



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

March 13, 2002

**Memorandum for William J. Haynes, II
General Counsel, Department of Defense**

Re: The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations

You have asked for our Office's views on the laws applicable to the transfer of members of the Taliban militia, al Qaeda, or other terrorist organizations, who have come under the control of the United States armed forces, to other countries. We conclude that the President has plenary constitutional authority, as the Commander in Chief, to transfer such individuals who are captured and held outside the United States to the control of another country. Individuals who are detained within the United States, however, may be subject to a more complicated set of rules established by both treaty and statute.

Part I of this memorandum discusses the President's constitutional authority, supported by two centuries of historical practice, to detain and transfer enemy prisoners captured in wartime. It reviews the two relevant treaties that regulate transfer – the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 ("GPW"), and the Torture Convention and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Apr. 18, 1987, 23 I.L.M. 1027 (entered into force June 26, 1987) (the "Torture Convention" or the "Convention"), – and it explains that these conventions do not apply to the factual situation posed by the transfer of al Qaeda or Taliban prisoners to third countries. As you have requested, we also survey in Part II the domestic legal rules governing extradition, and in Part III the domestic standards that govern removal under the immigration laws.

We conclude that the President has full discretion to transfer al Qaeda and Taliban prisoners captured overseas and detained outside the territorial jurisdiction of the United States to third countries. GPW does not restrict the President's discretion because the President has determined that the al Qaeda or Taliban detainees are not legally entitled to prisoner of war ("POWs") status within the meaning of the Conventions. The Torture Convention poses no obstacle to transfer because the treaty does not apply extraterritorially. As removal applies only to the transfer of individuals already within the territorial jurisdiction of the United States, and as extradition is rarely if ever applied to individuals held abroad, those methods of transfer do not apply to the detainees held either in Afghanistan or at the U.S. Naval Base at Guantanamo Bay, Cuba.

I. THE COMMANDER-IN-CHIEF POWER

Throughout history, army commanders –in chief have exercised the power to “dispose of the liberty” of prisoners captured during military engagements. This power has traditionally included the right to transfer such prisoners to the custody of third parties, including neutral countries and allied belligerents. As a matter of constitutional text and structure, the location of the Commander-in-Chief power in Article II of the Constitution makes clear that this function, historically held by military commanders –in chief, lies within the discretion of the executive branch. Our constitutional history and practice confirms this: the President has since the Founding era exercised exclusive and virtually unfettered control over the disposition of enemy soldiers and agents captured in time of war. Indeed, on several occasions throughout American history, the President, either in furtherance of particular diplomatic or military objectives or merely for the sake of convenience, has transferred POWs from the custody and control of the United States to the custody and control of other foreign nations.

Those treaties that purport to govern the transfer of detained individuals generally do not apply in the context of the current war against al Qaeda and other terrorist groups. Even if those treaties were applicable to the present conflict, however, they do not impose significant restrictions on the operation of the President’s Commander-in-Chief authority. The GPW imposes some limitations on the transfer of United States-held POWs to other nations. These limitations, however, apply only to individuals who are legally entitled to POW status, and leave the President considerable discretion as to when such transfers are permissible. Further, as this Office has explained elsewhere, the members of non-state terrorist organizations such as al Qaeda are not entitled to POW status as a matter of law because the GPW’s protections for POWs apply only to international armed conflicts between state parties. See Memorandum for Alberto R. Gonzales, Counsel to the President and William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* at 9-10 (Jan. 22, 2002) (“GPW Memo”). Therefore, there are no GPW constraints on the President’s ability to transfer al Qaeda prisoners to third countries. The Torture Convention also imposes limitations on transfer, but those restrictions have no extraterritorial effect and thus are not applicable to prisoners who are captured and detained abroad.¹

A. Presidential Authority Under The Constitution

This Part discusses the sources of the President’s constitutional authority to transfer military detainees to third countries. Throughout United States history, the Constitution’s vesting of the Commander-in-Chief and Chief Executive powers in the President has been understood to provide this affirmative legal authority. These grants have long been understood to include the authority to “dispose of the liberty” of enemy soldiers and agents captured in time

¹ To the extent that these treaties would cabin presidential freedom to transfer detainees, they could not constrain his constitutional authority. A transfer that was inconsistent with a treaty would amount to a suspension of the treaty. See generally Memorandum for John Bellinger, III, Senior Associate Counsel to the President and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001) (the “ABM Suspension Memo”).

of war. This view of the President's war powers is supported by the Constitution's text and a comprehensive understanding of its structural allocation of powers, but also by an unbroken chain of historical practice dating back to the Founding era. In tandem, these factors conclusively demonstrate that the Commander-in-Chief Clause constitutes an independent grant of substantive authority to engage in the detention and transfer of prisoners captured in armed conflicts.

1. Constitutional text and structure

The text, structure, and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to control and conduct military operations engaged in by the United States. Article II, Section 2 states that the "President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." U.S. Const. art. II, § 2. He is vested broadly with all of "[t]he executive Power" and the duty to execute the laws. *Id.* art. II, § 1.

By their terms, these provisions vest full control of the military operations of the United States in the President. It has long been the view of this Office that the Commander-in-Chief Clause is a substantive grant of authority to the President, *see, e.g.*, Memorandum for Honorable Charles W. Colson, Special Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President and the War Power: South Vietnam and the Cambodian Sanctuaries* (May 22, 1970), and that the authority conferred includes all those powers not expressly delegated by the Constitution to Congress that have traditionally been exercised by commanders –in chief of armed forces.

