jurisdiction for spying in United States army encampments.⁴³ Consequently, Stacey's military trial was explicitly foreclosed by statute, making his detention pursuant to military trial a Zone III *Youngstown* question. To overcome the Zone III situation, the Executive required the constitutional authority to force the military trial of a civilian for an offense that was beyond the scope of the Articles of War (1806). Neither the correspondence between Lewis and Secretary of the Navy Jones, nor the affidavits before the Court provide clarity on the nature and scope of the constitutional powers the Executive branch was relying on to detain Stacey . However, even if we were to assume that the Executive relied on its Commander-in-Chief power to order Stacey's court martial, it does not outweigh the Congressional prohibition of such trial. Insofar as there were civilian courts around the country which were open and provided the Executive with the power to bring criminal charges against Stacey, the necessity of a court martial is not readily apparent. The language of the Court is also revealing on this subject; Chief Judge Kent notes that, Lewis' actions constituted him "assuming criminal jurisdiction over a private

⁴³ Section 2, Articles of War 2 Stat. 359 (1806) ("And be it further enacted, That in time of war, all persons not citizens of, or owing allegiance to the United States of America, who shall be found lurking as spies, in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court martial.")

citizen....[thereby] condemning the civil authority of the State” (*In re Stacey* at 334).

Subsequently, in the realm of detention prior to trial, Stacey’s detention lies within Zone III, and is unauthorized.

Second, the Executive branch also lacked the powers of detention for its own end. In Stacey’s situation, the case implicates Zone II concerns since the statutory record does not speak to this question. The Articles of War (1806) are silent on wartime detention of civilians. The other relevant statutory provision comes in the form of the United States Declaration of War upon the United Kingdom⁴⁴, passed by Congress in June 1812. While the Declaration of War gives the President plenary control over the land and naval forces for the purpose of fighting the war, and also empowered him to issue letters of marque and reprisal (U.S. Const. art I, § 8, cl. 11), no mention is made of delegating other Congressional constitutional war powers - found in the Captures clause (U.S. Const. art I, § 8, cl. 11) or the Suspension clause (U.S. Const. art I, § 9, cl. 2) to the President. This likely suggests that Congress did not intend for the President to access its detention powers. In resolving the Zone II detention question, the Court sharply rebukes the Executive for Stacey’s continued unlawful detention. The decision to charge Lewis with “contempt of process”⁴⁵ is particularly revealing, since it suggests that Lewis and Chauncey’s actions were so unreasonable, that they rose to level of flagrant violations that involved a contempt of process. Furthermore, the Court viewed “the pretended charge of treason” and attempts to fulfill that charge in a military tribunal only served to “aggravate the confinement” (*Id.*). Subsequently, the Court’s language in *In re Stacey* strongly dispels the

⁴⁴ Act of Jun. 18, 1812, ch. 102, 2 Stat. 755, Chap. CII - An Act Declaring War Between the United Kingdom of Great Britain and Ireland and the Dependencies Thereof and the United States of America and Their Territories (1812) available at YALE LAW SCH. LILLIAN GOLDMAN LAW LIBRARY, THE AVALON PROJECT, http://avalon.law.yale.edu/19th_century/1812-01.asp

⁴⁵ *In re Stacey*, 10 Johns. 328, 333 (NY Sup Ct. 1813) (Kent, CJ., majority)

notion that any Executive power to detain citizens can be grounded in the concerns of expediency that wartime brings with it.

Finally, Stacey's detention does not fall within the remit of the limited Zone II Commander-in-Chief power discussed earlier in this paper. Insofar as Stacey was a civilian, and Congress was in session, the Commander-in-Chief clause could not authorize his detention. The Court's rejection of the exclusive military power of detention is further emphasized by their decision to order the attachment of Lewis unless Stacey was released and allowed to contest his detention in Court (*Id.* at 332). This in turn entrenches the notion that in Zone II situations, the President lacks the authority to detain civilians.

The final piece of the Stacey jigsaw puzzle concerns Executive practice; on July 26th, 1813, the Secretary of War, acting under the orders of President Madison ordered the release of Samuel Stacey, noting that a citizen could not be considered "a spy."⁴⁶ The Secretary's action saved Lewis from the responsibility of serving his attachment. However, the Secretary's action should not be understood as merely motivated by such pragmatic concerns. Rather, substantial evidence on the record highlights the military's perceived necessity to detain Stacey. Therefore, as Ingrid Wuerth notes, the decision to release Stacey strongly implies that the Executive branch was cognizant that no legal basis to detain Stacey existed.⁴⁷

Smith v. Shaw

The second important detention case from Sackett's Harbour concerned Shaw, a naturalized American citizen who was detained for a period of 4-5 days on charges that he had

⁴⁶ The true meaning of this declaration was that the authorities - both statutory and nonstatutory - of detention and military trial that extended to enemy combatants who were not citizens could not be leveraged in Stacey's context. *See* Wuerth at 21

⁴⁷ *Id.*

been responsible for treasonous activity, spying for the enemy, and for “exciting insurrection and mutiny” (*Smith v. Shaw*, 12 Johns. 257,258 (NY Sup. Ct 1815)). Smith, the defendant, was the officer charged with Shaw’s detention at Sackett’s Harbour. While the case mostly concerns Shaw’s claim for civil damages, the issues raised and the opinion of the Court speak to the Executive’s wartime detention authority. Shaw’s initial detention was undertaken on grounds that he was “an enemy’s spy” who was “making improper and suspicious inquiries of, and concerning the military post at Sackett’s Harbour” (*Id.*). However, the avowed purpose of Smith’s continued detention of Shaw was to confirm his citizenship, and for the military to make an independent determination on his innocence. (*Id.* at 258)

Counsel for Smith sought to justify this prolonged detention on two grounds - first, that the detention of Shaw was authorized by the Articles of War (1806), which gave courts martial subject matter jurisdiction over the offences Shaw was being charged with i.e. spying and treason. Therefore, a court martial could be used to determine Shaw’s citizenship (*Id.* at 260). Second, it was believed that Shaw posed a continuing threat to the United States military interests; particular reference was made to Shaw’s Scottish ancestry, which made him “prima facie, an enemy” and provided probable cause for his continued detention (*Id.* at 261). Smith’s counsel went so far as to suggest that the violation of Shaw’s individual rights was justified in much the same way that “rights of public property may be violated, in time of war, for the public good” (*Id.*).

The Court strongly rejected both rationales for Shaw’s detention. Like in the *Stacey* case, Section 2 of the Articles of War (1806) were explicit that American citizens were beyond the jurisdiction of courts martial. Furthermore, a court martial to determine Shaw’s citizenship was

both inappropriate and unnecessary, insofar as that claim had been corroborated by witnesses.⁴⁸ Finally, Shaw's court martial could not be justified on grounds that it sought to determine his allegiance to the United States, since the Articles of War (1806) exempted all citizens from court martial proceedings independent of their allegiance. Additionally, determining the allegiance of civilians was beyond the remits of the court martial's subject matter jurisdiction, and the Court also noted that if detention on the grounds of national origin were justified, "every citizen of the United States would, in time of war, be equally exposed to a like exercise of military power and authority" (*Id.* at 266). Therefore, Shaw's detention pursuant to military trial was impermissible, since "when such a court[the court martial] has neither jurisdiction of the subject matter, nor of the person, every thing done is absolutely void, and all are trespassers who are concerned in the proceedings" (*Id.* at 265).

On the question of detention for its own ends, the Court was divided. The majority made a merits determination on this issue, while Justice Spencer's dissent appeared to imply that Smith's actions fell within Zone I, insofar as they were carried out pursuant to his dutiful obedience to Art. 80⁴⁹ and Art. 81⁵⁰ of the Articles of War(1806). However, Justice Spencer's dissent does not advance a sufficiently robust claim for Smith's statutory authority of detention, because Art. 80, 81 only speak to Smith's civil liability for Shaw's detention, and not to the question of whether detention powers existed in the first instance. Therefore, while Smith may be

⁴⁸ *Smith v. Shaw*, 12 Johns. 257,258 (NY Sup. Ct 1815) (Thompson, CJ., majority) ("It was proved that Shaw, (a native of Scotland,) was a naturalized citizen of the United States, and resided in the county of St. Lawrence at the time of his arrest.")

⁴⁹ Art. 80, Articles of War, 2 Stat. 359 (1806) ("Article 80. No officer commanding a guard, or provost marshal, shall refuse to receive or keep any prisoner committed to his charge, by an officer belonging to the forces of the United States; provided the officer committing, shall, at the same time, deliver an account in writing, signed by himself, of the crime with which the said prisoner is charged.")

⁵⁰ Art. 81, Articles of War, 2 Stat. 359 (1806) ("Article 81. No officer commanding a guard, or provost marshal, shall presume to release any person committed to his charge, without proper authority for so doing, nor shall he suffer any person to escape, on the penalty of being punished for it by the sentence of a court martial.")

relieved from legal penalty insofar as his actions were pursuant to statutorily authorized responsibilities, that issue is entirely separate from the issue of whether Shaw's detention was lawful in the first instance. Justice Spencer himself concedes this point when he argues that the gentleman named Findlay who was responsible for capturing Shaw and bringing him to Sackett's Harbour in the first instance had no authority to do so.⁵¹ Therefore, the Articles of War (1806) cannot be relied on to support the lawfulness of Shaw's detention, and Justice Spencer's concession over Findlay might settle the resulting question of whether any inherent authority detention authority existed. Like *Stacey*, *Smith v. Shaw* is also a Zone II case - the powers of detention fall within a twilight zone, since statutes neither provided nor repealed the authority for detention. Pursuant to the same, the majority opinion makes clear that the initial arrest and detention of Shaw - based on inherent powers of the Executive branch - was unjustified.

Consequently, both of the War of 1812 cases clarify that no Zone II detention authority exists over civilians – a conclusion that resonates with the initial theory of detention powers laid out by this paper. Furthermore, they are valuable precedent for the notion that the Executive lacks any inherent constitutional authority to court martial civilians, when doing so is in explicit violation of Congressional statute. In this regard, they reinforce the limited powers of the Executive in the realm of wartime detention.

⁵¹ *Smith v. Shaw*, 12 Johns. 257,269 (NY Sup. Ct 1815) (Spencer, J., dissent) (“I am free to admit, that Hopkins and Findley were trespassers. Their act was self moved and voluntary, and at their peril.”)

Section III - The Civil War and Reconstruction

“Now it is insisted that Congress, and not the Executive, is vested with this power[the power to suspend *habeas corpus*]; but the Constitution itself is silent as to which or who is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed the framers of the instrument intended that in every case the danger should run its course until Congress could be called together, the very assembling of which might be prevented, as was intended in this case, by the rebellion.”⁵²

~ Abraham Lincoln (1861)

Perhaps no period has shaped American thinking on the question of *habeas corpus* as much as the Civil War has. In the year 1861, President Lincoln authorized Commanding Officers and Generals of the United States army to suspend the writ of *habeas corpus* on various occasions. As discussed below, Lincoln’s strategies often ran afoul of a rather activist judiciary. However, the insights on detention provided by the Civil War period do not end with the reign of Lincoln; Ulysses Grant’s decision to petition Congress for support to suspend *habeas corpus* - in many ways, the exact opposite strategy of Lincoln - also bears upon the question of what the President’s detention authority is during times of war.

Lincoln goes alone - Executive Orders, *Ex Parte Merryman* & *Ex Parte Benedict*

The unilateral suspension of *habeas corpus* by President Lincoln in 1861⁵³ remains one

⁵² Abraham Lincoln, Special Session Message (July 4, 1861), *available at* THE AMERICAN PRESIDENCY PROJECT(Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=69802> (last visited Apr. 8, 2015)

⁵³ Lincoln authorized many of his Commanding Generals with the discretionary power to suspend *habeas corpus* via a series of Executive Order. The first instance of the same was allowing General Winfield Scott to suspend the right of *habeas corpus* if his operations in Maryland necessitated the same. *See* Abraham Lincoln, Executive Order (Apr. 27, 1861), *available at* THE AMERICAN PRESIDENCY PROJECT(Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=70145> (last visited Apr. 8, 2015)

of the most important and polarizing issues from the Civil War period. The subsequent developments, from both within and outside of the courtroom bear immense significance upon the scope of the Executive's constitutional power of detention. The legal history of the Civil War detentions highlights the limitations of Executive's inherent constitutional powers as a legal basis for the wartime detention of citizens, and for the suspension of the writ of *habeas corpus*.

Ex Parte Merryman

Ex Parte Merryman, 17 F.Cas. 144 (C.C.D. Md. 1861) spoke to whether the President had the constitutional power to detain citizens via unilateral Executive suspension of *habeas corpus*. The case emerged in the foreground to Maryland's secession from the Union. From the perspective of military necessity and effective governance, preventing the secession of Maryland was vitally important since it remained the only available channel to connect the Northern states to Washington DC following the secession of Virginia in April 1861.⁵⁴ However, events in Maryland in April 1861 evinced strong anti-Union sentiment, and a high likelihood of secession.⁵⁵ Confronted by the reality of an insurrection in Maryland, Lincoln issued the Executive Order of April 27, 1861, formally authorizing his Commanding General Winfield Scott or any other commanding officer to suspend *habeas* as they deemed necessary in any areas

⁵⁴ *Ex Parte Merryman* and Debates on Civil Liberties During the Civil War : A Short Narrative, FED. JUDICIAL CTR. http://www.fjc.gov/history/home.nsf/page/tu_merryman_narrative.html (last visited Apr. 9, 2015)

⁵⁵ President Lincoln had sufficient cause for worry that Maryland too would secede from the Union, crippling the Federal Government in the process. When a Massachusetts regiment passed through Baltimore on April 19th 1861, they were met by a mob attack, resulting in the first casualties of the Civil War. Additionally, the state had taken additional steps that motioned towards a separation from the Union; railroads that connected Baltimore to Northern States were burnt, and telegraph lines to DC were also destroyed by vigilantes. (*See Id.*)

in the vicinity of the military line from Philadelphia to Washington DC.^{56 57}

On 25th May, 1861, John Merryman, who resided in Baltimore County was arrested by armed forces acting under military orders, and detained at Fort McHenry by General Cadwalder.⁵⁸ His lawyers were unable to secure a copy of his arrest warrant, and he was not charged with violating any specific laws of the United States. Rather, he was detained on account of vaguely defined general acts of treason.⁵⁹ Upon securing a writ of *habeas corpus*, General Cadwalader refused to comply, citing President Lincoln's Executive Order of April 27th as a legal authority that had suspended the writ of *habeas corpus* (*Id.* at 148). Merryman's *habeas* petition was addressed to Roger Taney, the then Chief Justice of the United States Circuit Court for Maryland, and the resulting case had significant implications for the contours of Presidential power to detain citizens during wartime. From the outset, it was clear that Merryman's case involved a Zone II detention, and that its central question concerned the Presidential authority to unilaterally suspend *habeas corpus*⁶⁰, and delegate that power to a subordinate within the Army. Taney's opinion betrays his bemusement that what he had hitherto considered "one of those points of constitutional law upon which there was no difference of opinion" (*Id.*) was the central

⁵⁶ A day earlier, Lincoln had urged Commanding General Scott to monitor the actions of the Maryland state legislature, which he believed would vote for secession from the Union. In that eventuality, Lincoln empowered Scott to undertake a number of steps, and as an extreme measure, suspend *habeas corpus* in Maryland if necessary. Lincoln's remarks turned out to be prescient. See Abraham Lincoln, Executive Order (Apr. 25, 1861), available at THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=70145> (last visited Apr. 8, 2015)

⁵⁷ Abraham Lincoln, Executive Order (Apr. 27, 1861), available at THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=69748> (last visited Apr. 8, 2015)

⁵⁸ *Ex Parte Merryman*, 17 F.Cas. 144,147 (C.C.D. Md.. 1861) (Taney.CJ.)

⁵⁹ *Id.*

⁶⁰ *Id.* at 148 ("As the case comes before me, therefore, I understand that the President not only claims the right to suspend the writ of *habeas corpus* himself, at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey judicial process that may be served upon him.")

question the Court was attempting to answer in *Ex Parte Merryman*; his opinion went on to conclusively demonstrate that *habeas corpus* could only be suspended by Congressional action.

The unlawfulness of Lincoln's action is established pursuant to two modalities of constitutional argumentation - first, Taney makes a structural argument concerning the position of the *habeas corpus* suspension clause in Article I of the Constitution (*See* U.S. Const. Art. I, §9). He reads this to indicate that the Framers explicitly intended to allocate the suspension power to Congress (*Id.* at 148-149). Had the original constitutionalists intended for a Presidential power to suspend *habeas corpus*, they would have formally enshrined significantly more expansive powers in Article II of the Constitution.⁶¹ Second, Taney draws on the historical record of detention up to that point, which compels the conclusion that only Congress - and not the President - possessed the power to suspend *habeas corpus*.⁶²

On May 30th, 1861, three days after Taney had issued his firm rebuke to the Executive in *Ex Parte Merryman*, Lincoln asked his Attorney General Edward Bates to ascertain the legal basis to two questions - first, whether the President possessed the authority to detain individuals he knew to be working in support of insurgents, and second, whether the President had the authority to refuse to obey a writ of *habeas corpus* in the process of detaining the aforementioned individuals. Bates' opinion subsequently found both statutory and constitutional authority for such detentions. He located the requisite statutory authority in The Militia Act of

⁶¹ *Id.* at 149 (“ And if the high power over the liberty of the citizens, now claimed, was intended to be conferred on the President, it would, undoubtedly, be found in plain words in this article. But there is not a word in it that can furnish the slightest ground to justify the exercise of the power.”)