Moreover, as the courts have consistently recognized, the President's discretion in exercising the Commander-in-Chief power is complete, and his military decisions are not subject to challenge in the courts. In the *Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862), for example, the Court faced the question whether the President "in fulfilling his duties as Commander in Chief" could treat the rebellious States as belligerents by instituting a blockade. The Court concluded that this was a question "to be decided by him" and which the Court could not question, but must leave to "the political department of the Government to which this power was entrusted."²

The Constitution's textual commitment to the President of control over the minutiae and the grand strategy of military operations alike is reinforced by analysis of the Constitution's structure. First, it is clear that the Constitution secures all federal executive power in the President to ensure a unity in purpose and energy in action. "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man, in a much more eminent degree,

² *Id.* (emphasis added). *See also Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation – even by a citizen – which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 12 (1926) ("It was peculiarly within the province of the Commander-in-Chief to know the facts and to determine what disposition should be made of enemy properties in order effectively to carry on the war.").

than the proceedings of any greater number...." *The Federalist No. 70*, at 472 (Alexander Hamilton) (Jacob E. Cooke ed., 1982 reprint) (1961). The centralization of authority in the President alone is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and make command decisions affecting operations in the field with a speed and energy that is far superior to any other branch. As Hamilton noted, "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." *Id. No. 74*, at 500 (Alexander Hamilton).

The handling and disposition of individuals captured during military operations requires command-type decisions and the swift exercise of judgment that can only be made by "a single hand." The strength of enemy forces, the morale of our troops, the gathering of intelligence about the dispositions of the enemy, the construction of infrastructure that is crucial to military operations, and the treatment of captured United States servicemen may all be affected by the policies pursued in this arena. Quick, decisive determinations must often be made in the face of the shifting contingencies of military fortunes.³ This is the essence of executive action.

Second, the constitutional structure requires that any ambiguity in the allocation of a power that is executive in nature must be resolved in favor of the executive branch. As this Office has recently explained, see Memorandum for Timothy E. Flanigan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001) ("September 25 War Powers Memorandum"), Article II, Section 1 provides that "[t]he executive Power shall be vested in a President of the United States." U.S. Const. art. II, § 1. By contrast, Article I's Vesting Clause gives Congress only the powers "herein granted." *Id.* art. I, § 1. This difference in language indicates that Congress's legislative powers are limited to the list enumerated in Article I, Section 8, while the President's powers include inherent executive powers that are unenumerated in the Constitution. The unification of executive power in Article II requires that unenumerated powers that can fairly be described as "executive" in nature belong to the President, except where the Constitution expressly vests the power in Congress. For example, as Commander in Chief, the President would ordinarily have plenary power to provide rules for the armed forces, but Article I, Section 8, Clause 14 excepts this power from the executive by expressly committing it to Congress. U.S. Const. Art. I, sec. 8, cl. 14 ("The Congress shall have Power... [t]o make Rules for the Government and Regulation of the land and naval Forces"). Even if the Constitution's entrustment of the Commander-in-Chief power to the President did not bestow upon him the authority to make unilateral determinations regarding the disposition of captured enemies, the President would nevertheless enjoy such a power by virtue of the broad sweep of the Vesting Clause. Thus, the power to dispose of the liberty of individuals captured and brought under the control of United States armed forces during military operations remains in the hands of the President alone unless the Constitution specifically commits the power to Congress.

³ For historical examples of the impact that United States prisoner of war policy has had in all of these areas, see Lt. Col. George G. Lewis & Capt. John Mewha, *History of Prisoner of War Utilization by the United States Army 1776-1945*, Dep't. of the Army Pamphlet No. 20-213 (1955), as well as Section I.A.2. of this memorandum.

The debates over the Constitution confirm that the Framers understood the Commander-in-Chief power to include all powers related to the conduct of war, with the exception only of those few powers that were expressly carved out and delegated to Congress. During the debates in the Federal Convention, for example, a clause that would have given Congress the power to “make” war was amended to give Congress the power only to “declare” it, in part because it was understood that as the Commander in Chief the President should enjoy the sole authority to conduct warfare.⁴ The treatment of captured enemy soldiers is but one of the many facets of the conduct of war, entrusted by the Constitution in plenary fashion to the President by virtue of the Commander-in-Chief Clause. Moreover, it is an area in which the President appears to enjoy exclusive authority, as the power to handle captured enemy soldiers is not reserved by the Constitution in whole or in part to any other branch of the government.

It might be argued that Article I, Section 8, Clause 11, which grants Congress the power to “make Rules concerning Captures on Land and Water,” addresses captured enemy soldiers. That provision has never been applied by the courts or by Congress to captured persons, however, and appears always to have been understood as pertaining to captured property only. Article IX of the Articles of Confederation, from which the provision is derived, more clearly indicated that the power extended only to property, stating that Congress would have the power “of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated.” Articles of Confederation, art. IX, reprinted in *Encyclopedia of the American Constitution* app. 2, at 2094 (Leonard W. Levy ed., 1986). The Articles of Confederation provision clearly did not apply to captured enemy soldiers, as persons can neither be “divided” nor “appropriated.” Moreover, the term capture, which is used both in the Articles of Confederation and in the Constitution, is defined by international law as “[t]he taking of property by one belligerent from another or from an offending neutral.” 1 Bouvier’s Law Dictionary 422 (Rawle’s 3d rev. 1914) (emphasis added). Thus, in his exhaustive commentaries on the Constitution, Justice Story noted that Article I, Section 8, Clause 11 confers on Congress the power to “authorize the seizure of and condemnation of the property of the enemy within, or without the territory of the United States,” yet he made no mention of any authority being vested in Congress over captured persons. 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1172, at 64 (reprinted 1991) (1833). This contextual understanding of the text of Article I, Section 8, Clause 11, buttressed by the absence in the historical record of any invocations of the clause by Congress or the courts in support of legislation applying to captured persons, leaves no doubt that Congress’s power “to make Rules concerning Captures on Land or Water” applies only to captured property.

Article I, Section 8, Clause 12, which vests Congress with the authority to “raise and support Armies,” and Clause 14, which vests it with power to “make Rules for the Government and Regulation of the land and naval Forces,” might also be thought to confer on Congress the power to promulgate prisoner of war policy. Using its funding power, Congress might attempt to place legislative riders on military appropriations that would seek to require certain treatment of prisoners of war. While this Office has concluded elsewhere that Congress cannot use the appropriations power to interfere with areas of plenary presidential power, see Memorandum for Abner J. Mikva, Counsel to the President, from Walter Dellinger, Assistant Attorney General,

⁴ 2 *The Records of the Federal Convention of 1787*, at 318-19 (Max Farrand ed., rev. ed. 1966) (1911).

Office of Legal Counsel, *Re: Bill to Relocate United States Embassy From Tel Aviv to Jerusalem* (May 16, 1995), Congress has not done so here, and so we need not reach that question. Congress also could attempt to use its authority to make rules for regulation of the military to establish standards for prisoner detention and transfer. While we believe that Congress's power on this point is limited to the discipline of U.S. troops, and not to issues such as the rules of engagement and treatment concerning enemy combatants, we have no need to directly address the question because Congress has not enacted any such statute. In fact, Congress's historical silence, as we will explain below, demonstrates that Congress itself has not understood its powers to reach so far into areas of presidential competence.

The historical context in which the Constitution was ratified supplies additional support for our view that the constitutional structure allocates to the President the plenary power to dispose of the liberty of military detainees. In particular, our understanding of the Constitution's allocation of powers between Congress and the President is informed by the British Constitution's allocation of powers between Parliament and the Crown. The Framers had lived under the British Constitution as English colonists, and in drafting their own Constitution they borrowed heavily from the legal and political concepts that formed the foundation principles of British constitutional government. Significant departures from the framework of the British government were explicitly spelled out in the Constitution's text, with the gaps left to be filled in by the Framers' shared understanding of the functional workings of the government under which they had lived. Reference to the British Constitution may shed particular light on those broad questions of power allocation that are not clearly answered by the text of the Constitution alone, for the British Constitution supplied the Framers with their contextual expectations about the manner in which sovereign powers should be allocated in a constitutional system of government.

By the late 18th century, it was well established under the British Constitution that the Crown had absolute authority to dispose as it saw fit of prisoners of war and other detainees. At the Battle of Agincourt in 1415, for example, King Henry V ordered the execution of a large number of French prisoners of war in retaliation for a French attack on part of the English baggage train.⁵ Similarly, during the War of the Roses in 1471 it was understood to be the prerogative of King Edward IV to decide which Lancastrian prisoners of war should live and which would die.⁶ Although the treatment of prisoners of war generally improved as time went on, the Crown's unilateral control of their handling remained undiminished. When the Spanish Armada was destroyed by a storm off the coast of Scotland in 1588, Queen Elizabeth and her Privy Council dictated every detail of the confinement of captured sailors, including the amount of the allowance to which they were entitled as prisoners of war.⁷ The Privy Council also assumed responsibility for determining which captured soldiers were entitled to prisoner of war status, denying the legal classification to those sailors it determined had simply been shipwrecked on their way home to Spain.⁸ During this and future periods, Parliament never

⁵ *Encyclopedia of Prisoners of War and Internment* 4 (Jonathan F. Vance ed., 2000).

⁶ *Id.* at 315.

⁷ Paula Martin, *Spanish Armada Prisoners: The Story of the Nuestra Señora del Rosario and Her Crew* at 44-46, 48 (1988) (quoting a Privy Council order stating that it was "her Majesty's pleasure that the Spanish prisoners for their relief should be allowed to every each of them 4d per diem").

⁸ *Id.* at 52.

sought to interfere with the executive's prerogatives regarding the disposition of prisoners of war.

The Crown's control of prisoners of war as a matter incident to military operations was also left untouched by the restructuring of the British Constitution during the civil wars of the mid-17th century. Queen Anne rejected a prisoner of war exchange cartel proposed by King Louis XIV of France in 1703, largely because she was personally insulted that Louis refused to recognize her as the legitimate heir to the English throne.⁹ And during the Revolutionary War in America, the British field commanders, who ultimately were controlled by the King, took charge of handling POWs. General Howe, for example, established a Commissary General of Prisoners in 1776 to handle the many soldiers he had captured during his campaigns in New Jersey and New York, and he later determined that many of the soldiers should be held at sea in prison ships.¹⁰ There was no doubt, under the British constitutional system in the 18th Century, that the executive's commander-in-chief power included the sole authority to control POWs. When drafting the Constitution in 1787, the Framers similarly would have understood the President's Commander-in-Chief and Chief Executive powers as encompassing the power to dispose of the liberty of prisoners of war. The Framers made no express allocation in the Constitution of the power to dispose of persons captured during military engagements; their silence on the point signals their intent to leave the power allocated to the Executive, as it was under the British Constitution.

2. Historical practice

Both the Supreme Court and the political branches have often recognized that governmental practice plays a highly significant role in establishing the contours of the constitutional separation of powers: "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). Indeed, as the Court has observed, the role of practice in fixing the meaning of the separation of powers is implicit in the Constitution itself: "the Constitution . . . contemplates that practice will integrate the dispersed powers into a workable government." *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (citation omitted). The role of practice is heightened in dealing with issues affecting foreign affairs and national security, where "the Court has been particularly willing to rely on the practical statesmanship of the political branches when considering constitutional questions." *Whether Uruguay Round Agreements Required Ratification as a Treaty*, 18 Op. O.L.C. 232, 234 (1994).¹¹

⁹ Mark A. Thompson, *William III and Louis XIV – Essays 1680-1720*, at 192 (R. Hatton & J.S. Bromley eds., 1968).

¹⁰ *Encyclopedia of Prisoners of War*, *supra* note 8, at 6-7.