⁶² While Taney does not discuss the War of 1812 detention cases, he discusses the events of the Burr Conspiracy and *Ex Parte Bollman* 8 U.S. 75 (1807) in some detail. He notes that Jefferson turned to Congress to suspend the writ of *habeas corpus* and did not claim any personal authority for suspension. Similarly, Taney cites Marshall's famous sentence on the legislative nature of the *habeas corpus* suspension power. The inclusion of the *Ex Parte Bollman* opinion and Thomas Jefferson's deferral to Congress reinforce Taney's conviction that the Executive lacks the inherent authority to suspend *habeas corpus*. (*Id.* at 147, 152)

1795, ch. 36 1 Stat. 424 (repealed in part 1861, and current version at 10 U.S.C. §§331-335) and the Insurrection Act of 1807, ch. 39 2 Stat. 443 (current version at 10 U.S.C. §§331-335).⁶³

Additionally, he found constitutional authority not necessarily intrinsic to the Commander-in-Chief clause, but rather when the Commander-in-Chief clause was employed in furtherance of the duty of the President to preserve, protect and defend the Constitution (U.S. Const art. II, §2, cl.8) and to “take care that the laws be faithfully executed”(U.S. Const. art. II, §3,cl.5) (*Id.* at 79). He believed that such a vestiture of power necessarily provided the President with the necessary authority to fulfill his obligations pursuant to the Constitution by detaining Merryman.

Upon closer scrutiny, neither Bates’ statutory nor constitutional arguments pass muster. At a statutory level, neither of the acts Bates cited support the proposition that the President or his Executive officers may detain citizens or fail to respect a writ of *habeas corpus* directed to their attention. The Militia Act of 1795 empowers the President to respond to the threat of insurrection or invasion by calling forth the militia of a State or several States to the defense of the nation (Section 1-2). The only portion of the Militia Act that could be read to support the conclusion that the President may rely on it to suspend *habeas corpus* can be found in Section 1, where it notes that the President may “issue his orders for that purpose [to repel the invasion], to such officer or officers of the militia, as he shall think proper.” However, to read this clause as authorizing the suspension of *habeas corpus*, and authorizing the refusal to comply with a writ issued by the Court is to stretch the boundaries of reasonable statutory construction. That the act makes no mention of “*habeas corpus*” provides sufficient insight to reject the perspective that the clause in Section I was meant to legitimize Executive suspension or disobedience of the

⁶³ See Hon. Edward Bates, Suspension of the Privilege of the Writ of Habeas Corpus (July 5, 1861) available in J. HUBLEY ASHTON, 10 OFFICIAL OPINIONS OF THE ATTY. GEN OF THE U.S 74, 83 (W.H. & O.H.Morrison 1870)

writ.⁶⁴ The avowed purpose of this clause, read in the context of the goals of Section I, was to give the President military authority over the militia once he called them up, and not the States, which also made clear that called up militia were bound by the will of the Executive, and owed their responsibility to the President, and not the States they were originally drawn from. Likewise, no statutory authority to detain can be found in the Insurrection Act of 1807, which merely enables the President to call upon the land and naval forces when necessary for the suppression of insurrection or obstruction of the laws. Like the Militia Act, it contains no language suggesting a delegation of the *habeas corpus* suspension power. Therefore, it only clarified the circumstances under which and the ends to which the U.S. land and naval forces could be deployed by the Executive branch.

Conversely, the apposite statute to answering Lincoln's question is the Judiciary Act of 1789 (ch. 20, 1 Stat. 73, now codified at 28 U.S.C. §1350), which Taney mention in his *Merryman* opinion (*Merryman* at 147). Section 14 of the Judiciary Act grants Federal courts of the United States the power to grant writs of *habeas corpus*, whenever a prisoner is held in custody, "under or by color of the authority of the United States." The statutory language is a firm rebuke to Bates' theory that the suspension of the writ involved a political question, and not a judicial one.⁶⁵ The text of the Judiciary Act does not suggest that the statutory authorization it provides diminishes in exceptional periods (such as times of war). Rather, it might be for

⁶⁴ Perhaps the best treatment of this question is found in *Luther v. Borden* 48 U.S. 1 (1849), where the Supreme Court found that within the statutory scope of Section 1, the discretionary power given to the President was in "deciding whether the exigency had arisen upon which the government of the United States is bound to interfere" (*Id.* at 43) and not in deciding the scope of military power invested in him by the power to call upon the militia. Therefore, one could not infer the powers to suspend *habeas corpus* from the power to call on the militia.

⁶⁵ See *supra* Note 35, at 86

precisely such periods that the Act was intended, to ensure that an overzealous Executive could not trample on the rights of citizens.

Subsequently, the only powers that the Executive can rely on are its inherent constitutional powers. The opinion in *Ex Parte Merryman* raises significant obstacles to the notion that the faithful execution of laws pursuant to either the Presidential Oath or the Executive power can authorize the detention of Merryman or similarly situated individuals (*Merryman* at 147). Taney argued that by suspending *habeas corpus*, the President was no longer faithfully executing laws, but usurping the legislative power from Congress. Furthermore, in faithfully executing the laws, the President is also bound to faithfully execute judicial decisions, and support the judiciary in enforcing its judgments (*Id.*). Subsequently, Taney's opinion already accounts for, and rejects the notion that the "faithfully executed" constitutional powers can authorize Merryman's detention.

Although Bates' opinion does not consider the Commander-in-Chief powers, they would not be applicable in this instance. Merryman's case had several characteristic factors that would otherwise support an Article II detention claim – he was detained within the 60 sunset window, and at a period that Congress was unable to meet. However, Merryman's status as a civilian precluded him from detention pursuant to Article II, since the Commander-in-Chief authority extended only to the removal of belligerents from the site of battle. At the time Merryman was captured, he was at his house, and not a member of an active insurgency against the Government. Subsequently, no constitutional power existed to detain Merryman.

The above fact pattern placed Merryman's case firmly within Zone II⁶⁶ - when Lincoln

⁶⁶ The Judiciary Act merely empowered the Judiciary to grant and recognize writs of *habeas corpus*. However, those powers of the judiciary do not speak to the question of whether the President has any detention powers by

suspended *habeas corpus*, there was no Congressional statute that either empowered him to do so or expressly limited his ability to do so. However, Bates' justification of the suspension is insufficiently responsive to Taney's opinion in *Ex Parte Merryman*, and to the history of *habeas corpus* suspension in the U.S. to that point - the cases from the War of 1812 dispel the notion that the Executive has the authority to disobey an issued writ of *habeas corpus*. As a consequence, Taney's opinion - which takes cognizance of, and accounts for Bates' arguments on the Presidential Oath of Office – nonetheless correctly concludes that the Executive lacks any inherent power to suspend the writ of *habeas corpus*, or to willfully disregard a writ of *habeas corpus* directed to its attention by a Federal Court of the United States. Consequently, when operating within Zone II of the Youngstown framework, we must conclude - as before - that the President lacks any inherent power to detain citizens.

Ex Parte Benedict

The logic of the *Merryman* case was recaptured in the detention of Judson Benedict by United States marshal Edward Chase, which culminated in *Ex Parte Benedict*, 3 F.Cas. 159 (4 West Law Month. 449) (Case No. 1292) (N.D.N.Y. 1862). Benedict was detained pursuant to the authority of two orders of the War Department, both issued on August 8th, 1862 - the first authorized United States marshals to “arrest and imprison any person or persons who may be engaged, by act, speech, or writing, in discouraging volunteer enlistments, or in way giving aid and comfort to the enemy, or in any other disloyal practice against the United States.”⁶⁷ It required marshals to arrange for a military trial of those detained, in coordination with the Judge

statute, or whether he statutorily authorized to obey writs of *habeas corpus* once issued. Therefore, this case is a Zone II, not a Zone III case.

⁶⁷ General Order 99: Regulation for the Enrolment and Draft of Three Hundred Thousand Militia, in United States War Dep't, General Orders of the War Department, Embracing the Years 1861, 1862 & 1863 at 360, 360-362 (Oliver Diefendorf ed., Derby & Miller 1864).

Advocate General. The second order authorized United States marshals to detain all individuals “liable to be drafted into the militia” who were attempting to leave the Country.⁶⁸ Crucially, the orders also suspended the writ of *habeas corpus* for all prisoners detained pursuant to their authority. Benedict petitioned the District Court of the Northern District of New York for a writ of *habeas corpus*, challenging the authority of the United States marshal to detain him.

Benedict’s question implicated a Zone II question, insofar as Congress was silent on the issue.⁶⁹ However, before the Court reached the merits of the Zone II question, it noted the plenary authority to detain citizens in Zone I, by suggesting that had Congress passed legislation that suspended the writ of *habeas corpus* in the United States, the Court would have had no option but to reject Benedict’s petition (*Id.*). In Benedict’s case, the constitutional question of relevance is the “the power of the president to suspend the privilege of habeas corpus, without the authority of congress” (*Id.*). Judge Hall resolves this issue by reinforcing the wisdom of Taney’s ruling in *Merryman*, suggesting that the suspension of *habeas corpus* “is a legislative and not an executive power, and must be exercised, or its exercise authorized, by congress” (*Id.*). In addition to *Merryman*, Hall - like Taney - draws on the thoughts of former Chief Justices Story⁷⁰ and Marshall⁷¹ on the subject, both of whom conclude that the power to suspend *habeas*

⁶⁸ General Order 104, in United States War Dep’t, General Orders Affecting the Volunteer Force: Adjutant general’s office at 100, 101 (U.S. GPO, 1862).

⁶⁹ See e.g. *Ex Parte Benedict*, 3 F.Cas. 159,165 (4 West Law Month. 449) (Case No. 1292) (N.D.N.Y. 1862)(Hall.J.,majority)(“Can the president, then, without the authority of congress, suspend the privilege of the writ of habeas corpus?”)

⁷⁰ *Ex Parte Benedict*, 3 F.Cas. 159,165 (4 West Law Month. 449) (Case No. 1292) (N.D.N.Y. 1862)(Hall.J.,majority) (“It would seem, as the power is given to congress to suspend the writ of habeas corpus in the cases of rebellion or invasion, that the right to judge whether the exigency had arisen, must exclusively belong to that body”)

⁷¹ *Id.* at 166 (citing Marshall’s holding in *Ex Parte Bollman*, 8 U.S. 95,101 “If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. The question depends upon political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty and obey the laws”)

corpus is purely legislative prerogative, and not an Executive discretion. Much of Hall’s opinion is an amalgamation of prior cases from around the United States, reinforcing the belief that the paucity of Presidential power in Zone II was not a Civil War development, but had its roots in American jurisprudential history.

In addition to Marshall and Story, Hill also cites with reverence the opinion of Chief Justice Francois Martin of the Louisiana Supreme Court from the case of *Johnson v. Duncan*, 30 Mart. (o.s.) 530 (La. 1815), which considered the question of whether the President could suspend *habeas corpus* pursuant to his powers of martial law. Martin’s analysis - which draws on Blackstone’s writings and decisions from British courts⁷² - lends itself to the conclusion that with respects to martial law, “no mention is made of the power of any other branch of government but the legislative” in the Constitution (*Id.* at 535). Martin subsequently notes that the powers of the President under martial law are merely to call militia into the service of the United States, the extent of which is to place “citizens subject to military duty under military authority and military law” (*Id.* at 552). In no unequivocal terms, he suggests that any steps beyond that constitute “usurpation of power” (*Id.*). Hill relies on Martin’s analysis to conclude that the power to suspend *habeas corpus* lies well beyond the scope of Executive powers during martial law situations. The *Johnson v. Duncan* opinion is particularly valuable insofar as it clarifies that Presidential authority that can be claimed under the constitutional power to suspend martial law is inherently limited. The opinion reads martial law powers as limited to merely the power to call up militias -and not the power to detain – which mirrors the earlier conclusion that

⁷² *Johnson v. Duncan* 30 Mart. (o.s.) 530,534-535 (La. 1815) (Martin.CJ., majority) (“In England, at the time of the invasion of the Pretender, assisted by the forces of hostile nations, the habeas corpus act was indeed suspended, but the executive did not thus, of itself stretch its own authority; the precaution was deliberated upon and taken by the representatives of the people”)

the statutory powers of martial law found in the Militia Act of 1795 were limited to the calling up power. Hill, guided by the wisdom of past decisions, concludes that “the president, without the authority of congress, has no constitutional power to suspend the privilege of the writ of habeas corpus in the United States.”⁷³

Congress steps in

After the Court had squarely rejected the theory that the Executive could unilaterally suspend *habeas corpus* in both *Benedict* and *Merryman*, Lincoln was forced to turn to Congress to acquire the necessary authorization to detain citizens who supported the Confederate Army. In his message to Congress July 4th, 1861, Lincoln invited Congressional action, noting, “Whether there shall be any legislation upon the subject, and, if any, what, is submitted entirely to the better judgment of Congress.”⁷⁴ However, since Congress was not acting as quickly and decisively as Lincoln desired, he disregarded the limitations on Executive power discussed in *Merryman* and *Benedict*, and unilaterally suspended the writ of *habeas corpus* on September 24th, 1862, with respect to “all persons arrested, or who now or hereafter during the rebellion shall be imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority.”⁷⁵ Perhaps it was Lincoln’s re-usurpation of the suspension power that finally pierced through the Congressional inertia, as Congress passed An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases, 12 Stat. 755 [hereinafter “Habeas Corpus Suspension Act”]. However, the authorizations of the Habeas Corpus Suspension Act

⁷³ *Ex Parte Benedict* 3 F.Cas. 159,171 (N.D.N.Y. 1862)

⁷⁴ Abraham Lincoln, Special Session Message (July 4, 1861), available at THE AMERICAN PRESIDENCY PROJECT(Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=69802> (last visited Apr. 8, 2015)

⁷⁵ Abraham Lincoln, Proclamation 94 - Suspending the Writ of Habeas Corpus (Sept. 24, 1862), available at THE AMERICAN PRESIDENCY PROJECT(Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=69783>, (last visited Apr. 8, 2015)

were not as broad as the hitherto authority asserted by the President. While the Act explicitly delegated the Congressional power to suspend *habeas corpus* to the President “whenever, in his judgment, the public safety may require it” (*Id.* at Section 1),⁷⁶ Congress included several provisions to cabin Executive overreach. First, it insisted that a list of all prisoners who were under detention or were likely to be detained in the future be submitted by the Secretary of State and Secretary of War to judges of the United States Circuit Courts (*Id.* at Section 2). Second, if a Court with jurisdiction was able to convene a Grand Jury, which was unable to find an indictment or presentment against a person in detention, the Judge was authorized to bring the said individual in front of the Court to order his discharge, and all officers of the United States were required to obey such orders (*Id.* at Section 2). Finally, Section 2 of the Act attempted to cabin the Executive power to detain by implementing strong checks on who could be detained and under what circumstances.

In the months following the passage of the Habeas Corpus Suspension Act, two more cases reached the Supreme Court which would yet again speak to the issue of wartime detention authority.

Ex Parte Vallandigham

Despite the passage of the Habeas Corpus Suspension Act, 12 Stat. 755, the detention questions raised by the detention of Clement Vallandigham focused on the President’s Article II detention power. On April 13th, 1863, Union General Ambrose Burnside issued General Order

⁷⁶ Furthermore, it also provided that no military authority was required to produce the body of an individual detained, provided that such detention was pursuant to the authority of the President (*See* Act of March 3d, 1863, 12 Stat. 755, Sec. 1 (“no military or other officer shall be compelled, suspension. in answer to any writ of habeas corpus, to return the body of any person or persons detained by him by authority of the President ; but upon the certificate, under oath, of the officer having charge of any one so detained that such person is detained by him as a prisoner under authority of the President”))

No. 38 that made it a crime triable by military commission (with a punishment of death) to express sympathy for the Confederate soldiers or to publicly criticize the war effort.⁷⁷ On May 1st, 1863, former Congressman Clement Vallandigham organized a public protest against General Order No. 38 and the war effort, urging those assembled to disregard and disobey the order.⁷⁸ Subsequent to these protests, Vallandigham was arrested at his home four days later, and brought to Cincinnati to stand military trial. Vallandigham repeatedly protested the authority of the military commission to detain him and try him for violations of General Order No. 38.⁷⁹ Before the military tribunal, he alleged both that his military trial was unlawful and that his alleged offense did not constitute a violation of the Constitution or any statute.⁸⁰ However, the military judge essentially punted on this question, with an unsatisfactorily terse discussion on an issue of great constitutional significance. He suggested that the lawfulness of the military trial had been affirmed by the decision of the Convening Authority to charge Vallandigham and bring him before the Commission, and subsequently found Vallandigham guilty for violations of General Order No. 38.⁸¹

However, the legality of the military commission - and Vallandigham's detention pursuant to it- was also litigated in the Federal court system. He petitioned the Circuit Court for the Southern District of Ohio for a writ of *habeas corpus*, alleging that the military commanders

⁷⁷ General Order No. 38, in *The Trial of Hon. Clement L. Vallandigham: By a Military Commission: And the Proceedings Under His Application for a Writ of Habeas Corpus in the Circuit Court of the United States for the Southern District of Ohio*, 7 (Rickey & Carroll 1863) [hereinafter *The Trial of Hon. Clement L. Vallandigham*], <https://archive.org/details/trialofhonclemen00vall> (last visited Apr. 9, 2015).

⁷⁸ *Trial of Hon. Clement L. Vallandigham By The Military Commission*, in *The Trial of Hon. Clement L. Vallandigham*, 11-12, *see supra* note 48

⁷⁹ *Id.* at 29-30 (“I am not either in either “the land or naval forces of the United States, nor in the militia in the actual service of the United States,” and therefore am not triable for any Cause, by any such court [military commission].”)

⁸⁰ *Id.* (“But the alleged “offense” is not known to the Constitution of the United States, nor any law thereof?”)