¹¹ As the Supreme Court has noted, "the decisions of the Court in th[e] area [of foreign affairs] have been rare, episodic, and afford little precedential value for subsequent cases." *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981). In particular, the difficulty the courts experience in addressing "the broad range of vitally important day-to-day questions regularly decided by Congress or the Executive" with respect to foreign affairs and national security makes the judiciary "acutely aware of the necessity to rest [judicial] decision[s] on the narrowest possible ground capable of deciding the case." *Id.* at 661, 660. Historical practice and the ongoing tradition of executive branch constitutional interpretation therefore play an especially important role in this area. "The framers of the constitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation

Accordingly, we must give great weight to the practice of the President and Congress in determining the scope of the President's authority to detain and transfer prisoners captured in war. In this case, the historical record unequivocally demonstrates that the President has exercised unchallenged and exclusive control over individuals captured during military operations since the time of the Founding. Presidents have established confinement conditions for prisoners of war, negotiated terms and conditions for the exchange of captured soldiers, promulgated rules requiring captured enemy personnel to perform productive labor, and, significantly, transferred prisoners of war to the custody and control of other foreign nations. With respect to each of these functions, Congress has never seriously questioned the President's authority. The history of prisoner of war policy strongly supports reading the Constitution as vesting in the President all of the traditional authority enjoyed by army commanders-in-chief to dispose of the liberty of captured individuals. Because of the novelty of this question and the lack of any direct guidance from the opinions of this Department or decisions by the federal judiciary, we review the relevant history here to demonstrate the depth of support for the conclusion that the President enjoys the unrestricted constitutional power to dispose of prisoners of war.

The Revolutionary War. The absence of a constitutionally recognized chief executive during the revolutionary period and the dominance of the Continental Congress in directing certain aspects of the Continental Army's military operations casts a cloud upon the utility of United States practices during the revolutionary era in discerning constitutional meaning. Nevertheless, the prisoner of war policies practiced by early American military forces indicate that the Founders recognized the power of the sovereign, consistent with contemporary European practices, to transfer prisoners of war to the custody and control of foreign nations. American naval forces that captured British prisoners at sea typically turned the prisoners over to French control.¹² On the home front, General George Washington established the living conditions of captured British soldiers who had fallen under his control.¹³ Although not yet in the position of President as created by Article II of the Constitution, General Washington held the title of Commander in Chief of the Continental Army, and neither the Continental Congress (which itself was more of an executive branch than a legislature that could tax or legislate) nor the state assemblies questioned his authority to handle and control prisoners of war. In this respect, General Washington exercised his authority in line with the traditional Anglo-American understanding of the scope of the Commander-in-Chief power.

The Quasi-War with France. As tensions between the United States and France intensified during the late 1790s, Congress passed a series of statutes pertaining to the disposition of French vessels captured during military engagements defending American shipping.¹⁴ The first such statute merely authorized the President "to seize, take and bring into

is unnecessary, and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight." *McPherson v. Blacker*, 146 U.S. 1, 27 (1892).

¹² Lewis & Mewha, *supra* note 3, at 5.

¹³ See Letter for British General Gage from General George Washington (Aug. 11, 1775), reprinted in Cong. Globe, 38th Cong., 2d Sess. (1865).

¹⁴ Congress is expressly granted the power to make rules for the disposition of captured enemy property by Article I, Section 8, Clause 11 of the Constitution. U.S. Const. art. 1, sec. 8, cl. 11 ("The Congress shall have Power [to]...make Rules concerning Captures on Land and Water").

any port of the United States" French ships found to be "committing depredations" on vessels belonging to citizens of the United States. Act of May 28, 1798, ch. 48, 1 Stat. 561. Three subsequent statutes, however, also included provisions relating to the disposition of the crews and officers of captured enemy ships.¹⁵ See Act of June 28, 1798, ch. 62, §4, 1 Stat. 574, 575; Act of July 9, 1798, ch. 68, § 8, 1 Stat. 578, 580; Act of Feb. 28, 1799, ch. 18, 1 Stat. 624.

The first statute relating to captured sailors provided that "it shall be lawful for the President of the United States, to cause the officers and crews of the vessels so captured... to be confined in any place of safety within the United States... and all marshals and other officers of the United States are hereby required to execute such orders as the President may issue for the said purpose." Act of June 28, 1798, 1 Stat. at 575. It appears that this statute was designed to serve two purposes. First, it was intended to send a clear message to France that her predations would no longer be tolerated, and that her countrymen would suffer the penalty of imprisonment if attacks on American shipping did not cease.¹⁶ Second, the statute's language indicates that it was designed to instruct non-military law-enforcement personnel that it was lawful and indeed required for them to imprison captured Frenchmen on the President's instruction, without any allegation that the Frenchmen had committed domestic crimes. These dual purposes provide ample explanation for the structure of the statute's text, and we do not read the statute as expressing an opinion or intending to imply that the President would not have had the power to imprison the captured sailors in the statute's absence.

The second statute, enacted just two weeks later, provided that "all French persons... who shall be found acting on board any French armed vessel... shall be reported to the collector of the port in which they shall first arrive, and shall be delivered to the custody of the marshal, or of some civil or military officer of the United States... who shall take charge for their safe keeping and support, at the expense of the United States." Act of July 9, 1798, § 8, 1 Stat. at

¹⁵ It is unclear which of its enumerated powers Congress was invoking to pass these statutes. One arguable source of authority would have been Congress's power to "regulate Commerce with foreign Nations," U.S. Const. art. I, § 8, cl. 3, which might be construed to allow Congress to take measures to protect foreign commerce. The foreign commerce power was never mentioned during the debates in Congress, however, and at any rate it could not by itself supply the whole answer, as the authorization of prisoner exchanges, for example, had anything to do with the protection of foreign commerce. Another arguable source of authority would have been Congress' power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." *Id.* at cl. 10. Indeed, at least one Congressman noted in a floor speech that the statutes were "intended to defend our commerce, according to the law of nations." 8 Annals of Cong. 1826 (May 26, 1798) (remarks of Mr. Macon). Again, however, that clause cannot supply the whole answer, as the authorization of prisoner exchanges, for example, does not have the effect of punishing offenses against the law of nations. Congress instead seems to have assumed that it had inherent authority to legislate on the subject because foreign affairs issues are committed to the federal government by the Constitution, and Congress is the federal government's sole legislative organ. As one Congressman opined, "[h]e had no doubt, that when one nation infringes the rights of another, it had a right to take measures against it; but this right was lodged in the sovereignty of the nation, and as that, in this country, does not lie wholly in the President, but in Congress, the President has no power to act in the case." *Id.* at 1828 (remarks of Mr. Bayard). This argument is inconsistent with our understanding of Article I, Section 1, however, which vests Congress only with those powers "herein granted." See U.S. Const. art. I, § 1. See also September 25 War Powers Memorandum. It is the President, and not Congress, who is accorded responsibility by the Constitution for the conduct of foreign affairs. *Id.* Thus, we believe that Congress may have acted outside the scope of its constitutionally granted powers in passing at least some of these statutes.