⁸¹ *Id.* at 30 (“Insofar as it called into question the jurisdiction of the Commission, that question had been decided by the authority ordering and convening the trial.”)

holding him lacked authority for his detention. Unfortunately, the Circuit Court's opinion in *Ex Parte Vallandigham*, 28 F.Cas. 874 (C.C.S.D. Ohio 1863)⁸² was arguably the worst piece of legal reasoning on the question of the Executive authority to detain, and was littered with both factual inaccuracies and doublespeak. First, it vacillated over the power of Federal Courts to issue writs of *habeas corpus* for cases arising from Military Commissions. Judge Leavitt cites the Court's opinion in the case of Bethuel Rupert, where it was held that the Court could not grant a writ of *habeas corpus* when the detention or imprisonment was under military authority.⁸³ Nonetheless, the Circuit Court also makes a merits determination on the validity of Vallandigham's *habeas corpus* claim, devoting nearly the entirety of its opinion to defending the Government's right to detain and try Vallandigham.⁸⁴ It is not clear whether that portion of the opinion constitutes *dicta*, especially since it makes a merits determination on the legality of Vallandigham's arrest. Leavitt even defends his merits examination by noting that "if the theory of his counsel [Vallandigham's counsel] were sustainable, that there can be no legal arrest except by warrant, based on the affidavit of probable cause, it would be clear that the arrest was illegal."⁸⁵

As a result, the Court places itself in a knotty legal situation - Vallandigham's detention could be justified under either of the two grounds laid out earlier in the paper - detention pursuant to military trial or detention for its own sake. However, by decrying its own jurisdiction

⁸² Available at Opinion of the Court by Hon H.H. Leavitt, in *The Trial of Hon. Clement L Vallandigham*, 259-272; see *supra* note 48

⁸³ *Id.* at 262 ("Mr. Justice Swayne, in an opinion of some length, though not written, distinctly held that this Court would not grant the writ of Habeas Corpus, when it appeared that the detention or imprisonment was under military authority.")

⁸⁴ *Id.* at 263 ("It seemed due to him that the Court should hear what could be urged against the legality of the arrest, and in favor of the interposition of the Court in behalf of the petitioner. And I have been greatly interested with the forcible argument that has been submitted, but unable to concur with the speaker in all his conclusions.")

⁸⁵ *Id.* at 266

to hear *habeas corpus* petitions arising from military commissions, the Court indicates that it cannot review the legality of the commissions themselves. Therefore, it must follow that the Court is also not in a position to judge whether detention pursuant to military trial is lawful, making a merits determination of Vollandigham's detention beyond the Court's competencies and jurisdiction. This is because the merits determination on detention can transpire in one of two ways - either the merits determination can find that the President possessed the authority to arrest and detain Vollandigham, without reaching the question of the legality of his subsequent military trial, therefore serving to authorize Vollandigham's arrest. However, if the Court's merit determination was to conclude that no independent detention authority exists, then such an inquiry provides Vollandigham with no relief insofar as the Court cannot the answer the question of the legality of detention pursuant to military trial. In this regard, this merits examination is a one-way ratchet – it can only serve the interests of one party, and is structurally biased in the outcomes it can promote. Furthermore, as a methodological concern, by initiating the analysis at the question of whether independent detention authority exists, the Court commits a blunder. As a matter of hierarchy, that determination is only made if it is determined that Vollandigham's military trial is illegal.⁸⁶ Insofar as the Circuit Court makes no such pronouncement, it has no scope to reach this second question.

The other factual error of note concerns the Court's determination on the scope of Article II authority in Vollandigham's case. In making the case for the Article II powers of detention, the Court notes, “[I]n deciding what he may rightfully do under this power [Commander-in-Chief], where there is no express legislative declaration, the President is guided solely by his own

⁸⁶ It is another matter that this paper argues the commissions were indeed unlawful, and that such analysis would have been necessary. The critique here is geared at the methodological approach the Court relied on to reach this position.

judgment and discretion...”⁸⁷ The error here is that Congress had spoken directly to the question of detention and suspension of the writ of *habeas corpus* in the Habeas Corpus Suspension Act, 12 Stat. 755 (1863). However, the Executive had sought to circumvent some of the restrictions codified in that Act - most notably the Grand Jury and reporting requirements - and therefore had deliberately not relied on it in this circumstance.⁸⁸ Consequently, the Government’s actions in Vallandigham's case constituted not merely an exercise of Article II authority, but willful neglect of statutory guidance on the relevant legal question. The Circuit Court’s suggestion that Congress had not provided guidance on the issue is without factual basis.

Although the Circuit Court does not reach nor consider the legality of detention pursuant to military trial, it is clear that such practice falls within the purview of Zone III. The relevant statutory framework is found in Sections 24 and 25 of An Act for enrolling and calling out the national Forces, and for other Purposes 12 Stat. 731 (1863) [hereinafter “Enrollment Act”].⁸⁹ Vallandigham was not subject to the Articles of War, and his anti-war and anti-Union speeches fall within “attempts to procure or entice desertion, or counselling to resist the draft amongst U.S. soldiers” (Section 24). While the statute recognizes that criminal sanctions of up to two years may accompany such actions, it is clear that the correct jurisdictional forum to adjudicate

⁸⁷ Opinion of the Court by Hon H.H. Leavitt, in *The Trial of Hon. Clement L Vallandigham*, 267; *see supra* note 48

⁸⁸ Argument of Hon. Aaron F. Perry in *The Trial of Hon. Clement L Vallandigham*, 107 ; *see supra* note 48

⁸⁹ The relevant portion of Section 24 of the Enrollment Act reads, “That every person not subject to the rules and articles of war who shall procure or entice, or attempt to procure or entice, a soldier in the service of the United States to desert; or who shall harbor, conceal, or give employment to a deserter, or carry him away, or aid in carrying him away, knowing him to be such...[shall] upon legal conviction, be fined, at the discretion of *any court having cognizance of the same*, in any sum not exceeding five hundred dollars, and he shall be imprisoned not exceeding two years nor less than six months” (emphasis added). Similarly, the relevant portion of Section 25 of the Enrollment Act reads, “That if any person shall resist any draft of men enrolled under this act into the service of the United States, or shall counsel or aid any person to resist any such draft.... such person shall be subject to summary arrest by the provost-marshal, *and shall be forthwith delivered to the civil authorities*, and, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding two years, or by both of said punishments” (emphasis added).

violations of Section 24 was a civilian court, and not a military tribunal. Therefore, in attempting to charge and punish Vallandigham in a forum contrary to that mandated by Congress, the President required Article II to equip him with the powers to unilaterally set up military commissions and define their personal jurisdiction. However, as the War of 1812 cases demonstrate, such powers are beyond the scope of the President's Article II authority (See e.g. *Smith v. Shaw, In re Stacey*); subsequently, Vallandigham's case could not be justified on the grounds that it was lawful pre-trial detention.

In light of the above factual errors, it is prudent to adopt a critical lens towards the rest of the Circuit Court's opinion; the Court found Vallandigham's detention authorized by the Commander-in-Chief clause of the Constitution, relying on the "state of the country"⁹⁰ and imminent danger posed by the Civil War for why such authorities existed. In such a state of affairs, the Court asserted that the Commander-in-Chief powers contained very broad levels of discretion to undertake any action in the interests of military necessity.⁹¹ Subsequently, the role of Courts was not to second guess the actions of the Executive, even when civil rights were on the line. The Court reached this conclusion despite simultaneously suggesting that it was not equipped to detail the precise contours of the President's authority under Article II.⁹² Finally, the Court also displayed a naiveté, when it proposes the notion that each branch of government must "act on a presumption that a co-ordinate branch knows its powers and duties and will not transcend them"⁹³ (*Id.* at 270). Such a view is detached from reality, especially in the realm of

⁹⁰ Opinion of the Court by Hon H.H. Leavitt, in *The Trial of Hon. Clement L Vallandigham*, 263; *see supra* note 48

⁹¹ *Id.* at 266 ("No one denies however, that the President, in this character is invested with very high powers")

⁹² *Id.* ("The Constitution does not specify the powers he may rightfully exercise in this character, nor are they defined by legislation")

⁹³ Furthermore, the Circuit Court notes "it would be an unwarrantable exercise of the judicial power to decide that a co-ordinate branch of the Government, acting under its high powers, had violated the Constitution" (*Id.*). However,

detention, where the jurisprudential history is littered with instances of the Executive branch exceeding the bounds of their power, and being forcibly reined in by Courts (See e.g. *Ex Parte Bollman*, *Ex Parte Benedict*, *In re Stacey*).

Before deconstructing Vallandigham's detention further, it is necessary to note that his detention - for its own sake - also involved another Zone III question. In this instance, Congress had provided strict statutory guidelines for detention in the Habeas Corpus Suspension Act (1863). However - as discussed above - the President sought to ignore those guidelines. Subsequently, his detention of Vallandigham violated the prescribed procedure for detention as per Congress' rules.

In evaluating the scope of Commander-in-Chief powers, the Circuit Court opinion displays two deficiencies. First, in its doctrine of deference to the Executive, the Circuit Court fails to conduct a meaningful merits inquiry into the facts of Vallandigham's detention. If military necessity was indeed such a central portion of the need to detain Vallandigham, then it appears to be at odds with his release and exile mere days after the military commission sentenced him to jail.⁹⁴ Furthermore, Article II of the Constitution clearly contains no scope of Executive detention power over civilians.

As if any further evidence was required that the Circuit Court's opinion was unspeakably poor, and ought not be considered judicial precedent, the opinion offered two further reasons at its conclusion - first, the opinion cursorily notes that in the days prior, the Ohio legislatures had passed statutes that legalized the arrest and detention of individuals pursuant to General Order

such a position seemingly contradicts the core holding of the U.S. Supreme Court in *Marbury v. Madison* 5 U.S. 137 (1803).

⁹⁴ *Clement Vallandigham*, OHIO HISTORY CENTRAL, http://www.ohiohistorycentral.org/w/Clement_Vallandigham (last visited Apr. 9, 2015).

No. 38.⁹⁵ Consequently, Vallandigham’s detention moved to a Zone I situation, where the President has plenary power of detention pursuant to statute. Subsequently, Vallandigham’s case became moot, insofar as his situation no longer demanded access to a remedy. Second, Justice Leavitt generates significant concern over the legal validity of his opinion when he suggests that he was influenced by concerns that issuing *habeas corpus* would be meaningless insofar as Courts could not compel enforcement of the writ. Although Leavitt attempts to downplay the importance of this concern to his ultimate decision, such a concession is shocking, and definitely indicates that extra-legal considerations affected his interpretation of the legal question at hand (*Id.*).

Unsurprisingly, on *certiorari*, the Supreme Court stepped away from most of the Article II analysis conducted by the Circuit Court. Rather, the Court upheld the lawfulness of the military tribunal as grounded in the “common law of war” (*Ex Parte Vallandigham* 68 U.S. 243, 249(1863)). Pursuant to the same, the Court held that it lacked original jurisdiction to review *habeas* petitions arising from military commissions.⁹⁶ However, the rest of the Circuit Court’s opinion - in particular its erroneous understanding of the Commander-in-Chief power - did not find mention at the Supreme Court’s opinion, and never entered the holding of the highest court. In this manner, the Supreme Court never spoke to the detention in Vallandigham’s case, and therefore refused to endorse the position that Article II contained any detention authority over civilians.

⁹⁵ Opinion of the Court by Hon H.H. Leavitt, in *The Trial of Hon. Clement L Vallandigham*, 272; *see supra* note 48

⁹⁶ *Ex Parte Vallandigham* 68 U.S. 243, 253 (1863) (Wayne, J., majority) (“there is no original jurisdiction in the Supreme Court to issue a writ of habeas corpus *ad subjiciendum* to review or reverse its proceedings, or the writ of certiorari to revise the proceedings of a military commission.”)

Ex Parte Milligan

While the Habeas Corpus Suspension Act (1863) played little role in the trial of Clement Vallandigham, it roared back to prominence in one of the landmark cases of the Civil War era, *Ex Parte Milligan* 71 U.S. 2 (1866). On September 15th, 1863, pursuant to the authorities granted to him by Congress, President Lincoln suspended *habeas corpus* in all of the United States.⁹⁷ Subsequent to these powers, Lambdin Milligan - a member of the pro-Confederate group Sons of Liberty - was arrested at his home, and confined in a military prison, to await trial by military commission.⁹⁸ Like Vallandigham's case, Milligan's detention also involved questions of pre-trial detention, and detention for its own ends.

On the authority to detain Milligan pursuant to lawful military trial, the Supreme Court emphasized that at the time of his detention and arrest, there could be little argument that Milligan was not a Prisoner of War, but a civilian (*Id.* at 117), especially since Indiana was still loyal to the Union (*Id.* at 141). Furthermore, he had no history of service in the land or naval forces (*Id.* at 107). Therefore, Milligan was beyond the jurisdictional purview of military tribunals that could be enacted pursuant to the Articles of War (1806). The lack of statutory authority is of particular import since the Court notes that any military trial raises significant constitutional concerns over access to protections in the Bill of Rights (*See* U.S. Const. amdt. IV, V, VII).⁹⁹ Subsequently, Milligan's military trial falls on the cusps of Zone II and Zone III. In conducting the subsequent *Youngstown* analysis, the Supreme Court makes two important notes:

⁹⁷ Abraham Lincoln, Proclamation 104 - Suspending the Writ of Habeas Corpus Throughout the United States (Sep. 15, 1863), available at THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=69898> (last visited Apr. 8, 2015)

⁹⁸ *Ex Parte Milligan* 71 U.S. 2, 108 (1866) (Davis, J., majority)

⁹⁹ *Id.* at 120-121 ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.")

first, that the power to establish military commissions is a Congressional power. The opinion notes that “the Constitution expressly vests it [the powers of the judiciary] “in one supreme court and such inferior courts as the Congress may from time to time ordain and establish,” and it is not pretended that the commission was a court ordained and established by Congress” (*Id.* at 121). Second, the Court observes – albeit in an indirect fashion – that the President lacks the Article II authority to create military commissions – a sharp contrast to the breadth of Commander-in-Chief power supported by the *Vallandigham* Circuit Court opinion. This narrow Article II reading has two warrants – first, that the powers of Commander-in-Chief are geographically bound to the theatres of war, an explanation that coheres well with the limited Article II powers of detention offered and supported throughout this paper.¹⁰⁰ Second, the Court held that there was no detention authority inherent in the powers of martial law.¹⁰¹ Therefore, since the President lacked the unilateral authority to set up military commissions, Milligan’s military trial was unconstitutional, and therefore, detention could not be justified on pre-trial grounds.

Next, Milligan’s detention as an end in itself posed a Zone III question, since it violated the terms of Habeas Corpus Suspension Act, 12 Stat.755 (1863). More than twenty days after his arrest and detention in military custody, a grand jury was convened to consider the charges against Milligan; they adjourned twenty five days later, without indicting Milligan or finding any

¹⁰⁰ *Id.* at 126 (“The jurisdiction claimed is much more extensive. The necessities of the service, during the late Rebellion, required that the loyal states should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theatre of military operations; and, as in this case, Indiana had been and was again threatened with invasion by the enemy, the occasion was furnished to establish martial law. The conclusion does not follow from the premises.”)

¹⁰¹ *Id.* at 127 (“Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.”)

presentment against him.¹⁰² The grand jury noted that it had been “wholly out of his power to have acquired belligerent rights, or to have placed himself in such relation to the government as to have enabled him to violate the laws of war” (*Id.* at 17). Following the failure of the grand jury to indict Milligan, Lincoln’s continued military detention of Milligan fell within Zone III of the Youngstown framework, since it violated Section 2 of the Habeas Corpus Suspension Act (1863) (requiring military officials to bring Milligan before a Federal judge who would authorize his discharge). Therefore, the *Milligan* Court had to resolve whether the President had any inherent powers to detain Milligan, even when strictly forbidden to do so by an Act of Congress.¹⁰³

Unsurprisingly, the Court found that Lincoln lacked the necessary powers to continue to detain Milligan. In his opinion for the Court, Justice Davis systematically deconstructs all of the government’s rationales for why the Court is not empowered to grant Milligan a writ of *habeas corpus*. Two of his observations are particularly insightful: first, his earlier observation on martial law dispels with the notion that martial rule can be applied in Milligan’s case to justify his detention. As he notes, “if this government [referring to martial law] is continued *after* the courts are reinstated, it is a gross usurpation of power” (*Id.* at 127). This argument is further reinforced by reference to *Smith v. Shaw*, which supports the proposition that martial law cannot be applied when Courts are open and functioning (*Id.* at 129). Second, Davis notes that the illegality of the military commission used to try Milligan meant that he was entitled to release on the grounds of the Habeas Corpus Suspension Act (1863). In particular, he notes that the President cannot unilaterally classify individuals as Prisoners-of-War; Milligan could be liable

¹⁰² *Id.* at 131 (“a grand jury, convened in session at Indianapolis; and afterwards, on the 27th day of the same month, adjourned without finding an indictment or presentment against him.”)

¹⁰³ If true, such a conclusion would also render Habeas Corpus Suspension Act (1863) unconstitutional

for trials in the courts of Indiana, but that necessitates his release from military detention. He says, “[i]t is not easy to see how he can be treated as a prisoner of war when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion.” (*Id.* at 131)

It was particularly striking that the Government’s brief did not even address the question of where the authority for detention came from, with the majority of the brief addressing the question of why the Supreme Court lacked jurisdiction to hear the case. Unsurprisingly, the *Milligan* Court concluded that Lambdin Milligan’s detention raised a Zone III question, and that in such situations, the President lacked any inherent constitutional powers of detention.

Reconstruction: Ulysses Grant and the Ku Klux Klan Act

The racism that had been central to the Civil War continued to rear its ugly head even after the defeat of the Confederate Army. In the early 1870s, the Ku Klux Klan’s horrific acts of violence were responsible for insurrectionary conditions in some Southern states of the Union. State and local police and prosecutorial authorities were entirely powerless to stop killings, rapes, and other acts of terror perpetrated by Klansmen¹⁰⁴, and the deteriorating nature of the situation necessitated involvement from the Federal Government.

In the immediate aftermath of the Civil War, it would have been unsurprising to see then President Ulysses S. Grant rely on broad Executive powers to suspend *habeas corpus* in South Carolina. However, in a letter to Congress, Grant makes a vital concession - he did not believe that the Executive branch, acting on its own possessed the requisite suspension powers.¹⁰⁵ Grant

¹⁰⁴ Ulysses S. Grant, Special Message (March 23, 1871), *available at* THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=70242> (last visited Apr. 8, 2015) (“That the power to correct these evils is beyond the control of the State authorities I do not doubt”)

¹⁰⁵ *Id.* (“ [T]hat the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear.”)

went on to plead with Congress to urgently pass “such legislation as...shall effectually secure life, liberty, and property and the enforcement of law in all parts of the United States” (*Id.*). While Grant’s letter did not specifically enumerate which authorities he found the Executive lacking in, it is clear that the Executive sought detention authority. This is evident both from the statutory language of the resultant act and the early actions of the Executive after securing the necessary statutory authorization. Congress acquiesced to Grant’s demands, responding with the Enforcement Act of 1871 ch.31, 17 Stat 13 (currently 42 U.S.C. §1983) [hereinafter “Ku Klux Klan Act”]. Section 4 of the Act made it lawful for the President - relying on his judgment - to suspend the writ of *habeas corpus* when it became impossible to try and convict violent insurrectionists in certain districts. Furthermore, early Executive practice pursuant to the Ku Klux Klan Act reinforces the notion that Grant was ultimately concerned with acquiring detention authority. On October 17, 1871, Grant explicitly relied on the Ku Klux Klan Act to suspend *habeas corpus* in certain counties of South Carolina - the State where he would wage his battle against the Klan.¹⁰⁶ Accounts of his early actions in South Carolina emphasize the large scale arrests of Klan members in the hopes of extracting confessions and the names of higher-up Klansmen from them.¹⁰⁷ In light of the same, it is safe to conclude that Grant sought the power to suspend *habeas corpus*.

Grant’s end of year address to Congress emphasizes the “extraordinary”¹⁰⁸ nature of the power to suspend *habeas* that he had been given. If the power to suspend *habeas corpus* was

¹⁰⁶ Ulysses S. Grant, Proclamation 201 - Suspending the Writ of Habeas Corpus in Certain Counties of South Carolina (Oct. 17, 1871), *available at* THE AMERICAN PRESIDENCY PROJECT(Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=70258> (last visited Apr. 8, 2015)

¹⁰⁷ *See e.g.* Amanda L. Tyler, Suspension as an Emergency Power, 118 Yale L.J. 600,655-661 (2008) (discussing how Grant’s actions, both in the lead-up to his lobbying of Congress, and in the aftermath of securing the necessary authorization suggest the power of preventive detention was what he desired from Congress)

¹⁰⁸ Ulysses S. Grant, Third Annual Message (Dec. 4, 1871), *available at* THE AMERICAN PRESIDENCY PROJECT(Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=29512> (last visited

intrinsic to the Executive's Article II powers, then such language would have been totally unnecessary; however, Grant's choice of words and his actions are telling - they imply that his requested powers of detention lay beyond Article II of the Constitution.

Grant's voluntary recognition of the limitations of his own power is quite significant from the perspective of Executive practice surrounding detention. From a *Youngstown* lens, Grant's actions moved him from a Zone II situation to a Zone I situation. At the time of Grant's request, The Enforcement Act of 1870, 16 Stat. 140 [hereinafter "Force Act"] was in effect. Under Section 13 of the Force Act, the President was given the lawful authority to "employ such part of the land or naval forces of the United States, or of the militia" to enforce the Force Act (which dealt with ensuring voting rights for the black population in the South). Grant's failure to recognize the power to suspend *habeas corpus* in Section 13 is telling, since it solidifies the initial position of this incident in Zone II, and reinforces the conclusion that the power to suspend *habeas corpus* cannot be inferred from the power to call on militias. Subsequently, Grant lacked the power to detain Klansmen on account of his Article II powers in Zone II - Klansmen were not Prisoners of War, but civilians, and because Congress was open and capable of passing legislation as evidenced by its passing of the Force Act. Furthermore, he would have been unable to prevent them from exercising their *habeas corpus* rights and to petition courts for their release. By turning to Congress, Grant moved his actions to Zone I, which in turn provided him with sufficient authority to detain suspected Klansmen without trial, a centerpiece of his ultimately successful strategy to disrupt Klan networks in parts of South Carolina.

Apr. 8, 2015) ("Under the provisions of the above act I issued a proclamation calling the attention of the people of the United States to the same, and declaring my reluctance to exercise any of the extraordinary powers thereby conferred upon me, except in case of imperative necessity")

Section IV: World War II & The Cold War

“Why should I be running back if you’re not running back? We’re both Americans!”¹⁰⁹

~ Gordon Hirabayashi (1942)

After the Civil War, perhaps no memory is as etched into public consciousness as the internment of Japanese-American citizens by President Roosevelt’s Executive Orders during World War II. The Second World War was home not only to the Japanese-American internment cases, but also to the well-known *Quirin* case concerning Nazi saboteurs, and the oft forgotten detention of Gaetano Territo. Reflecting the emergence of an international legal order, for the first time, treaty agreements supplemented existing statutory frameworks in authorizing the detention of Americans who were prisoners of war.

The Internment and Exclusion of Japanese-Americans

In the weeks following the attack of the Japanese Imperial Navy on Pearl Harbor, American public opinion became increasingly wary of the threat of espionage posed by the large populations of Japanese-American citizens living on the West Coast of the United States. A mere two months after the attack, on February 19th, 1942, President Roosevelt promulgated Executive Order 9066, 7 Fed.Reg. 1407 (1942),¹¹⁰ which had two characteristic features: first, it allowed the Secretary of War and Military Commanders to prescribe military areas from which “any or all persons may be excluded” (*Id.*). Furthermore, military commanders had the discretion to place restrictions on the “the right of any person to enter, remain in, or leave” (*Id.*). Second, broad authority was transferred to the Secretary of War and Military Commanders to ensure

¹⁰⁹ Chapter 4: World War II, in Gordon K. Hirabayashi, *A Principled Stand: The Story of Hirabayashi V. United States* (Univ. of Wash. Press 2013), <https://books.google.com/books?isbn=0295804645>

¹¹⁰ Franklin D. Roosevelt, Executive Order 9066- Authorizing the Secretary of War To Prescribe Military Areas (Feb. 19, 1942), *available at* THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=61698>. (last visited Apr. 8, 2015)

compliance with the military restrictions, including but not limited to assistance from Federal troops, Federal agencies and the ability to secure help from state agencies if necessary. A little over a month later, President Roosevelt issued Executive Order 9102, 7 Fed.Reg. 2165¹¹¹, which established the War Relocation Authority, which was to formulate a program for removal of all citizens who fell within the purview of Executive Order 9066.¹¹² Congress ratified and confirmed Executive Order 9066 through the Act of March 21, 1942, 56 Stat. 173 (1942).¹¹³

Curfews and Exclusion Orders - Gordon Hirabayashi and Fred Korematsu

On March 2nd, 1942, Lieutenant General John DeWitt issued Public Proclamation 1, 7 Fed. Reg. 2320¹¹⁴ which specified and designated Military Areas on the Pacific West Coast of the United States. Under the aegis of Lieutenant General John DeWitt, the Western Defense Command promulgated Civilian Exclusion Order No. 34¹¹⁵ on May 3rd, 1942 requiring that all persons of Japanese ancestry were to be excluded from Military Area No. 1 (covering large parts of the current states of California and Washington). Furthermore, Provision 2 required persons of Japanese ancestry living within Military Area No. 1 to report to assembly centres where they would temporarily stay, before moving to permanent military relocation centres. Finally, under Provision 3, the Western Defense Command issued a curfew order, requiring all persons of

¹¹¹ Franklin D. Roosevelt, Executive Order 9102 7 Fed. Reg. 2165- Establishing the War Relocation Authority. (Mar. 18, 1942), *available at* THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=16239>. (last visited Apr. 8, 2015)

¹¹² *Id.* (“I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.”), *see supra* Note 94

¹¹³ Act of March 21, 1942, 56 Stat. 173 (1942), *available at* DIGITAL HISTORY, http://www.digitalhistory.uh.edu/active_learning/explorations/japanese_internment/act_1942.cfm

¹¹⁴ John L. DeWitt, Public Proclamation No. 1 (March 2, 1942) *available at* WIKISOURCE, http://en.wikisource.org/wiki/Public_Proclamation_No._1

¹¹⁵ John L. DeWitt, Civilian Exclusion Order No. 34 (May 3, 1942) *available at* HIST. SOC’Y OF PA., <https://hsp.org/education/primary-sources/civilian-exclusion-order-no-34>

Japanese ancestry confined to a military area to “be within their place of residence between the hours of 8 p. m. and 6 a. m” (*Id.*). Gordon Hirabayashi, a student of the University of Washington was one of a handful of Japanese-American persons to violate the curfew and exclusion orders, which in turn led to his arrest and indictment by a jury. His case was ultimately reached the Supreme Court (*Hirabayashi v. United States*, 320 U.S. 81 (1943)) where he challenged the constitutionality of both the curfew and the civilian exclusion orders.

From the outset, it is crucial to establish that Hirabayashi’s case deals only with the constitutionality of curfew and exclusion orders. The Court is explicit that their ruling does not speak to the question of detention at all, since they do not believe that the reporting requirement of the exclusion orders amounts to confinement.¹¹⁶ In deciding the legality of the curfew order, the Supreme Court made it clear that Hirabayashi’s detention implicated a Zone I question, since “Congress, by the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066” (*Id.* at 87). Furthermore, the legislative history of the Act of March 21, 1942 reveals that Congress had considered the Act as a means to generate the necessary enforcement mechanism for the curfew orders.¹¹⁷ Finally, the Court noted that the constitutional question raised by the curfew orders was not one of unlawful delegation of Congressional powers to the Executive branch. Rather, it was whether Congress and the President acting together could enact a regime of curfew

¹¹⁶ *Hirabayashi v. United States*, 320 U.S. 81, 105 (Stone, C.J., majority) (“For this reason also it is unnecessary to consider the Government’s argument that compliance with the order to report at the Civilian Control Station did not necessarily entail confinement in a relocation center.”)

¹¹⁷ *Id.* at 89-90 (“[T]he legislative history...stated explicitly that its purpose was to provide means for the enforcement of orders issued under Executive Order No. 9066. This appears in the committee reports on the bill, which set out in full the Executive Order and the Secretary’s letter.”) (“A letter of the Secretary to the Chairman of the House Military Affairs Committee, of March 14, 1942, informed Congress that “General DeWitt is strongly of the opinion that the bill, when enacted, should be broad enough to enable the Secretary of War or the appropriate military commander to enforce curfews and other restrictions within military areas and zones”) (“The Chairman of the Senate Military Affairs Committee explained on the floor of the Senate that the purpose of the proposed legislation was to provide means of enforcement of curfew orders and other military orders made pursuant to Executive Order No. 9066.”)

orders in the interests of national security (*Id.* at 92), and the Court spends the rest of the opinion detailing the military necessity of the curfew and exclusion orders.

From a detention perspective, the *Hirabayashi* case has two important takeaways - first, it did not deal with the question of detention at all, but only with the power to impose curfews and exclusion orders. As noted earlier, the Court did not believe that reporting to a Civilian Control Station constituted detention; subsequently, the Zone I powers that the Court identifies in *Hirabayashi* only extend as far as curfew and exclusion authority. Second, the Court does not attempt to determine whether the President possesses the Article II authority to promulgate curfew and exclusion orders.

The constitutionality of the exclusion and internment programme was yet again challenged in the seminal case of *Korematsu v. United States*, 323 U.S. 214 (1944); the *Korematsu* case mirrored the *Hirabayashi* case in many regards - like *Hirabayashi*, Fred T. Korematsu came under the purview of a Civilian Exclusion Order (No. 34), and like *Hirabayashi*, he too deliberately violated the Order, believing it to be unconstitutional. Furthermore, in its decision, the Supreme Court relied on the same interpretation of the Act of March 21, 1942 that it did in *Hirabayashi*, finding the exclusion orders falling within the purview of the Act's statutory powers. The only difference between *Hirabayashi* and *Korematsu*, was that while *Hirabayashi* secured a unanimous opinion, Justices Murphy, Roberts and Jackson filed dissents in *Korematsu*. However, the dissents in *Korematsu* did not speak to the question of whether the reporting requirements as part of the Exclusion Orders functionally constituted detentions; rather, they were staunch oppositions to the violations of equal protection or inherent

racism, masked as military necessity that were being undertaken by the military.¹¹⁸

Subsequent to the above discussion, there are three important takeaways from the *Korematsu* and *Hirabayashi* cases - first, that their precedential value only extends to questions over the constitutionality of exclusion and curfew orders, and not questions of detention implicated in other internment cases such as *Endo*. Second, even in the question of exclusion and curfew, the Court emphasized the importance of Congressional authorization to ultimately sustaining the lawfulness of the Executive action. This reinforces the conception of Zone I as a position of plenary authority. Third, in determining the constitutionality of the exclusion orders, the Court also placed a heavy premium on the perceived military necessity for the exclusion and curfews. It can only follow from the same that when such necessity is not preset, the exclusion and curfew orders lose legal basis.¹¹⁹

Detaining loyal Americans: *Ex Parte Endo*

Mitsuye Endo's detention was the other case of note from the Japanese-American internment cases of World War II. Her life history made her continued detention particularly dubious - she was a *Nisei* (a person of Japanese ancestry who had never visited Japan), and had a brother in the U.S. Army. Additionally, she was unable to speak or read a word of Japanese.¹²⁰

¹¹⁸ See *Korematsu v. United States* 323 US 114, 234-235 (Murphy, J., dissenting) ("Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment"); *Id* at 243 (Jackson, J., dissenting) ("There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.")

¹¹⁹ *Korematsu* and *Hirabayashi*'s cases were re-opened in the 1980s, when it was discovered that an ethics lapse in the Solicitor General's office had led to the suppression of evidence on why the internment and exclusion of Japanese-American citizens was unnecessary for the military to combat sabotage. On two writs of *coram nobis*, *Korematsu*'s and *Hirabayashi*'s rulings were overturned. See *Korematsu v. United States*, 584 F.Supp. 1406 (N.D. Cal 1984), *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987)

¹²⁰ Brian Niiya, *Ex Parte Endo* (Densho Encyclopedia 2013), <http://encyclopedia.densho.org/Ex%20parte%20Endo/> (last visited Apr. 12, 2015).

Pursuant to military orders, she was evacuated from her house in Sacramento, California to Tule Lake War Relocation Centre, where she was detained by the War Relocation Authority that had been set up by Executive Order 9102, 7 Fed.Reg. 2165.¹²¹ ¹²² The War Relocation Authority had the power to process leave clearance, which allowed for the relocation of loyal Japanese-Americans to non-military areas. On February 19, 1943, Endo made an application for leave clearance, which was subsequently granted on August 16, 1943.¹²³ However, despite her leave clearance, the War Relocation Authority continued to detain her, maintaining that “detention for an additional period after leave clearance has been granted is an essential step in the evacuation program” (*Id.* at 295). Endo filed for a writ of *habeas corpus*, and her case ultimately made it to the Supreme Court (*Ex Parte Endo*, 323 U.S. 283 (1944)).

The first question to consider was whether the Act of March 21, 1942 granted the Executive statutory authority for detention of Japanese-Americans. Despite recognizing that the legislative history and text of the Act was silent on the question of “detention” (*Id.* at 301), the Court nonetheless concluded that the Act granted some level of detention authority, deducing the same from the power to evacuate Japanese-Americans and establish of relocation zones pursuant to Executive Order 9102 (*Id.* at 301). The Court reasoned that in order to run a successful relocation programme, it was necessary to at least temporarily detain civilians in Relocation Centres, and therefore, the power of detention may be inferred from the power to administer the same. Nonetheless, the Court ultimately concluded that the War Relocation Authority lacked any statutory basis to continue to detain Endo after it had determined her loyalty to the United States,

¹²¹ *Ex Parte Endo*, 323 US 283,285 (1944) (Douglas,J., majority)

¹²² Franklin D. Roosevelt, Executive Order 9102, 7 Fed. Reg. 2165 - Establishing the War Relocation Authority. (March 18, 1942), available at THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=16239> . (last visited Apr. 8, 2015)

¹²³ *Ex Parte Endo*, 323 US 283,294 (1944) (Douglas,J., majority)

and cleared her leave application (*Id.* at 302). This was because the Act of March 21, 1942 was a wartime measure decidedly focused at tackling the problem of espionage; however, an individual who had been determined to be loyal to the United States posed no threat of detention, and therefore, no military necessity could justify their continued detention (*Id.* at 303-304).¹²⁴

Whether the Act of March 21, 1942 contains any statutory detention authority merits further investigation. It is clear that the Act of March 21, 1942 legalizes the curfew programme, which is covered by the statutory language of “any military area or military zone prescribed...contrary to the restrictions applicable to any such area or zone.” Similarly, the Act legalizes relocation orders, insofar as it suggests criminal penalties for refusal to obey an order to leave promulgated by the relevant commander. However, inferring detention authority from the Act is problematic, since internment camps were not military zones or military areas prescribed by the Executive; rather, they remained civilian zones, administered by a civilian authority - the War Relocation Authority. In light of the same, the authority delegated to the Executive by the Act of March 21, 1942 ought not to extend to internment camps. However, even if we were to accept if the Act applied to internment camps, it is unclear how any detention powers follow from it. The Court’s opinion claims that detention powers were necessary to enforce short-term relocation. However, the Act seems to provide for an alternate statutory mechanism to deal with challenges related to enforcement - a civilian trial, where a violation earns one a fine not exceeding \$5000 or a prison sentence not exceeding a year, or both. Taking into the account the above, it bears reiterating that the legislative history of the Act never contemplated any powers

¹²⁴ See *Hirabayashi v. United States* 320 U.S. 81, 95 (Stone, CJ.,majority) (“in which Congress and the military commander united, that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort”) for a discussion of how the risks of sabotage and espionage were the motivating factors behind the Act of March 21,1942

of detention proceeding from it. Finally, although it was passed after Executive Order 9102, it cannot be conceived that the Act of March 21, 1942 provided any statutory codification of the same, since the date of first consideration of the bill in Congress, and the legislative debate on the same preceded the passage of Executive Order 9102.

Therefore, Endo's detention implicates a Zone II question, since it could only be grounded in the authority of Executive Order 9102 in the absence of authority from the Act of March 21, 1942. The Court correctly found no authority to authorize Endo's detention in this instance - insofar as Endo was decidedly loyal to the United States, no military necessity existed to justify her detention that could be grounded in concerns with espionage or sabotage. Similarly, her civilian status precluded her from Article II detention authority. In this regard, Endo's detention could not be justified on grounds of Executive authority, and therefore was correctly struck down. In this regard, Endo's detention aligns with the historical pattern of detention powers in Zone II – when Presidents find themselves in a Zone II detention situation, they lack any lawful powers of detention.