¹⁶ See 8 Annals of Cong. at 1819 (remarks of Mr. Shepard) ("It is time, said he, to tell the French nation, 'we will not submit any longer.'").

580. That provision clearly was meant to apply only to Frenchmen captured by *private* parties, and not to Frenchmen who were captured by armed forces of the United States. Although the first provision of the statute related solely to actions taken by the President, *see id.* § 1, 1 Stat. at 578, the six intervening statutory sections authorized “private armed ships and vessels of the United States” to capture French marauders, *id.* § 2, 1 Stat. at 579, and further prescribed rules regulating such captures and the ensuing distribution of captured property, *id.* §§ 3-7, 1 Stat. at 579-80. The requirement that captured Frenchmen be turned over to a marshal or to “some civil or military officer of the United States” makes sense only as applied to private captures, as Frenchmen captured by United States forces would already have been in the custody of “military officer[s] of the United States.” *Id.* § 8, 1 Stat. at 580. This statute, then, merely directed private citizens to turn captured Frenchmen over to the control of the President, but did not purport in any way to control the actions of the President once the prisoners were in his custody.

The third statute, which was passed half a year later, similarly imposed no requirements on the President. That statute provided that “the President... is authorized to exchange or send away from the United States to the dominion of France, as he may deem proper and expedient, all French citizens that have been or may be captured and brought into the United States....” Act of Feb. 28, 1799, ch. 18, 1 Stat. 624. Any debates that this provision may have occasioned were not recorded in the Annals of Congress, and it is therefore difficult to place this statute within the context of the events that led to its passage. On its face, however, the statute appears to be designed to encourage the President to use captured Frenchmen as bargaining chips to secure the release of Americans being held prisoner in France. The statute provides no substantive standards, and expressly leaves all prisoner exchanges to the complete discretion of the President. Thus, we do not read the statute to imply that the President would have been without power to effect such exchanges absent congressional authorization.

The one statute from this time period that does appear to require the President to take certain actions was passed only a few days later. That statute provided that if the President received information that a United States citizen who was impressed into serving on a foreign vessel of war was put to death or subjected to corporal punishment after being captured by France, “it shall be lawful for the President of the United States, and he is hereby empowered *and required* to cause the most rigorous retaliation to be executed on any such citizen of the French Republic, as have been or hereafter may be captured in pursuance of any of the laws of the United States.” *See* Act of March 3, 1799, ch. 45, 1 Stat. 743 (emphasis added). On its face, the statute seems to require the President to take retaliatory measures against captured Frenchmen in his custody, and thus might be read to imply that Congress was asserting that it had the authority to dictate prisoner of war policy. A careful examination of the legislative history of the statute, however, belies such a reading.

The statute was passed in response to a French *arrêt* ordering the execution of United States citizens found on captured war ships belonging to nations that were at war with France. As originally passed by the Senate and introduced into the House, the measure authorized and required retaliation against any Frenchmen that the President could get his hands on, including Frenchmen who were legally in the United States. The President would indeed have needed congressional authorization to effect such sweeping retaliatory measures. As the United States was not at war with France, and the United States citizens who were threatened by the *arrêt* were

not working on vessels belonging to the United States or its citizens, the President could not have invoked the Commander-in-Chief power to support such unilateral retaliation on his own authority.

Only after it had been passed by the Senate and debated for several days in the House was the retaliation provision narrowed by limiting retaliation to captured Frenchmen who were already in the President's custody. Representatives Gallatin and Smith successfully argued that retaliation should be limited to those Frenchmen who had actually engaged in predation against the United States and been captured, and the amendment was agreed to immediately prior to the passage of the entire bill. 9 Annals of Cong. 3047 (March 3, 1799) (remarks of Mr. Gallatin); *Id.* at 3051 (March 3, 1799) (remarks of Mr. S. Smith). Although as Commander in Chief the President already enjoyed authority to retaliate against French prisoners who had fallen into his custody, the rest of the provision was not rewritten to conform with the last-minute amendment, and the word "required" remained in the statute as a vestige of its original construction.¹⁷ Had Congress actually purported to require the President to retaliate against prisoners whom he held by virtue of his authority as Commander in Chief, the provision would have constituted an unconstitutional interference with presidential prerogatives.¹⁸

This contextual reading of the statute also indicates that the statute should not be understood to imply that the President could not have engaged in retaliation against captured enemy agents absent congressional authorization. As originally constructed, the bill authorized retaliation against Frenchmen who were legally within the territory of the United States, and over whom the President would have had no inherent authority to inflict death or corporal punishment. As has been noted, the President would indeed have required congressional authorization to retaliate against such Frenchmen. Congress seems not even to have realized that the amendment to the statute brought the issue of retaliation within the President's power as Commander in Chief, and thus did not think to amend the statute to remove the reference to authorization. Moreover, even if Congress had intentionally included the word "authorized" in the amended provision, absent evidence to the contrary we would read its inclusion as designed to encourage the President to take action, rather than as an expression of an opinion that the President had no inherent authority as Commander in Chief to engage in such retaliation.