The Nazi Saboteur Case : *Ex Parte Quirin*

Few cases carry the historical significance and legacy that *Ex Parte Quirin*, 317 U.S. 1 (1942) does, despite challenges to its precedential value given the extraordinary circumstances under which it was decided. Furthermore, there are still bitter debates about the scope of holding versus *dicta* of the opinion. The case itself concerned eight saboteurs from Germany - seven German citizens, and Herbert Haupt, a dual U.S-German citizen - who had attempted to commit acts of sabotage in the United States during World War II.¹²⁵ Carried via German Submarine, they landed on Amagansett Beach, New York and Ponte Vedra Beach, Florida; however, before

¹²⁵ *Ex Parte Quirin*, 317 U.S. 1,21 (1942) (per curiam)

they were able to commit any act of sabotage, they were apprehended by FBI agents in New York (*Id.*). On July 2, 1942, President Franklin D. Roosevelt - drawing on his Article II authority as Commander-in-Chief, and “more particularly”, on the 38th Article in the Articles of War, Bul. No. 25, W.D. (10 U.S.C §1509) (1920) [hereinafter “Articles of War (1920)”] announced a military commission that would try the saboteurs.¹²⁶ Such a commission was empanelled and commenced a secret trial of the saboteurs; however, just as the military trial was drawing to a conclusion, the Supreme Court - in a specially convened summer session - took the step of accepting on appeal the petitioner’s claims for a writ of *habeas corpus*, which had been rejected by lower courts.

A careful examination of the *Quirin* holding is not only merited, but necessary, on account of the extent to which it has been relied upon to support claims of plenary Article II powers of detention and military trial.¹²⁷ Such conclusions are quite at odds with the holding the *Quirin* court confined itself to. The detention question in *Quirin* involves the detention of alleged enemy combatants prior to trial by military tribunal. The Court frames this question around the belief that neither the Executive nor Congress “possess...power not derived from the Constitution.”¹²⁸ Consequently, after listing the constitutional war powers of both branches, the Court reaches the conclusion that the Constitution “invests the President, as Commander in Chief, with the power to... carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing

¹²⁶ Franklin D. Roosevelt, 74 - Order Establishing a Military Commission to Try Eight Captured German Saboteurs, 7 Fed. Reg. 5103 (July 2, 1942) available at THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=16280> (last visited Apr. 8, 2015)

¹²⁷ See e.g. Brief for the Respondents at 9, 13, *Hamdi v. Rumsfeld* 542 U.S. 507 (2004) (No. 03-6696); U.S. DEP’T OF JUSTICE - OFFICE OF LEGAL COUNSEL, DETERMINATION OF ENEMY BELLIGERENCY AND MILITARY DETENTION 1, 2-5 (2002), available at <http://ccrjustice.org/files/memomilitarydetention06082002.pdf>

¹²⁸ *Ex Parte Quirin*, 317 U.S. 1, 25 (1942) (per curiam)

offenses against the law of nations, including those which pertain to the conduct of war” (*Id.* at 26). This framing highlights the deficiency of the inherent Presidential power claim by implying that the majority of inherent Presidential power lies in facilitating or acting pursuant to delegation by Congress. The Court’s limited vision of Commander-in-Chief powers echoes the limited conception of President’s martial law powers under the clause endorsed in *Ex Parte Benedict* and *Ex Parte Milligan*. Therefore, in light of the deficiencies of Article II power, the *Quirin* detention question must comprise a Zone I question in order for it to be lawfully authorized.¹²⁹

The Court goes on to establish that *Quirin* implicates a Zone I question by suggesting that the Articles of War (1920) provided the President with the statutory authority to detain the saboteurs pursuant to their trial. Article 15 of the Articles of War established the jurisdiction of military commissions to try Haupt and the seven Germans¹³⁰, and Article 12 of the Articles established that the saboteurs fell under the personal jurisdiction of military commissions.¹³¹ Finally, Congress explicitly delegated authority to the President in Articles 38 and 46 to prescribe the procedure for military commissions, which Roosevelt exercised in setting up the commission for the Nazi saboteurs. Consequently, the military trial (and by extension, pre-trial detention) of the saboteurs derived statutory authority from the Articles of War (1920), and not from the President’s inherent Article II powers.

¹²⁹ A Zone II Article II detention is not possible in this instance in light of the sunset on Article II powers suggested by this paper earlier. Congress had already acted to recognize a state of war against Germany, and more than 60 days had elapsed since the first acts of hostility against the German state.

¹³⁰ Articles of War (1921), Bul. No. 25, W.D. (“Art. 15 - The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, ...jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable”)

¹³¹ *Id.* (“Art 12 - to try any person subject to military law ...any other person who by the law of war is subject to trial by military tribunals.”)

In addition to the Articles of War (1920), the Court recognized another source of Zone I authority - treaties that the United States was party to, that had been ratified by the Senate (*See* Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2295 [hereinafter “Hague Convention (IV)”]). The Annex to Article I¹³² laid forward a framework for classifying belligerents that Haupt fell within, therefore allowing the United States to classify him as an enemy belligerent. Based on international law, the Court reached the conclusion that irrespective of whether or not a combatant was lawful or unlawful, he/she could be subject to capture and detention.¹³³

One portion of the *Quirin* opinion that has elicited much confusion is its statement regarding lawful and unlawful combatants; the *Quirin* court held that,

“By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”¹³⁴

This portion of the *Quirin* opinion has always been leveraged to suggest that the President maintains the authority to designate a combatant as lawful or unlawful, and therefore retains power over detention as an Article II prerogative. However, such a reading is grossly myopic.

¹³²Hague Convention (IV), Annex to Art. I, Oct. 18, 1907, 36 Stat. 2295 (“Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: 1. To be commanded by a person responsible for his subordinates; 2. To have a fixed distinctive emblem recognizable at a distance; 3. To carry arms openly; and 4. To conduct their operations in accordance with the laws and customs of war.”)

¹³³ This right is also recognized implicitly in the Regulations accompanying Article III to Hague Convention (IV), which contemplates the rights of enemy belligerents upon capture. *See* Hague Convention (IV), Annex to Art. 3, Oct. 18, 1907, 36 Stat. 2295 (“The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.”)

¹³⁴ *Ex Parte Quirin*, 317 U.S. 1,30-31 (1942) (per curiam)

First, the distinction between lawful and unlawful combatants is not grounded on the independent judgment of the President, but rather on statutory and treaty classification that renders certain activities unlawful. In *Quirin*, the act of spying from behind the military lines of the army one is belligerent to was a violation of the Annex to Article I of Hague Convention (IV). The saboteurs did not meet the standard for recognition as lawful belligerents pursuant to Article I of the Annex of the Regulations - by discarding their uniforms on the beach, they were in violation of the requirement “[t]o have a fixed distinctive emblem recognizable at a distance.”¹³⁵ Furthermore, the saboteurs’ actions fall within the statutory definition of spying according to the Annex to Article 29, Hague Convention (IV). It is undisputed that the saboteurs were “acting clandestinely or on false pretences,” and were attempting to infiltrate enemy lines for the advantage of belligerents.¹³⁶ Furthermore, the Annex to Article 30 appears to provide for the punishment of spies pursuant to a trial, and therefore, subsequently authorizes their pre-trial detention. In this regard, the opinion of the Court did not recognize any powers of detention that may emerge pursuant to the power to classify enemy belligerents as lawful belligerents or unlawful belligerents (spies). The classificatory mechanism for lawful and unlawful combatants was instead imported from Hague Convention (IV), and not devised at the prerogative of the President. Consequently, the story of the *Quirin* case is straightforward- it involved the designation of saboteurs as spies pursuant to the definition provided in Hague Convention (IV), and the subsequent military trial of said saboteurs through the powers given to the President under the Articles of War (1920) and Hague Convention (IV). Reading *Quirin* to imply Article II authorities is therefore deeply erroneous.

¹³⁵ Hague Convention (IV), Annex to Art. 1, Oct. 18, 1907, 36 Stat. 2295

¹³⁶ Hague Convention (IV), Annex to Art. 29, Oct. 18, 1907, 36 Stat. 2295

In conclusion, two facets of the *Quirin* case must be emphasized - first, it is a Zone I case, and therefore reinforces the theory that Zone I cases involve plenary detention power. Second, on accord of its Zone I status, *Quirin* does not implicate the Article II authority to detain. However, based on *Quirin*'s discussion of Article II powers, the only plausible conclusion to draw is that the Commander-in-Chief clause carries a paucity of power, and not plenary authority for detention. Therefore, it is improper to rely on *Quirin* to support the claims inherent Presidential power over detention, and many cases that have relied on it in this manner have erroneously quoted fragments from the opinion without placing them in the appropriate *Youngstown* context.

The forgotten detention of an Italian-American private: *In re Territo*

The *Quirin* case was not the only instance of government detention of a Prisoner of War from World War II. *In re Territo* 156 F.2d 142 (9th Cir. 1946), a case that has received little attention in detention jurisprudence, concerned American citizen Gaetano Territo, born to Italian parents in West Virginia, who left the United States for Italy in 1920.¹³⁷ While in Italy, Territo served in the Italian Army for 6 months in 1936, and again beginning in 1940 as private in the Army Engineering Corps (*Id.*). He was captured by the U.S. Army in Sicily while U.S. was at war with Italy in July 1943, and was temporarily detained at Bizerte as Prisoner of War, before his transfer to the U.S. mainland and was later held as a Prisoner of War at Camp Ross Figueroa in California. (*Id.*) From captivity, Territo petitioned the District Court for the Southern District of California, and later the Ninth Circuit Court of Appeals for a writ of *habeas corpus*, arguing that his American citizenship precluded him from detention as a Prisoner of War. However, both Courts rejected Territo's claim and relied on the authorities found in treaties to establish the

¹³⁷*In re Territo*, 156 F.2d 142, 143 (9th Cir. 1946) (Stephens,J.,majority)

lawfulness of Territo's detention.

Within the *Youngstown* framework, Territo's case is a Zone I detention, since the authorities for Territo's detention are gleaned from Hague Convention (IV). The Annex to Article III of Hague Convention (IV) defined both "combatants and non-combatants"¹³⁸ as members of the Armed Forces of belligerent parties, further noting that both had "a right to be treated as prisoners of war" upon capture (*Id.*). Subsequently, Territo's status as an engineer did not exempt him from the purview of the treaty. At the time of Territo's capture, the United States was engaged in a congressionally declared war against Italy.¹³⁹ In a state of declared war between two states, there is no ambiguity that Hague Convention (IV) provides significant statutory authority to the President. Concomitantly, there is no doubt that Territo could be detained as a belligerent. Crucially, the Court never considered - let alone supported - whether Commander-in-Chief powers were responsible for Territo's detention, and no portion of the *Territo* opinion supports claims of an Article II power of detention. Furthermore, in Territo's case, such considerations would be superfluous insofar as the Executive was detaining Territo pursuant to treaty obligations, and was therefore in Zone I.

The *Territo* case also aligns with this paper's central argument on *habeas corpus* suspension i.e unless Congress has suspended the writ of *habeas corpus* or delegated the suspension power to the Executive, detainees have an unqualified right to challenge their status

¹³⁸ See *supra* note 134

¹³⁹ Joint Resolution Declaring That a State of War Exists Between The Government of Italy and the Government and the People of the United States and Making Provisions to Prosecute the Same, S.J. Res 120, PL 332, 77th Cong. (1941) ("That the state of war between the United States and the Government of Italy which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Government of Italy; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States") available at ALTERNATE WARS, http://www.alternatewars.com/Congress/PL_332_Italy_DOW.pdf

and the lawfulness of their detention. Furthermore, as the Court's inquest in *Territo* demonstrates, *habeas corpus* review is meant to involve an independent merits determination of the facts of the detainee's situation, and not merely a deference to the Executive branch's version of events.

Finally, the *Territo* court provides guidance on temporal limits to detention. Although formal hostilities between the U.S and Italy had ceased at the time of Territo's detention, the two countries were yet to negotiate a treaty of peace. Subsequently, Territo maintained the status of a belligerent towards the United States, which justified his continued detention.¹⁴⁰ However, this conclusion also serves to highlight the paucity of Zone II detention authority. The existence of a congressionally declared state of war is an access card to the detention powers found in Hague Convention (IV). However, the moment Congress successfully negotiates a peace treaty, the authorities of Hague Convention (IV) disappear, and Territo's detention would no longer raise a Zone I question. Therefore, the inference that in a state of declared peacetime, the President lacks any Article II detention power is echoed by the Court's conclusion that the passage of a peace treaty forms the temporal bound on the lawful authority to detain Territo.

Unsurprisingly - and before the case could reach the Supreme Court - Territo was deported to Italy in 1946¹⁴¹, and according to the Italian Embassy, was immediately discharged from the army.¹⁴²

¹⁴⁰ *In re Territo*, 156 F.2d 142, 148 (9th Cir. 1946) (Stephens, J., majority) ("However, no treaty of peace has been negotiated with Italy and petitioner remains a prisoner of war.")

¹⁴¹ Jess Bravin, How Ditchdigger for Mussolini Plays a Role in War on Terror (Wall St. Journal 2002), <http://www.wsj.com/articles/SB1035765232593485071> (last visited Apr. 10, 2015)

¹⁴² The United States and Italy signed a peace treaty a few months after Territo's release. *See* Treaty of Peace with Italy, 61 Stat. 1245 (1947) available at LIBRARY OF CONG., <http://www.loc.gov/law/help/us-treaties/bevans/m-ust000004-0311.pdf>

Non-Detention Act

In the early stages of the Cold War, when McCarthyism had gripped the nation and fear of the Red Scare loomed large over most parts of the U.S., Congress passed the Internal Security Act, 64 Stat. 987 (1950) over President Truman's veto. Title II of the Internal Security Act ("The Emergency Detention Act") granted the Executive broad-stroked detention authority to fight Communist influences within the United States. Section 103(a) of the Act empowered the Executive to detain anyone who might "conspire with others to engage in, acts of espionage or of sabotage."¹⁴³ Warrants for the arrest of such individuals could be issued by the Attorney General and the Justice Department. Section 105(a) set up a Detention Review Board within the Executive as an appellate body, where individuals could challenge their detentions. Although the writ of *habeas corpus* was available to all detainees, the language of the Act clearly contemplated that determinations of the necessity of detention be outsourced to the Detention Review Board, and not Federal Courts.¹⁴⁴ In this regard, The Emergency Detention Act was particularly terrifying since it contemplated the *Vallandigham*-esque notion of the Executive branch serving as a check on its own excesses.

Some twenty years later, better sense prevailed, and Congress took steps to repeal the Emergency Detention Act. In its stead, Congress passed the Non-Detention Act of 1971 (18

¹⁴³ Internal Security Act, 64 Stat. 987 of 1950, Title II, Section 103(a), *available at* Legisworks, CONG. DATA COAL., <http://legisworks.org/sal/64/stats/STATUTE-64-Pg987.pdf>

¹⁴⁴ *Id.*, Sec 109(a) ("Any Board created under this title is empowered- (1) to review upon petition of any detainee any order of detention issued pursuant to section 104 (d) of this title ; (2) to determine whether there is reasonable ground to believe that such detainee probably will engage in, or conspire with others to engage in, espionage or sabotage ; (3) to issue orders confirming, modifying, or revoking any such order of detention ; and (4) to hear and determine any claim made pursuant to this paragraph by any person who shall have been detained pursuant to this title and shall have been released from such detention, for loss of income by such person resulting from such detention if without reasonable grounds . Upon the issuance of any final order for indemnification pursuant to this paragraph, the Attorney General is authorized and directed to make payment of such indemnity to the person entitled thereto from such funds as may be appropriated to him for such purpose")

U.S.C. §4001(a)), also known as the Railsback Amendment, after its sponsor Tom Railsback. The Non-Detention Act severely curbed the erstwhile Executive powers of detention by requiring that “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” The legislative and executive histories of the bill are of particular importance, because neither of them indicate that the Bill was thought to infringe on any Article II detention authorities of the President.

In Congress, even opponents of the Bill did not portray it as an infringement of Article II authority. Richard Ichord, Chair of the House Internal Security Committee argued that it would force the President’s hand in wartime, by depriving the Executive of its “most effective means of coping with sabotage and espionage agents in war-related crises.”¹⁴⁵ Furthermore, Ichord’s concern was not that the Railsback Amendment interfered with the President’s Article II detention authority, but rather exactly the opposite. In a world with §4001(a), Ichord worried that from a *Youngstown* perspective, the President would always find himself/herself in Zone III, and would be unable to lawfully conduct any detention activities absent explicit statutory authorization.¹⁴⁶ Ichord feared that such a requirement would greatly limited the ability of the President to respond to situations of military necessity. The recognition that §4001(a) curtailed Presidential power was also recognized by supporters of the Bill in the House. Yet, this was considered a desired outcome by many in House, since they sought to eliminate the ability of the President to exploit the twilight of Zone II, as Roosevelt had done in setting up internment

¹⁴⁵ 117 CONG. REC. H 31,542 (daily ed. Sept. 13, 1971) (statement of Rep. Ichord)

¹⁴⁶ *Id.* at H31,544 (“On principles reiterated in the steel seizure case, *Youngstown Company v. Sawyer*, 343 US. 579 (1952), undoubtedly if this act were in force during World War II, the group evacuation of American citizens of Japanese ancestry would not have occurred, nor would any such action have been upheld by the court”)

camps.¹⁴⁷ Rep. Railsback, the sponsor of the Bill suggested that if the Non-Detention Act were to pass, the power to detain in times of war would only be available to the Executive branch pursuant to either Congressional delegation, or in a situation of invasion of the country.¹⁴⁸

The actions of the Executive branch in the context of §4001(a) are even more remarkable and revealing. If Congress were indeed trampling upon an Executive prerogative, then it would have been likely to see the Executive fight to preserve its constitutional rights. However, the Executive Branch seemed to happily acquiesce to the limitations placed on it by §4001(a). The Signing Statement to the Bill read, “This repeal legislation was wholeheartedly supported by this administration.”¹⁴⁹ Furthermore, if the protection of a core constitutional power was at stake, one would have expected the Executive branch to support members of Congress fighting to prevent its passage. However, as Congressman Smith noted, “Some people have indicated that the President has sovereign powers. I asked the Department of Justice what those sovereign powers were, and I asked them to give me a review of those powers. I have received no information from them.”¹⁵⁰ This acquiescence is particularly relevant since just a few years later, the Executive branch vigorously opposed the constitutionality of the War Powers Resolution of 1973 (50 U.S.C. §§1541-1548) (1973). This Executive acquiescence reinforces the conclusion that no

¹⁴⁷ *Id.* at H31,537 (statement of Rep. Railsback) (“Let me say I understand your position, but frankly simply repealing title II does not, in my opinion, have a chance. I think the gentleman from Missouri, who is on the opposite side, would agree. I think what that does simply is it leaves it in limbo. If you want to follow what he has proposed, that is one thing. If you want to prevent what happened in 1942, then that is something else”)

¹⁴⁸ *Id.* (“Even under the amendment that will be offered by the gentleman, I believe there are three events which trigger or can trigger a Presidential proclamation. Two of them would now require in his amendment some kind of congressional action in the near future. The other thing is that under martial law, if there were an invasion of this country and the courts were not able to operate, there is no question but what the President would retain his powers in that event”)

¹⁴⁹ Presidential Statement on the Repeal of the Emergency Detention Act, 32 WEEKLY COMP. PRES. DOC. 1338 (1971)

¹⁵⁰ 117 CONG. REC. H 31,536 (daily ed. Sept. 13, 1971) (statement of Rep. Smith)

Article II authority was suppressed by the Act, which in turn suggests that no such authority (except in cases of invasion) existed in the first instance.

From an analytic perspective, §4001(a) had one important *Youngstown* impact - it functionally eliminated Zone II as a detention category (except in cases of invasion or defensive war powers) when it came to American citizens, since §4001(a) eliminated the notion of Congressional silence on questions of detention. However, this paper already recognizes a need for Congress to act to legitimate Zone II detention powers, since the President only has a 60 day sunset period before he/she loses detention authority. In this regard, §4001(a) coheres with the already limited extent of powers of the Executive in Zone II suggested by this paper's analysis thus far.

Section V : The War on Terror

“But when you take his[then Solicitor General Paul Clement] argument at core, it is, trust us. And who is saying trust us? The executive branch. And why do we have the great writ? We have the great writ because we didn't trust the executive branch when we founded this Government....I would urge the Court to find that citizens can only be detained by law. And here there is no law. If there is any law at all, it is the executive's own secret definition of whatever enemy combatant is...And don't fool yourselves into thinking that that means somebody coming off a battlefield because they've used it in Chicago, they've used it in New York and they've used it in Indiana. The Congress needs to act here.”¹⁵¹

~ Frank Dunham Jr., counsel for Yaser Esam Hamdi, *Hamdi v. Rumsfeld*

For the first time in many years, the United States faced an attack on its mainland from foreign agents on September 11, 2001, when hijacked planes manned by terrorists from Al Qaeda and their affiliates crashed into the World Trade Centre and the Pentagon. In response, the U.S. entered an international armed conflict against Al Qaeda, the Taliban and their affiliates, and the “War on Terror” continues to persist nearly 15 years after it initially began. Unequivocally, the most important piece of legislation to emerge from the aftermath of the September 11 attacks was the Authorization for the Use of Military Force (AUMF), S.J. Res 23, 115 Stat. 224 (2001), which explicitly delegates broad authorities to the President. As noted earlier, the AUMF authorizes the President “*to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided*

¹⁵¹ Oral Argument at 57:00, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696)

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” (emphasis added) (AUMF §2(a)). Of some importance was one of the “Whereas clauses” used to explain the necessity of Joint Resolution; the fifth clause, which was missing from the original White House draft of the document read, ¹⁵² “Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States” (Preamble to AUMF). While jurisprudence suggests that the language of the preamble to an Act cannot be cited as statutory authority for an action, Congress’ decision to affirmatively claim that the President possessed the necessary powers to conduct operations against Al Qaeda based purely on his inherent constitutional powers was striking. ¹⁵³

The scope of the AUMF is limited when dealing with individuals who were not responsible for planning, authorizing, committing or aiding the acts of September 11th, but are nonetheless affiliated with Al Qaeda or the Taliban. In those circumstances, it applies only to individuals who are enemy combatants upon detention or capture, or who will enter enemy combatant status in the near future. This reading is grounded in the statutory language of the AUMF, which apportions power to the Executive only “in order to prevent any future acts of international terrorism against the United States.” (AUMF §2(a)) Therefore, the detention of a citizen who does not pose a future terrorist threat to the U.S, falls outside the purview of the detention powers contemplated by the AUMF.

¹⁵² Richard F. Grimmett, Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History 1, 3-4 (Cong. Research Serv. 2007), <http://fas.org/sgp/crs/natsec/RS22357.pdf>.

¹⁵³ However, as Bradley and Morrison note, Legislative acquiescence to the Executive ought not be taken *prima facie* to suggest a persuasive opinion on constitutional powers because of the competing partisan concerns of Congress; *see supra* Note 19

Detention as an incident of waging war: Hamdi v. Rumsfeld

Perhaps the most important case of detention from the War on Terror era was that of Yaser Esam Hamdi, an American citizen who was captured in Afghanistan while fighting for the Taliban in late 2001. Hamdi joined the Taliban in July or August 2001, and had remained with them during and after the attacks on September 11th, 2001.¹⁵⁴ After unilaterally determining that Hamdi was an enemy combatant, the military took control over Hamdi and transferred him initially to Guantanamo Bay, and later to naval brigs, first in Norfolk, Virginia and then Charleston, South Carolina upon learning that he was a U.S. citizen.¹⁵⁵ Two aspects of Hamdi's case bear mentioning - first, it was amongst the first instances where a citizen was captured outside the sovereign territory of the United States, and then brought back to the United States for detention. Second, the Executive branch had not charged Hamdi with violations of any laws - either domestic or international. Therefore, the purpose of Hamdi's detention was not instrumental to trying him in a military commission; rather, the Government only sought to detain Hamdi to prevent him from re-entering the battlefield.¹⁵⁶

The specific question of whether the President was lawfully authorized to detain Hamdi was a cause of substantial polarization within the Federal Court system. The District Court for Eastern Virginia did not reach the question of where power to detain originated from, merely concluding that the facts on the record were insufficient to authorize Hamdi's detention. (*See Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2004)). The District Court found two particular deficiencies with the Declaration of Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy which was included with the factual record of the case

¹⁵⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (O'Connor, J., plurality)

¹⁵⁵ *Id.*

¹⁵⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 539-540 (2004) (Souter, J., concurring/dissenting)

[hereinafter “Mobbs’ Declaration”]¹⁵⁷ - first, there were concerns regarding whether the report was produced pursuant to a fair and impartial process. The Court took particular note of the ambiguity over who Mobbs reported to, over who had asked him to commission the report and what procedures Mobbs had relied on in preparing the report.¹⁵⁸ Second, they found that the Mobbs Declaration did not sufficiently demonstrate that Hamdi was engaged in a fight against the United States with the Taliban.¹⁵⁹ However, while the Court did not reach the question of the legal basis for Hamdi’s detention, they did cite both the AUMF and Article II Commander-in-Chief powers as authorities for detention (while not endorsing either in the opinion).

Upon appeal, the Circuit Court strongly rebuked the District Court for not showing “proper deference to the government's legitimate security and intelligence interests.” (*See Hamdi v. Rumsfeld*, 316 F.3d 450,461 (4th Cir. 2003)). In overturning the District Court’s decision, the 4th Circuit took two important positions - first, it argued that Commander-in-Chief powers of Article II provided the President with the authority necessary to detain Hamdi.¹⁶⁰ Second, the 4th Circuit adopted the position that the 2001 AUMF provided the necessary statutory authority to fulfill the requirements of §4001(a) of the Non-Detention Act, on account of its “all necessary and appropriate force” language. Since capturing and detaining combatants was a necessary incident of warfare, the AUMF plainly construed was read to authorize Hamdi’s detention (*Id.* at

¹⁵⁷ The Mobbs Declaration was a declaration by Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy. The Mobbs’ Declaration provided factual detail on the circumstances of Hamdi’s capture and the need for his detention.

¹⁵⁸ *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527,534-535 (E.D. Va. 2004) (Doumar, DJ)

¹⁵⁹ In particular, the District Court finds the description of Hamdi’s affiliation with the Taliban is both vague and poorly substantiated. See, e.g. *Id.* at 534-536 (“The declaration makes no effort to explain what “affiliated” means nor under what criteria this “affiliation” justified Hamdi's classification as an enemy combatant. The declaration is silent as to what level of “affiliation” is necessary to warrant enemy combatant status.”) (“Hamdi was originally classified as an enemy combatant by “military forces” based upon his interviews and in light of his association with the Taliban. *Id.* at 2. The document is silent on whose military forces, i.e. U.S. military forces or Northern Alliance forces, who originally classified Hamdi as an enemy combatant.”)

¹⁶⁰ See e.g. *Hamdi v. Rumsfeld*, 316 F.3d 450,459,461,471 (4th Cir. 2003) (Wilkinson, CJ. majority)

460, 468, 475).

The claim that Article II of the Constitution contained an inherent power to detain is a particularly spurious one, and was backed up by little in the way of historical analysis. The 4th Circuit cited three opinions as support for its claim that Article II authorized Hamdi's detention - first, it cited its own earlier decision from *Hamdi II*¹⁶¹, which was entirely reliant on the Supreme Court's holding in *The Prize Cases*, 67 U.S. 635 (1863), which concerned President Lincoln's blockades of Southern ports during the Civil War. The section of the opinion that the 4th Circuit placed particular emphasis on reads,

Whether the President, in fulfilling his duties as Commander-in-chief in suppressing an insurrection, has met with such armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. (*Id.* at 670)

However, relying on the above excerpt of the *Prize Cases* to argue a constitutional power to detain citizens is deeply misguided. First, the *Prize Cases* is the inapposite opinion from the Civil War period, since the fundamental question it dealt with was whether a formal declaration of a state of war was necessary to blockade ports.¹⁶² No aspect of the case concerned the detention of persons; the more apposite cases from the Civil War period - *Ex Parte Merryman*, 17 F.Cas. 144 (C.C.D. Md. 1861), *Ex Parte Benedict*, 3 F.Cas. 1292 (N.D.N.Y. 1862) and *Ex Parte Milligan*, 71 U.S. 2 (1866) - all unambiguously concluded that the President possesses no inherent constitutional detention power. Second, even if the excerpt from the *Prize Cases* was to be read independent of prior holdings, the 4th Circuit inappropriately conflated two separate

¹⁶¹ *Hamdi v. Rumsfeld*, 296 F. 3d 278 (4th Cir. 2002)

¹⁶² *The Prize Cases*, 67 U.S. 635,666 (1863) (Grier,J.,majority) ("Let us enquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.")

legal questions - the first concerned who had the power to designate an individual as an enemy combatant, and the second concerned what level of protections were owed to an enemy combatant. Therefore, even if the 4th Circuit correctly suggested that the *Prize Cases* allowed the Executive to unilaterally designate an individual as an enemy combatant, the history of *habeas corpus* in the United States conclusively shows that such individuals have the right to challenge that classification (*See Smith v. Shaw, Ex Parte Milligan*). As this paper has argued, the right to *habeas corpus* is only limited under two conditions - first, when Congress has lawfully suspended it, or second, when the Courts are closed, in which case it is inaccessible as a remedy for potentially unlawful detention. Furthermore, a closer reading of the *Prize Cases* supports the conclusion that the Court was not endorsing an Executive prerogative over acts over detention; the Court expended considerable effort justifying Congress' tacit assent to the state of war through a number of appropriations bills.¹⁶³ Third, the above excerpt of the *Prize Cases* only referred to the determination of whether a state of war exists, which therefore requires the Court to only determine the "character of belligerents."¹⁶⁴ This confined inquiry makes sense for the context of the *Prize Cases*, since the United States would be at a state of war if it were engaged in conflict against belligerents, and not in a state of war if conflict was against non-belligerents. Nothing from that determination can then be used to infer the broad Article II detention power over belligerents that the *Hamdi* court relies on it for. Rather, the only Article II detention powers the President has over enemy belligerents are those detailed earlier in this paper, and which exist independent of the holding in the *Prize Cases*. Finally, the reliance on the *Prize*

¹⁶³ *See e.g. The Prize Cases*, 67 U.S. 635,696 (1863) (Grier, J., majority) ("The Act of 31st July....appropriates \$2,000,000 to be expended under the authority of the President in supplying and delivering arms and munitions of war to loyal citizens[w]e agree, therefore, that the Act 13th July, 1861, recognized a state of civil war between the Government and the people of the State described in that proclamation")

¹⁶⁴ *Id.* at 670

Cases is erroneous insofar as it does not account for the development in the statutory landscape since then. As discussed earlier, the Non-Detention Act, 18 U.S.C §4001(a) was passed by Congress and signed by the Executive without concern that it impeded the President's Article II authority.

The Court also relied on *Ex Parte Quirin* 317 U.S. 1 (1942) and *Ludecke v. Watkins*, 335 U.S. 160 (1948) to support the President's power to detain Hamdi on the basis of Article II authority; however, neither case can support such a conclusion. The rationale for *Ex Parte Quirin* has already been explained above. Unlike Hamdi's situation, *Ludecke v. Watkins* dealt with the question of alien enemies, and not U.S. citizens and therefore cannot apply to the facts of Hamdi, and the broader question of detention authority over citizens.

At the Supreme Court, the question of detention took another turn, as the Court produced a number of opinions with no single opinion finding a majority from the justices. The plurality opinion, authored by Justice Sandra Day O'Connor acknowledged the Government's claim that the Executive possessed constitutional detention authority, yet did not reach the question of whether such claims were accurate.¹⁶⁵ Rather, the plurality claimed that Congress had authorized the detention of Hamdi through the provisions of the AUMF, and also found the AUMF satisfied the requirements of §4001(a) of the Non-Detention Act.¹⁶⁶ One important note on the implication of the plurality position is that statutes need not contain the specific language of detention for the powers of detention to be inferred from the same. In *Hamdi*, the Court reasoned that the "necessary and appropriate powers"¹⁶⁷ delegated to the President were pursuant to engaging in

¹⁶⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507,517-518 (2004) (O'Connor,J., plurality) ("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.")

¹⁶⁶ *Id.*

¹⁶⁷ *See supra* note 2

armed conflict against Al Qaeda, the Taliban and their affiliates. Since detention was “a fundamental incident of waging war” (*Id.* at 519) and Hamdi’s case involved “narrow circumstances” (*Id.* at 519), the powers of detention could be inferred from the AUMF.¹⁶⁸ However, related to the detention issue, the position of the plurality on *habeas corpus* echoes the position of this paper - since the writ had not been suspended by Congress, it was available to Hamdi (*Id.* at 525).

Four justices disagreed with the plurality position that the AUMF gave the Executive sufficient authority to detain Hamdi, which would in turn migrate Hamdi’s detention from a Zone I question to a Zone III question.

In a concurrence/dissent, Justice Souter - joined by Justice Ginsburg - argued that the AUMF did not meet the requirements of §4001(a), adopting the view that in the absence of the specific statutory language of detention, the AUMF could not be relied on as “an act of Congress” for the purposes of §4001(a). (*Id.* at 540 (Souter,J., concur/dissent)) Furthermore, while Souter does not reach the question of whether the President may rely on his Commander-in-Chief powers to detain Hamdi, he provides sufficient kernels of insight to suggest that such authority likely lies beyond the Executive’s reach. Souter notes the weakness of the “the Government’s mixed claim of inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war.”¹⁶⁹ Furthermore, he recalls the Youngstown

¹⁶⁸ This pattern of inferring powers not mentioned directly in statute reflects the Supreme Court’s approach in *Ex Parte Endo* 323 U.S. 283, where they found some powers of detention as a necessary incident of maintaining internment camps. It is a different and unrelated matter that they did not find the powers inferred sufficient to authorize Endo’s detention.

¹⁶⁹ *Id.* at 552 (“I will, however, stray across the line between statutory and constitutional territory just far enough to note the weakness of the Government’s mixed claim of inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war. It is in fact in this connection that the Government developed its argument that the exercise of war powers justifies the detention, and what I have just said about its inadequacy applies here as well. Beyond that, it is instructive to recall Justice Jackson’s observation that the President is not Commander in Chief of the country, only of the military.”)

framework which notes that Presidential authority is at “at its lowest ebb” when the President acts contrary to Congress (*Id.* at 552).

Justice Scalia - joined by Justice Stevens - went a step further than Souter; he argued that the only condition that would lawfully allow for Hamdi’s detention without trial was a suspension of *habeas corpus* by Congress.¹⁷⁰ The AUMF could not authorize Hamdi’s detention since the Government had never argued that the AUMF was an implementation of the Suspension Clause. Quoting *Youngstown*, Scalia noted that “The Suspension Clause was by design a safety valve, the Constitution’s only “express provision for exercise of extraordinary authority because of a crisis.”¹⁷¹ Of all the opinions, Scalia’s relies on the history of detention in the United States to the greatest extent. In addition to chronicling the thoughts of the Founders (which reflected a desire to not place the power of detention in the hands of the President), Scalia draws on a litany of historical examples – including the Burr conspiracy, *In re Stacey*, *Ex Parte Milligan* and *Ex Parte Endo* – to find that, “[a] view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the mistrust” (*Id.* at 570) that is reflected in the jurisprudential history. Consequently, he found that Hamdi’s detention was unlawful, both insofar as it lacked statutory authority from Congress, and also because the President lacked the inherent constitutional power to detain Hamdi.

¹⁷⁰ *Id.* at 573-574 (Scalia, J., dissenting) (“A suspension of the writ could, of course, lay down conditions for continued detention, similar to those that today’s opinion prescribes under the Due Process Clause. . . . The plurality finds justification for Hamdi’s imprisonment in the Authorization for Use of Military Force. . . . This is not remotely a congressional suspension of the writ, and no one claims that it is.”)