The War of 1812. The Congress that presided over the War of 1812 provides the only other historical instance that we have been able to identify of direct congressional involvement in prisoner of war issues. On July 6, 1812, just three weeks after the U.S.'s declaration of war against Britain, the Twelfth Congress passed "An Act for the safe keeping and accommodation of prisoners of war." The Act authorized the President "to make such regulations and arrangements for the safe keeping, support and exchange of prisoners of war as he may deem expedient." Act of July 6, 1812, ch. 128, 2 Stat. 777. It also appropriated funds for the purpose of detaining prisoners of war. The statute, however, did not establish any substantive standards

¹⁷ It is also worthy of note that even prior to the amending of the statute, most members of Congress seemed to accept that the President would not be legally bound to engage in retaliation. See, e.g., 9 Annals of Cong. at 3046 ("knowing...the character of the President...he did not believe a single case would ever happen in which it would be exercised") (remarks of Mr. Gallatin); *id.* at 3049 ("the President...would not suffer the law, if passed, to be carried into effect") (remarks of Mr. Dana).

¹⁸ See, e.g., our discussion of measures pertaining to retaliation debated by Congress during the Civil War, *infra*.

governing the disposition of prisoners, and it did not lay any claim to congressional authority in the area. Although the statute spoke in terms of “authoriz[ing]” the President to take action, it at best represented a recognition by Congress of powers that President Madison already enjoyed by virtue of his position as Commander in Chief and provided the funds for the exercise of his responsibilities. Indeed, we read the 1812 Act in the same manner as we have construed the War Powers Resolution, which also purports to “authorize” the President to exercise his Commander-in-Chief authority. *See, e.g.*, September 25 War Powers Memorandum. As the President possess the Commander-in-Chief and Executive powers alone, Congress cannot constitutionally restrict or regulate the President’s decision to commence hostilities or to direct the military, once engaged. This would include not just battlefield tactics, but also the disposition of captured enemy combatants.

In *Brown v. United States*, Chief Justice Marshall observed in dicta that Congress’s passage of the Act suggested that the President had no inherent authority to hold and detain captured enemy soldiers. 12 U.S. (8 Cranch) 110, 126 (1814) (noting that the Act “affords a strong implication that [the President] did not possess these powers by virtue of the declaration of war”). *Brown* was exclusively concerned with the President’s authority to confiscate enemy property within the United States, however, a subject that is expressly reserved to Congress by Article I, Section 8, Clause 11 of the Constitution.¹⁹ Marshall’s offhand reference to the handling of prisoners of war was intended to provide an additional example of a war-related power that the President could not exercise without express statutory authorization. Marshall was unable, however, to cite any constitutional provision comparable to the Captures Clause of Article I, Section 8, Clause 11 that expressly delegates to Congress the power to make rules concerning captured persons. Indeed, there is no such comparable constitutional provision, and Marshall’s comment in *Brown* cannot hold up under the weight of longstanding historical practice to the contrary. Despite the fact that the 1812 Act was repealed by Congress in 1817, *see* Act of March 3, 1817, ch. 34, 3 Stat. 358, Presidents have continued, with Congress’s blessing – usually in the form of supporting appropriations²⁰ – to exercise exclusive control over prisoner-of-war policy.

A second prisoner of war issue confronted by the Twelfth Congress indicates that Congress did not believe that the President required legislative authorization before determining the treatment of captured enemy combatants. From the very beginning of the war, the United States protested the treatment that the British accorded captured American soldiers. To induce the British to give them better treatment, a bill was introduced in Congress in 1813 to vest the President “with [the] power[] of retaliation [against British POWs].”²¹ The bill was initially rejected by the House in November of 1812, and the Annals of Congress report that “[t]he objections to the bill were not to the principle of retaliation, but arose from the opinion that such a power already existed, from usage and from the nature of things, and was inseparable from sovereignty.”²² The Act was subsequently reconsidered and enacted in the face of a growing furor over British atrocities, *see* Act of March 3, 1813, ch. 61, 2 Stat. 829, but documents entered

¹⁹ *See supra* note 15.

²⁰ *See, e.g.*, Act of July 5, 1862, ch. 133, § 1, 12 Stat. 505, 507; Act of Feb. 9, 1863, ch. 25, § 1, 12 Stat. 642, 644; Act of June 15, 1864, ch. 124, § 1, 13 Stat. 126, 128; Act of March 3, 1865, ch. 81, § 1, 13 Stat. 495, 496.

²¹ *Lewis & Mewha, supra* note 3, at 22-23.

²² 25 Annals of Cong. 154, 1144 (1812-13).

into the Annals of Congress demonstrate that the President had without rebuke or challenge to his authority already instituted several retaliatory measures in order to protect captured American soldiers.²³ Congress never asserted that it possessed any constitutional authority to regulate prisoner treatment, nor did it challenge the President's Commander in Chief and executive powers in this area. Rather, Congress merely sought to encourage the President to take a more aggressive approach toward Britain.

The Mexican War. During the Mexican War, the cost of maintaining captured Mexican soldiers was deemed to be too high. President James K. Polk therefore approved a policy in 1846 whereby captured Mexican soldiers would be released on parole and permitted to return to their homes on the condition that they would not reengage in hostilities.²⁴ President Polk hoped that this policy not only would allow the army to prosecute the attack on Mexico without having to devote an undue number of troops to guard duty, but also that the leniency of the policy would curry favor with Mexican citizens and encourage them to put pressure on their government to bring about a quick settlement to the war. President Polk later modified the parole policy in 1847, ordering that captured Mexican officers be detained with an eye toward exchanging them for captured American soldiers being held by the Mexicans.²⁵ At no time during the course of the war did anyone in Congress challenge the President's constitutional authority to regulate and establish prisoner of war policy on behalf of the United States.

The Civil War. During the Civil War, President Abraham Lincoln was faced with the task of managing thousands of captured Confederate soldiers. President Lincoln created the post of Commissary General of Prisoners in 1861 to direct the disposition of POWs.²⁶ Although the Commissary General's office was originally placed under the jurisdiction of the Quartermaster General, that arrangement was later changed in 1862, and the office thereafter became subject only to the orders of the War Department.²⁷ As can be seen from this command structure, POWs were throughout the Civil War subject to the exclusive control of the President, exercised under the auspices of the War Department.

President Lincoln's War Department made various uses of the POWs as the war progressed. In July of 1862 the administration entered into an agreement with Confederate authorities setting forth procedures for the exchange of captured soldiers.²⁸ Later, in 1863 and 1864, the President approved a proposed War Department plan to recruit captured Confederate soldiers who agreed to take an oath of loyalty to serve in the Union army. During the same time period, a handful of Confederate POWs held in Illinois and New York were ordered to perform labor on various minor construction projects, including water works and drainage ditches.²⁹ Finally, after the surrender of the Confederate army at Appomattox on April 9, 1865, explicit

²³ 25 Annals of Cong. at 1239 (letter from Major General Pinckney to the Secretary of War) (Nov. 4, 1812) ("Information having been given...that six American seamen...had been sent to Jamaica to be tried as British subjects, for treason, he called upon the marshal to retain double that number of British seamen as hostages."). See also 27 Annals of Cong. 2098-2238 (1813-14).

²⁴ Lewis & Mewha, *supra* note 15, at 25-26.

²⁵ *Id.* at 26.

²⁶ *Id.* at 28.

²⁷ *Id.* at 29.

²⁸ *Id.* at 29-30.

²⁹ *Id.* at 39.

terms and conditions were established for the release of captured soldiers who were still being held in confinement.³⁰

A spirited debate in the Senate during January of 1865 regarding a measure urging the President to retaliate against captured Confederate soldiers strongly demonstrates Congress's view that the ultimate authority to decide prisoner of war policy resided in the President by virtue of his constitutional position as Commander in Chief. In the face of mounting evidence that the Confederacy was starving and otherwise mistreating captured Union soldiers, Senator Wade of Ohio moved the adoption of S.R. No. 97, a joint resolution urging President Lincoln to take retaliatory measures.³¹ Significantly, rather than speaking in terms of "authorizing" or "commanding" the President to take action, the resolution declared that "in the judgment of Congress, it has become justifiable and necessary that the President *should*, in order to prevent the continuance and recurrence of such barbarities...resort at once to measures of retaliation."³²

To emphasize congressional recognition of the President's prerogative in this area, the resolution explicitly stated that "Congress do not, however, intend by this resolution to limit or restrict the power of the President to the modes or principles of retaliation herein mentioned, but only to advise a resort to them as demanded by the occasion."³³ Indeed, during the debates over the resolution, several Senators expressly remarked that the President already had inherent authority to effect retaliatory measures by virtue of his position as the Chief Executive and the Commander in Chief of the armed forces. Senator McDougall forcefully expressed this sentiment in a floor speech, stating that:

we have been for a week talking about a thing that does not belong to the...Senate or House of Representatives, but belongs to the province of the Executive, and undertaking to give advice to the President of the United States, who has charge of this business, and whose particular duty it is to see that he understand it, and that he executes his office in a proper manner....I vote against this proposition upon the ground that it has no business either in this Hall or in the other Hall of Congress, but belongs to a department of the Government which has full authority over it.³⁴

³⁰ *Id.* at 41.

³¹ Cong. Globe, *supra* note 18, at 307.

³² *Id.* at 363 (remarks of Senator Wade) (emphasis added).

³³ *Id.* at 364.

³⁴ *Id.* at 522. See also *id.* at 408 (remarks of Senator Brown) (remarking that "the doctrine of retaliation has [already] been recognized and has been applied by the Government of the United States and its officers in the present war" and that the wording of the resolution "shows that...the President, as the Executive Officer of the Government, charged with its execution, was not to be understood as being limited in his action by any suggestion which might be contained in the body of that resolution"); *id.* at 413 (remarks of Senator Davis) (noting that the resolution merely constituted a request for the President to take action); *id.* at 427 (remarks of Senator Davis) ("This law may be taken up by the President of the United States without any additional legislation upon the part of Congress just as it exists, and it may be executed by him; and as some of the members of the Senate have maintained,...there is no reason whatever for the interposition of Congress in this matter at this time. So far as the law of retaliation exists, so far as it may be legitimately executed, it is to be decided by the law of nations, and the President of the United States, without any ancillary legislation on the part of Congress, may execute that law just as he would and to the same extent and rigor with which he might execute it backed by any legislation which Congress

Of further significance, the retaliation statute that Congress passed during the War of 1812 was characterized during the debate as merely expressing Congress's opinion "that [retaliation in the face of outrageous enemy practices] was a duty which was then incumbent upon the Executive as the Commander in Chief of the Army as it is now."³⁵ In sum, the Civil War Congress firmly recognized that the President possessed inherent authority to dispose of the liberty of prisoners of war by virtue of his constitutional position as Commander in Chief, and consequently made no challenge at any time during the war to his repeated unilateral exercise of that power.

The Spanish-American War. The War Department began its planning for the utilization of POWs captured during the Spanish-American War prior to actually engaging in hostilities.³⁶ Plans were drafted but ultimately abandoned to use Spanish POWs captured in Santiago de Cuba and Puerto Rico to build roads accessing the interior of the islands for use by the army.³⁷ Later, during the occupation of the Philippines, the War Department determined how to handle the detention of captured Filipino insurrectionists. It ultimately decided to parole insurrectionists who agreed to take an oath of allegiance to the United States, but deported insurrectionists who refused to take the oath to Guam.³⁸ As in previous wars, it appears that Congress made no effort to intervene in the President's control over the detention and disposition of prisoners of war.