¹⁷¹ Scalia also deals with the specific question of detention until the end of hostilities in Hamdi’s case. Unlike most prior cases of detention, this facet made Hamdi’s cases unique insofar as most other trials were detention pursuant to intended military trial. Scalia made it clear that such detention was unlawful in Hamdi’s case, and the appropriate model to follow was that which the U.S. Government employed against John Walker Lindh, who was charged with ten violations of the U.S. Code, and tried via the usual criminal process.

Thomas' opinion - a dissent – echoed the plurality reasoning that the Bush administration - armed by the AUMF from Congress and the President's Article II powers - had all the necessary authority to detain Hamdi. He only breaks from the plurality in suggesting that detention need not be terminated at the end of hostilities.¹⁷² While Thomas' opinion does not reach the question of whether the President has the inherent constitutional power to detain Hamdi, he does seem to suggest that such powers might exist. He notes:

“Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so.... AUMF authorizes the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” of September 11, 2001.” (*Id.* at 588)

From a *Youngstown* perspective, the four opinions in *Hamdi* reinforce our understanding of the relative extent of detention power in each zone.¹⁷³ In reaching this conclusion, it is not necessary to resolve the question of whether the AUMF provides for detention power and fulfills the requirements of §4001(a). Rather, if we accept each opinion's respective interpretation of the AUMF as true, we can still resolve the question of where detention powers originate from. The plurality opinion and Thomas' opinion, which legitimized Hamdi's detention on the grounds of the provisions of the AUMF placed the President in Zone I; therefore, they did not even need to reach the question of Article II detention powers since statutory authorities legitimized Hamdi's detention. Both the Scalia and Souter opinions place Hamdi's detention in Zone III; neither

¹⁷² *Id.* at 589 (Thomas.J., dissenting) (“And, in any case, the power to detain does not end with the cessation of formal hostilities”)

¹⁷³ One important clarification is that the central holding of the case along which the concurrences and dissents split was over the question of whether the American citizens, designated as Enemy Combatants ought be able to challenge their detention in front of Combatant Status Review Tribunals that had been established by the Department of Defense. Consequently, Souter's opinion was a concurrence, (although it dissented on the question of where the detention power lay), and Scalia's and Thomas' were dissent.

opinion believes that the AUMF authorized Hamdi's detention, and therefore, the prohibitions of §4001(a) apply. Scalia emphatically decries the notion that Article II contains any level of power to authorize Hamdi's detention, and notes that the power to detain without trial can only be exercised by Congressional suspension of *habeas corpus*. While Souter did not ultimately resolve the issue (since the central issue in the case was the *habeas* question), his opinion expressed similar levels of skepticism over claims of an Article II detention authority. Therefore, all four opinions are in accordance with the historical trend that has been observed - in Zone I, a plenary authority to detain exists since Congress has acted by sanctioning the detention. Conversely in Zone III, lacking Congressional sanction, the Executive branch lacks detention authority grounded in its own constitutional powers.

Detention on American Soil: Jose Padilla

The other notable instance of detention of an American citizen during the Bush presidency was that of Jose Padilla. On May 8, 2002, Padilla was arrested by FBI officials upon arrival at Chicago's O'Hare on charges of material support. However, a little over a year later, he was designated by President Bush as an enemy combatant, who unilaterally placed him in military detention.¹⁷⁴ The history of Padilla's case as it made its way through the Federal Court system is rich and varied, with each court approaching the detention question from a different angle.

In the first case, *Padilla ex rel. Newman v. Bush*, 233 F.Supp.2d 564 (S.D.N.Y. 2002), Padilla's legal counsel, Donna Newman filed a *habeas corpus* petition in the District Court for the Southern District of New York. The District Court found that Padilla could be classified as an enemy combatant by the President pursuant to his Article II powers as Commander-in-Chief

¹⁷⁴ *Rumsfeld v. Padilla*, 542 U.S. 426, 430-431 (Rehnquist,CJ., majority) (2004)

and pursuant to the powers delegated to him by the AUMF, and the power to detain followed from the same.¹⁷⁵ Furthermore, it found that the AUMF met the statutory requirements of §4001(a).

However, in an incredibly detailed opinion, the 2nd Circuit reversed and struck down Padilla's detention (*Padilla v. Rumsfeld*, 352 F.3d 695 (2nd. Cir, 2003)) on the grounds that it violated §4001(a) of the Non-Detention Act. The 2nd Circuit engaged in a comprehensive *Youngstown* analysis to verify the scope of the President's authorization to detain Padilla; the subsequent opinion has three defining aspects - first, it squarely forecloses the possibility that a Commander-in-Chief power exists to detain Padilla. An Article II power to detain *Padilla* could be sustained if the President possessed the authority to designate American citizens as enemy combatants and therefore order their detention subsequent to this classificatory authority. However, the classificatory power is not an inherent Executive prerogative. Rather, based on the unqualified right to *habeas corpus* recognized throughout American history except in situations where the writ was suspended, Courts are required to validate the Executive's judgment by making a merits determination on the status of a detained individual. This approach is further emphasized by the reliance on Chief Justice Marshall's opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) to support the proposition of judicial review of Executive designation of a citizen's status.¹⁷⁶ Subsequently - as the Court notes - the Government is compelled to rely on the claim that the Commander-in-Chief clause provides inherent detention authority. However,

¹⁷⁵ *Padilla ex rel. Newman v. Bush*, 233 F.Supp.2d 564 (S.D.N.Y. 2002) (Mukasey,J.) (“The President, for the reasons set forth above, has both constitutional and statutory authority to exercise the powers of Commander in Chief, including the power to detain unlawful combatants, and it matters not that Padilla is a United States citizen captured on United States soil.”)

¹⁷⁶ *Padilla v. Rumsfeld*, 352 F.3d 695,713 (2nd. Cir, 2003) (Pooler,J. and Parker,J., majority) (“Where the exercise of Commander-in-Chief powers, no matter how well intentioned, is challenged on the ground that it collides with the powers assigned by the Constitution to Congress, a fundamental role exists for the courts”)

the Court found that power explicitly delegated to Congress under the plenary powers of Captures Clause (U.S. Const. art. I, § 8, cl. 10), the Suspension Clause (U.S. Const. art. I, § 9, cl. 2), and the Third Amendment (U.S. Const. amend. III). The confluence of the above constitutional powers led the Court to reject the conclusion that the President could claim the inherent authority to detain Padilla. The Court further emphasized that neither *Ex Parte Quirin* 317 U.S. 1(1942) nor the *Prize Cases* 67 U.S. 635 (1863) supported the proposition that the President possessed Article II authority to detain Padilla.

Having settled the question of Presidential Powers, the Court then systematically disproved the claim that any statutory authority existed for Padilla's detention. First, the Court reasoned that in the absence of Congressional statute that could satisfy §4001(a) of the Non-Detention Act, Padilla's case would fall within the remits of Zone III of *Youngstown*, and would subsequently be unconstitutional. Second, they failed to find such authority in the AUMF, suggesting that it could not meet the high threshold set by the Non-Detention Act and the *Endo* opinion.¹⁷⁷ The Court went one step further, suggesting that even if the powers of detention were a part of the "necessary and appropriate" authority allocated to the President, such powers had a geographic limitation, i.e. they are confined to active theatres of war, and not mainland United States, where no conflict existed.¹⁷⁸ Finally, the Court drew attention to §2(b) of the AUMF, which specifically addressed §5(b) of the War Powers Resolution, 87 Stat. 55 (50 U.S.C. §1541) (1973), which required Congressional sanction to conduct armed conduct for more than sixty

¹⁷⁷ *Id.* at 723 ("The plain language of the Joint Resolution contains nothing authorizing the detention of American citizens captured on United States soil, much less the express authorization required by section 4001(a) and the "clear," "unmistakable" language required by *Endo*.")

¹⁷⁸ *Id.* ("While it may be possible to infer a power of detention from the Joint Resolution in the battlefield context where detentions are necessary to carry out the war, there is no reason to suspect from the language of the Joint Resolution that Congress believed it would be authorizing the detention of an American citizen already held in a federal correctional institution and not "arrayed against our troops" in the field of battle")

days. The Court reasoned that insofar as Congress had found it appropriate to explicitly address the limitations on wartime conduct implicated by one statute (War Powers Resolution) but not another (Non-Detention Act), it seemed “inconceivable” that Congress sought to authorize the detention of citizens.¹⁷⁹ Subsequently, the 2nd Circuit’s holding reaffirmed the core argument of this paper - that in Zone III situations, the President lacks the requisite constitutional authority to detain American citizens.

At the Supreme Court level in *Rumsfeld v. Padilla*, 542 U.S. 426 (2003), the Court decided to shun a ruling on the merits in favor of ruling on jurisdictional grounds. Insofar as Padilla was being detained in South Carolina, the appropriate location for filing was in the 4th Circuit, and not the 2nd Circuit where Padilla’s lawyers had filed for a writ of *habeas corpus*.¹⁸⁰ Subsequently, despite Justice Stevens’ dissent noting the momentous importance of deciding the case,¹⁸¹ ¹⁸²Padilla’s petition was dismissed on jurisdictional grounds.

After re-filing in South Carolina, the case made its way up to the 4th Circuit, now in the form of *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005); at the District Court level, the lower Court had echoed the 2nd Circuit’s argumentation on the inadequacy of both the statutory and constitutional powers to support Padilla’s continued detention, suggesting that the only options

¹⁷⁹ *Padilla v. Rumsfeld*, 352 F.3d 695, 723 (“It is unlikely — indeed, inconceivable — that Congress would expressly provide in the Joint Resolution an authorization required by the War Powers Resolution but, at the same time, leave unstated and to inference something so significant and unprecedented as authorization to detain American citizens under the Non-Detention Act.”)

¹⁸⁰ *Rumsfeld v. Padilla*, 542 U.S. 426,451 (2003) (Rehnquist,CJ., majority) (“The District of South Carolina, not the Southern District of New York, was the district court in which Padilla should have brought his habeas petition. We therefore reverse the judgment of the Court of Appeals and remand the case for entry of an order of dismissal without prejudice.”)

¹⁸¹ *Rumsfeld v. Padilla*, 542 U.S. 426,451 (2003) (Stevens, J., majority) (“As the Court's opinion itself demonstrates, that rule is riddled with exceptions fashioned to protect the high office of the Great Writ. This is an exceptional case that we clearly have jurisdiction to decide.”)

¹⁸² Stevens’ dissent (which is joined by Souter, Breyer, Ginsburg) also makes clear that he believes that Padilla has the right to a *habeas corpus* hearing, and that the Executive might have exceeded its power in detaining him. This consideration ought be borne in mind when discussing the Executive’s detention to release Padilla and not contest his detention in the Supreme Court upon appeal from the 4th Circuit.

were to pursue a criminal trial for Padilla, or to release him (*See Padilla v Hanft*, 389 F.Supp.2d. 678 (D.S.C. 2005)). However, the 4th Circuit's opinion entirely reversed the District Court opinion by finding both statutory authority for Padilla's detention pursuant to the AUMF and constitutional authority pursuant to Article II. Since Padilla's case had been litigated in the Supreme Court, there had been one major factual development that the 4th Circuit relied on to authorize Padilla's continued military detention - the declaration of Jeffrey N. Rapp, the Director of the Joint Intelligence Task Force for combating terrorism within the Department of Defense.¹⁸³ The Court relied heavily on the Rapp Declaration to find an analogy between the situations of Hamdi and Padilla, and therefore justified Padilla's detention as an enemy combatant under the AUMF.

However, the reliance on the Rapp Declaration to ascertain Padilla's combat status is flawed for three reasons: first, the Rapp Declaration emerged almost two years after Padilla's initial detention and arrest; subsequently, while such information could reliably be the basis for his future detention, the Executive could not rely on it to justify Padilla's detention and arrest for any period prior to the publication of the Rapp Declaration. Padilla's initial detention was authorized on the grounds of material support - which clearly does not elevate him to the status of enemy combatant that is claimed.¹⁸⁴

Second, if powers of detention are to be read in the AUMF, they must aim to prevent future acts of international terrorism against the United States. In Hamdi's case, it is

¹⁸³ The Rapp Declaration was included in the factual record of the case, Joint Appendix to *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005). Unfortunately, I was not able to obtain a copy of the Rapp Declaration, and I believe the document is classified. All references to the Declaration below are references to when it has been cited and discussed in secondary sources, such as briefs, opinions, blog posts etc.

¹⁸⁴ *Padilla v. Hanft* 423 F.3d 386,390 (4th Cir. 2005) (“[O]n May 8, 2002, Padilla was detained by FBI agents, who interviewed and eventually arrested him pursuant to a material witness warrant....[O] June 9, 2002, the President designated him an "enemy combatant" against the United States and directed the Secretary of Defense to take him into military custody”)

straightforward to see why detention was necessary as a measure of incapacitation - he was detained on a battlefield, where he was engaged directly in acts of belligerency against the United States and its allies. Therefore, his detention served the aim of preventing future acts of terrorism. However, commentators who saw the Rapp Declaration raised significant concerns over whether it proved that Padilla had any intention or ability of committing future acts of belligerency that would pose a security risk to the United States.¹⁸⁵ In this regard, it would appear that he forfeited his status as an enemy combatant the moment he left the active warzones in Afghanistan and Pakistan, and should therefore be beyond the purview of the AUMF's detention authority.

Third, the 4th Circuit emphasizes that the similarity between Hamdi's and Padilla's situations were that they were both armed by Al Qaeda or the Taliban; however, the relevant factor that the *Hamdi* plurality emphasized was that Hamdi took up arms against the United States,¹⁸⁶ while it was true that Padilla was armed by the United States, he did not engage in any armed conflict against the United States, and at the time of his detention, was not armed.¹⁸⁷ Subsequently, his prior possession of armaments from the group the AUMF targeted is insufficient basis to authorize Padilla's detention. In this regard, attempting to invoke the powers of detention under the AUMF by analogizing Padilla with Hamdi fall short of the mark.

In recognizing Padilla's enemy combatant status, the 4th Circuit also analogized Padilla's detention to the *Quirin* case. However, such efforts also fall short. First, the *Quirin* court held

¹⁸⁵ Marty Lederman, Further Thoughts on Preventing Padilla from "Returning" to the Afghan Battlefield (Balkinization Blog, Sep. 10, 2005), <http://balkin.blogspot.com/2005/09/further-thoughts-on-preventing-padilla.html> (last visited Apr. 12, 2015).

¹⁸⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (O'Connor, J., plurality) (finding lawful authority to detain only that category of citizens who are known to be "engaged in an armed conflict against the United States")

¹⁸⁷ Marty Lederman, Further Thoughts on Preventing Padilla from "Returning" to the Afghan Battlefield (Balkinization Blog, Sep. 10, 2005), <http://balkin.blogspot.com/2005/09/further-thoughts-on-preventing-padilla.html> (last visited Apr. 12, 2015).

that, “[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction *enter this country bent on hostile acts*, are enemy belligerents within the meaning of . . . the law of war”¹⁸⁸(emphasis added). However, as noted above, the facts in the Rapp Declaration are inadequate to support the conclusion that Padilla entered the country with the intention to commit hostile acts. Second, even if one finds the factual record compelling enough to declare Padilla an enemy combatant, Padilla still cannot be classified – and subsequently detained - as an enemy belligerent pursuant to the *Quirin* standard. The *Quirin* court framework for enemy combatant status is directly adopted from Annex to Convention IV of the Hague Convention (1907). However, those regulations are inapposite to situations of warfare between states and non-state actors insofar as a number of the distinguishing features that elevate an individual to the level of unlawful enemy combatant status do not apply to the war against Al Qaeda. For instance, Al Qaeda operatives do not employ uniforms with insignia, thereby forfeiting recognition under Hague Convention (IV).

In this regard, the 4th Circuit opinion exaggerated the factual record in reaching its conclusion that Padilla was an enemy combatant, and therefore amenable to detention under the powers of the AUMF. His detention was neither necessary nor appropriate based on the factual record that confronted the 4th Circuit. The strongest evidence in support of this conclusion comes from the events that transpired while Padilla’s petition for certiorari was under review by the Supreme Court. Instead of allowing the case to proceed to the Supreme Court, the Government announced that it was transferring Padilla to law enforcement custody for criminal prosecution in the same manner as John Walker Lindh¹⁸⁹. The transfer rendered Padilla’s case

¹⁸⁸ *Ex Parte Quirin*, 317 U.S. 1, 38 (per curiam)

¹⁸⁹ *United States v. Lindh*, 227 F.Supp.2d 565 (E.D. Va. 2002)

moot, and thereby prevented the Supreme Court from ruling on the issue (and potentially limiting Executive detention powers even more substantially). Padilla's transfer to law enforcement authorities significantly weakens the Executive's military necessity claims of detention, and the 4th Circuit's reliance on the same in determining his enemy combatant status. Furthermore, it also strengthens the argument against deference to the Executive in *habeas* reviews.

Padilla's case ended up being a Zone III detention situation, since it is not apparent that the AUMF authorizes his detention, at which point, Congressional will is represented by §4001(a). Furthermore, in light of the Government's ultimate release of Padilla before the Supreme Court could hear his case, it appears sensible to conclude that he was a civilian, and not an enemy combatant, in which case the provisions of the AUMF could not apply to his detention in the first instance. Subsequently, Padilla's case reinforces the theory that in Zone II situations concerning civilians, there is no authority to detain. Although the 4th Circuit rejected that claim, the Government's actions in these circumstances speak louder than the Court's opinion.

SECTION VI: Conclusion - What History Teaches Us

The history of detention brings us back to the original question that motivated this thesis - is the disclaiming of Article II power by Obama supported by our conclusions from history? Examining Obama's claimed detention powers zone by zone leads to the conclusion that it aligns with the history of detention powers, which also aligns with *Youngstown* division of detention authorities laid out in Section I.

In Zone I, the Obama administration has so far not had to litigate any situations of citizens detained, but it has sufficient statutory authority to do so. First, like the Bush administration, it can rely on the "necessary and appropriate" powers clause in the AUMF to detain American citizens. Additionally, the detention authority in the AUMF has been restated and codified in recurring National Defense Authorization Acts [hereinafter "NDAA"]. For instance, §1021(c)(1) of the National Defense Authorization Act for Fiscal Year 2012¹⁹⁰ clarified the authority of the Armed Forces under the United States as extending to authority to "detain covered persons." Furthermore, the NDAA also makes explicit that such detention can be for its own sake i.e. detention without trial, or it can be detention pursuant to either civil or military trial (See NDAA 2012§1021(c)(2), §1021(c)(3)). Subsequently, the combination of the AUMF and the restatement of its powers under the NDAA give the President with sufficient power to detain in Zone I. This conclusion aligns with the observed historical arc of detention, and also with the claim in Section I that Zone I was a zone of maximum detention authority: when Congress delegates power of detention to the President - be it through the suspension of *habeas corpus*, or the ex post ratification of Executive Orders, or through statutes like the AUMF - the President acts with plenary authority to detain citizens.

¹⁹⁰ National Defense Authorization Act for Fiscal Year 2012, 125 Stat. 1298, 1562-1564, §1021(c)(1) (2011)

For two reasons the Obama administration is never likely to find itself in Zone II when it detains citizens pursuant to the war against Al Qaeda and its affiliates. First, as discussed above, statutory authorities to detain have been codified into law. Second, absent the AUMF and the NDAA, the administration would find itself in a Zone III situation because of the provisions of the Non-Detention Act. However, it is worth temporarily casting aside those limitations and probing this question on its merits. Were the AUMF and the Non-Detention Act to be temporarily removed from the books, would Obama's position of not relying on Article II for detention authority still be prudent? A close reading of history reveals that Obama's positions are in line with the *Youngstown* understanding of powers, and that Article II has almost no powers of detention inherent to it. The only circumstances in which Article II generates any detention authority is when the President employs it against enemy combatants within the 60 day sunset after Congress has first met. When Obama entered office, the offensive against Al Qaeda was midway through its fifth year - far outside the scope of the sixty day sunset period. Obama's non-reliance on Article II authority accords well with the historical trajectory of Zone II cases: two of America's greatest Presidents (Abraham Lincoln and Franklin Roosevelt) both found their detentions struck down when in Zone II situations. Subsequently, apart from the very limited detention power that originates in the President's defensive war powers, Article II does not meaningfully contain any detention authorities. Such an approach also vindicates this thesis' conception of Zone II powers as extremely limited.

Finally, the paucity of Article II powers of detention is most apparent in Zone III. History leaves us with the conclusion that lawful detention is functionally impossible in Zone III, be it in the form of Madison's pretrial detention of Stacey in the War of 1812, Lincoln's pre-trial detention of Milligan or Wilkinson's attempts to suspend *habeas corpus* in pursuits of Bollman

and Swartwout. In this regard, Zone III is correctly regarded as the nadir of Presidential detention authority. Consequently, both Obama's and this thesis' recognition of the absence of detention authority in Zone III is grounded in historical gloss that has consistently emphasized the same conclusion over 200 years of detention history.

The lack of any historical basis to support claims of broad Article II detention authority does not mean that Presidents will display subservience to this conclusion. Lincoln did not let his suspension of *habeas corpus* be guided by Marshall's holding in *Ex Parte Bollman*, 8 U.S. 75 (1807). Franklin D. Roosevelt did not replicate Ulysses Grant's successful approach to deference to Congress when he set up the War Relocation Authority. George W. Bush did not adhere to the primer on Executive powers laid down at the time the Non-Detention Act. There is always a tendency to view the present as radically different from the past, and to believe that the prudential concerns of today outweigh the learnings from bygone years. Lincoln echoed such pragmatic concerns when he railed against Taney's *Merryman* decision, noting "Are all the laws but one to go unexecuted and the government itself go to pieces lest that one be violated."¹⁹¹ A similar concern for prudence was echoed in Justice Jackson's dissent in *Terminiello v. City of Chicago*, 337 U.S. 1,13 (1949)¹⁹² where he notes that the Constitution is not a "suicide pact" (*Id.* at 37). However, the structure of the Constitution was meant to enshrine a system of checks and balances, a system that balanced the interests of prudence with those of substantive rights protections for citizens. Presidents are free to disregard the history of detention when it comes to formulating their legal position; no one can stop them from claiming broad Article II powers to

¹⁹¹ Abraham Lincoln, Special Session Message (July 4, 1861), available at THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=69802> (last visited Apr. 8, 2015)

¹⁹² *Terminiello v. City of Chicago*, 337 U.S. 1,13 (1949) (Jackson, J., dissenting)

detain citizens during wartime. However, should such cases be litigated and reach a Court, they should also be prepared to see such detentions struck down as unlawful. Ultimately, that is what history teaches us.

BIBLIOGRAPHY

CASES

Brown v. United States, 12 U.S. 110 (1814)

Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956)

Duncan v. Kahanamoku, 327 U.S. 304 (1946)

Ex Parte Benedict, 3 F.Cas. 1292 (N.D.N.Y. 1862)

Ex Parte Bollman, 8 U.S. 75(1807)

Ex Parte Endo, 323 U.S. 283 (1944)

Ex Parte Merryman 17 F.Cas. 144 (C.C.D. Md. 1861)

Ex Parte Milligan, 71 U.S. 2 (1866)

Ex Parte Quirin, 317 U.S. 1 (1942)

Ex Parte Vallandigham, 28 F.Cas. 874 (C.C.S.D. Ohio 1863)

Ex Parte Vallandigham, 68 U.S. 243 (1863)

Hamdi v. Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2004)

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

Hamdi v. Rumsfeld, 542 U.S. 507 (2004)

Hirabayashi v. United States, 320 U.S. 81 (1943)

Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987)

In re Stacey, 10 Johns. 328 (NY Sup. Ct. 1813)

In re Territo, 156 F.2d 142 (9th Cir. 1946)

Johnson v. Duncan, 30 Mart. (o.s.) 530,534-535 (La. 1815)

Korematsu v. United States, 323 U.S. 214 (1944)

Korematsu v. United States, 584 F.Supp. 1406 (N.D. Cal. 1984)

Ludecke v. Watkins, 335 U.S. 160 (1948)

Luther v. Borden 48 U.S. 1 (1849)

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)

Moyer v. Peabody, 212 U.S. 78 (1909)

Padilla ex rel. Newman v. Bush, 233 F.Supp.2d 564 (S.D.N.Y. 2002)

Padilla v Hanft, 389 F.Supp.2d. 678 (D.S.C. 2005)

Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005)

Padilla v. Rumsfeld, 352 F.3d 695,713 (2nd. Cir, 2003)

Rumsfeld v. Padilla, 542 U.S. 42 (2003)

Smith v. Shaw, 12 Johns. 257 (NY Sup. Ct. 1815)

The Prize Cases, 67 U.S. 635 (1863)

Terminiello v. City of Chicago, 337 U.S. 1 (1949)

United States v. Lindh, 227 F.Supp.2d 565 (E.D. Va. 2002)

United States v. Lindh, 212 F. Supp. 2d 541 (ED Va. 2002)

Youngstown Sheet & Tube Co. v. Sawyer, 343 US 579 (1952)

COURT BRIEFS AND ORAL ARGUMENTS

Brief for the Respondents, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696)

Brief for the Petitioner at 35, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027)

Oral Argument, *Hamdi v. Rumsfeld* 542 U.S. 507 (2004) (No. 03-6696)

STATUTORY PROVISIONS AND LEGISLATIVE RECORD

117 CONG. REC. H 31,542 (daily ed. Sept. 13, 1971)

An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases, 12 Stat. 755 (1863) [“Habeas Corpus Suspension Act”]

Act of Jun. 18, 1812, ch. 102, 2 Stat. 755 (1812)

Act of March 21, 1942, 56 Stat. 173 (1942)

An Act for enrolling and calling out the national Forces, and for other Purposes 12 Stat. 731 (1863) [“Enrollment Act”]

Articles of War, 2 Stat. 359 (1806)

Articles of War, Bul. No. 25, W.D. ,10 U.S.C. §1509 (1920)

Authorization for the Use of Military Force, S.J. Res. 23, Pub. L. No. 107-40, 115 Stat. 224 (2001)

Enforcement Act of 1871, ch.31, 17 Stat 13 (currently 42 U.S.C. §1983) [“Ku Klux Klan Act”]

Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2295 (1907)

Insurrection Act, ch. 39 2 Stat. 443 (current version at 10 U.S.C. §§331-335) (1807)

Internal Security Act, 64 Stat. 987 (1950)

Joint Resolution Declaring That a State of War Exists Between The Government of Italy and the Government and the People of the United States and Making Provisions to Prosecute the Same, S.J. Res 120, PL 332 (1941)

Judiciary Act, ch. 20, 1 Stat. 73, now codified at 28 U.S.C. §1350 (1789)

National Defense Authorization Act for Fiscal Year 2012, 125 Stat. 1298 (2011)
Non-Detention Act, 18 U.S.C. §4001(a) (1971)

The Militia Act, ch. 36 1 Stat. 424 (repealed in part 1861, and current version at 10 U.S.C. §§331-335) (1795)

Treaty of Peace with Italy, 61 Stat. 1245 (1947)

War Powers Resolution of 1973, 50 U.S.C. §§1541-1548 (1973)

SPEECHES BY EXECUTIVE OFFICERS, EXECUTIVE ORDERS AND EXECUTIVE REGULATIONS

Abraham Lincoln, Executive Order (Apr. 27, 1861), *available at* THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=70145>

Abraham Lincoln, Proclamation 104 - Suspending the Writ of Habeas Corpus Throughout the United States (Sep. 15, 1863), *available at* THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=69898>

Abraham Lincoln, Special Session Message (July 4, 1861), *available at* THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=69802>

Barack Obama, Remarks at the National Archives and Records Administration (May 21, 2009), *available at*, THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/index.php?pid=86166>

DEP'T OF DEF., LIST OF INDIVIDUALS DETAINED BY THE DEPARTMENT OF DEFENSE AT GUANTANAMO BAY, CUBA FROM JANUARY 2002 THROUGH MAY 15, 2006 (Dep't of Def. 2006), <http://www.defense.gov/news/May2006/d20060515%20List.pdf>

Franklin D. Roosevelt, Executive Order 9066, 7 Fed. Reg. 1407 - Authorizing the Secretary of War To Prescribe Military Areas (Feb. 19, 1942), *available at* THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=61698>.

Franklin D. Roosevelt, Executive Order 9102 7 Fed. Reg. 2165- Establishing the War Relocation Authority. (Mar. 18, 1942), *available at* THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=16239>

Franklin D. Roosevelt, Order Establishing a Military Commission to Try Eight Captured German Saboteurs, 7 Fed. Reg. 5103 (July 2, 1942) *available at* THE AMERICAN PRESIDENCY

PROJECT(Gerhard Peters ed., John T. Woolley ed.),
<http://www.presidency.ucsb.edu/ws/?pid=16280>

General Order 104, in United States War Dep't, General Orders Affecting the Volunteer Force: Adjutant general's office at 100, 101 (U.S. GPO, 1862).

General Order 99: Regulation for the Enrolment and Draft of Three Hundred Thousand Militia, in United States War Dep't, General Orders of the War Department, Embracing the Years 1861, 1862 & 1863 at 360, 360-362 (Oliver Diefendorf ed., Derby & Miller 1864).

General Order No. 38, in The Trial of Hon. Clement L. Vallandigham: By a Military Commission: And the Proceedings Under His Application for a Writ of Habeas Corpus in the Circuit Court of the United States for the Southern District of Ohio, 7 (Rickey & Carroll 1863) ,
<https://archive.org/details/trialofhonclemen00vall>

Harold H. Koh, The Obama Administration and International Law, Annual Meeting of the American Society of International Law. (March 25, 2010) *available at* U.S. DEPT. OF STATE.
<http://www.state.gov/s/l/releases/remarks/139119.htm>

Hon. Edward Bates, Suspension of the Privilege of the Writ of Habeas Corpus (July 5, 1861) *available in* J. HUBLEY ASHTON, 10 OFFICIAL OPINIONS OF THE ATTY. GEN OF THE U.S 74, 83 (W.H. & O.H.Morrison 1870)

John L. DeWitt, Civilian Exclusion Order No. 34 (May 3, 1942) *available at* HIST. SOC'Y OF PA., <https://hsp.org/education/primary-sources/civilian-exclusion-order-no-34>

John L. DeWitt, Public Proclamation No. 1 (March 2, 1942) *available at* WIKISOURCE,
http://en.wikisource.org/wiki/Public_Proclamation_No._1

Presidential Statement on the Repeal of the Emergency Detention Act, 32 WEEKLY COMP. PRES. DOC. 1338 (1971)

Thomas Jefferson, Inaugural Address (March 4, 1801), *available at* THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.),
<http://www.presidency.ucsb.edu/ws/index.php?pid=25803&st=&st1=>

Thomas Jefferson, Message to Congress to Congress on the Burr Conspiracy (Jan. 22, 1807), *available at* THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.) <http://www.presidency.ucsb.edu/ws/?pid=65721>

U.S. DEP'T OF JUSTICE - OFFICE OF LEGAL COUNSEL, DETERMINATION OF ENEMY BELLIGERENCY AND MILITARY DETENTION 1, 2-5 (2002), *available at*
<http://ccrjustice.org/files/memomilitarydetention06082002.pdf>

Ulysses S. Grant, Special Message (March 23, 1871), *available at* THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=70242>

Ulysses S. Grant, Third Annual Message (Dec. 4, 1871), *available at* THE AMERICAN PRESIDENCY PROJECT (Gerhard Peters ed., John T. Woolley ed.), <http://www.presidency.ucsb.edu/ws/?pid=29512>

ACADEMIC ARTICLES AND BOOKS (PAPER AND ELECTRONIC)

2 THE NAVAL WAR of 1812: A DOCUMENTARY HISTORY (William S. Dudley ed., Naval Historical Ctr. 1992), *available at* http://ibiblio.org/anrs/docs/E/E3/dh_1812_v02.pdf

Amanda L. Tyler, Suspension as an Emergency Power, 118 Yale L.J. 600 (2008)

Chapter 14, Document 46: Thomas Jefferson to James Madison, in Thomas Jefferson, 1 The Papers of Thomas Jefferson (Julian P. Boyd et al. ed., Princeton Univ. Press 1950), <http://press-pubs.uchicago.edu/founders/documents/v1ch14s46.html>

Charles F. Hobson, The Aaron Burr Treason Trial 1,3 (Fed. Judicial Ctr. 2006), (last visited Apr. 11, 2015).

Charles Fairman, The Law of Martial Rule and the National Emergency, 55 Harv. L. Rev. 1253 (1942)

Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2048 (2005)

Curtis A. Bradley & Trevor W. Morrison, Historical Gloss and the Separation of Powers, 126 Harv. L. Rev. 412 (2012).

Danielle Tarin, Will an Attack on America Justify an Attack on Americans?: Congressional and Constitutional Prohibitions on the Executive's Power to Detain U.S. Citizens As Enemy Combatants, 44 Va. J. Int'l L. 1145 (2004).

Francis D. Wormuth & Edwin B. Firmage, To Chain the Dog of War (2nd ed. Univ. of Ill. Press 1989)

Gordon K. Hirabayashi, A Principled Stand: The Story of Hirabayashi V. United States (Univ. of Wash. Press 2013), <https://books.google.com/books?isbn=0295804645>

Ingrid B. Wuerth, The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War, 98 Nw. U. L. Rev. 1, 18 (2003)

Jennifer K. Elsea, Presidential Authority to Detain "Enemy Combatants", 33 Presidential Stud. Q. 568 (2003).

Louis Fisher, Jefferson and the Burr Conspiracy: Executive Power Against the Law, [45 no. 1] Presidential Stud. Q. 157 (2015)

Oona Hathaway et al., The Power to Detain: Detention of Terrorism Suspects After 9/11, 38 Yale J. Int'l L. 123, 146 (2013)

Richard F. Grimmett, Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History 1, 3-4 (Cong. Research Serv. 2007), <http://fas.org/sgp/crs/natsec/RS22357.pdf>.

Saikrishna Prakash, Unleashing the Dogs of War: What the Constitution Means By "Declare War", 93 Cornell L. Rev. 45 (2007)

Stephen Dycus et al., National Security Law (5th ed. Wolters Kluwer 2011).

Stephen I. Vladeck, Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan, 16 Transnat'l L. & Contemp. Probs. 1 (2007) *available at* <http://ssrn.com/abstract=964004>

Stephen I. Vladeck, Note, Emergency Power and the Militia Acts, 114 Yale L.J. 114 (2004)

Stephen I. Vladeck, Student Note, The Detention Power, 22 Yale L. & Pol'y Rev. 153 (2004).

INTERNET RESOURCES

BELCHER FOUND., CONSTITUTION, LAW AND POLITICS IN UNITED STATES V. AARON BURR, Belcher Found., http://www.belcherfoundation.org/us_vice_president_aaron_burr.htm

Brian Niiya, Ex Parte Endo (Densho Encyclopedia 2013), <http://encyclopedia.densho.org/Ex%20parte%20Endo/>

Clement Vallandigham, OHIO HISTORY CENTRAL, http://www.ohiohistorycentral.org/w/Clement_Vallandigham

Ex Parte Merryman and Debates on Civil Liberties During the Civil War : A Short Narrative, FED. JUDICIAL CTR. http://www.fjc.gov/history/home.nsf/page/tu_merryman_narrative.html

Jess Bravin, How Ditchdigger for Mussolini Plays a Role in War on Terror (Wall St. Journal 2002), <http://www.wsj.com/articles/SB1035765232593485071>

Marty Lederman, Further Thoughts on Preventing Padilla from "Returning" to the Afghan Battlefield (Balkinization Blog, Sep. 10, 2005), <http://balkin.blogspot.com/2005/09/further-thoughts-on-preventing-padilla.html>

The Burr Conspiracy, in NAT'L COUNTERINTELLIGENCE CTR., A COUNTERINTELLIGENCE
READER: AMERICAN REVOLUTION TO WORLD WAR II(Frank J. Rafko ed., Nat'l
Counterintelligence Ctr.), <http://fas.org/irp/ops/ci/docs/ci1/ch1d.htm>