World War I. Planning for World War I began in July of 1916. It was quickly determined that "the War Department should take charge of prisoners of all classes captured or arrested by any agency of the government in time of war."³⁹ Within the War Department, responsibility for handling POWs was assigned at first to the office of the Adjutant General, and later to the newly created office of the Provost Marshal General ("PMG").⁴⁰ In March 1918, the War Department promulgated extensive regulations governing the domestic employment of POWs who were shipped to the United States from Europe for internment.⁴¹ The regulations provided that POWs could either be hired out on a case-by-case basis to private parties and corporations or made to perform labor on public works projects such as road building, for which the government would pay them the prevailing private wage.⁴² Although POWs were used during World War I to perform construction and salvage work in Europe, it was the announced policy of the United States throughout the conflict not to transfer any POWs to the control of Allied powers.⁴³ Nevertheless, the United States did allow the Allies to transfer numerous prisoners of war to *its* control, particularly during the campaign in France.⁴⁴ Again, Congress took no action in regard to prisoners of war that indicates it believed it had any constitutional authority or competence in that area.

would adopt."); *id.* at 429 (remarks of Senator Howard) (assuming the authority of the President to dispose of the liberty of prisoners of war in stating that "I shall presume in this discussion that the executive branch of the Government have at least tried faithfully to do their duty to the country, and that if they have failed in bringing about this exchange and the liberation of our prisoners in rebel hands, they have innocently failed").

³⁵ *Id.* at 431 (remarks of Senator Howard).

³⁶ Lewis & Mewha, *supra* note 3, at 44.

³⁷ *Id.*

³⁸ *Id.* at 46.

³⁹ *Id.* at 50.

⁴⁰ *Id.* at 50, 59.

⁴¹ *Id.* at 56.

⁴² *Id.* at 56.

⁴³ *Id.* at 52, 63.

⁴⁴ *Id.* at 52-53, 59.

The Interwar Years. The War Department engaged in significant prisoner of war planning during the 20-odd year period between the two World Wars. The Provost Marshal General's Department was abolished soon after the end of World War I. This left a significant vacuum of responsibility, however, when the United States signed the Geneva Prisoner of War Convention of 1929, thereby assuming the obligation to establish a domestic War Information Bureau to collect and dispense information about POWs in the event of a war.⁴⁵ Responsibility for prisoner of war planning was therefore transferred to the Adjutant General's office and remained there until a new Provost Marshal General was appointed in the summer of 1941.⁴⁶ Anticipating the entry of the United States into World War II, the PMG ordered the construction of detention facilities in the southwestern United States beginning in the fall of 1941. The PMG also issued regulations establishing the conditions under which POWs could be employed as a source of wartime labor.⁴⁷

World War II. American prisoner of war policy underwent several significant transformations during the Second World War. Moreover, POW policy varied from front to front depending on the tactical conditions that the army faced and the types of operations in which the army was engaged. Rather than examine the handling of POWs during World War II in minute detail, it is easier to sketch the broad themes that characterized United States policy.

Although the army underwent several reorganizations during the course of the war, the Office of the Provost Marshal General remained at all times directly in charge of handling POWs.⁴⁸ The PMG's office was broken up into different sections for operations on the various theaters of the war, each under the ultimate command of the Allied Commander in Chief.⁴⁹ At the Commander in Chief's direction, soldiers captured in North Africa and in Europe were extensively employed in support of advancing troops on construction and other projects, freeing Allied units to directly participate in combat on the front lines.⁵⁰ This was particularly true of non-fascist Italian POWs, who proved to be more cooperative than their German counterparts and who were formed into regular work companies called "Italian Service Units" or ISUs.⁵¹ POWs who refused to work or were otherwise deemed unfit for employment were kept in central enclosures well away from the front lines, where there was no danger that the Axis armies would attempt to free them.⁵²

Many prisoners of war captured in early campaigning were shipped to the United States, there to be either put to work or placed in internment camps. Homefront employment of POWs became sufficiently extensive by the summer of 1943 that the Secretary of War enlisted the aid of another executive agency, the War Manpower Commission, to aid in the effective utilization of POW labor resources and to ensure that POW labor was distributed to areas of pressing need,

⁴⁵ *Id.* at 67-70.

⁴⁶ *Id.* at 72.

⁴⁷ *Id.* at 73.

⁴⁸ *Id.* at 80-81, 175.

⁴⁹ *Id.* at 176, 207.

⁵⁰ *Id.* at 94-95, 176-77.

⁵¹ *Id.* at 95, 177.

⁵² *Id.* at 221.

such as food processing, lumbering, and the railroad industry.⁵³ The War Department and the War Manpower Commission not only determined which industries POWs could, consistent with the dictates of the Geneva Convention, be employed in, but also established wage scales for the various types of work performed by the POWs.⁵⁴ Furthermore, at the close of hostilities the President and the War Department determined the conditions and the timetable under which POWs would be released.⁵⁵

World War II provides the first large-scale example of massive prisoner of war transfers to foreign nations. It is significant that this transfer occurred pursuant to unilateral Presidential order, without the need for congressional approval. During the course of World War II, the United States transferred tens of thousands of prisoners of war to the control of other nations. Shortly after the surrender of the Italian and German forces in Tunisia in May of 1943, the United States transferred 15,000 of its Italian POWs and 5,000 of its German POWs to French control for labor purposes.⁵⁶ A similar arrangement was made on the continent after V-E Day in 1945, whereby the United States agreed to transfer 1,300,000 POWs to the control of France, Belgium, and Luxembourg to perform necessary labor on public works projects.⁵⁷ 700,000 POWs were ultimately transferred, and it is highly significant that a POW transfer of this scale was made in the sole discretion of the President even after the hostilities in Europe had been concluded.

The most complicated and elaborate transfer schemes employed by the United States during World War II were tailored to the unusual conditions that prevailed in the Middle Eastern theater. In early 1943, the Provost Marshal General's office found itself unprepared to handle a large influx of POWs in this area, and therefore directed that any enemy soldiers who were captured be immediately turned over to British control.⁵⁸ By the summer of 1943, however, the American command had established an infrastructure capable of handling POW internment, and the United States and Great Britain agreed that "[e]ach nation, after the initial documentation [of the capture], was to assume responsibility for one-half the total number of prisoners of war captured, after the deduction of any [POWs] captured by a third ally."⁵⁹ Later, a new wrinkle was added to this policy when an additional complication arose: The British had an agreement with the Egyptian government allowing them to import prisoners of war into the country, but the United States did not. An arrangement was therefore agreed to whereby American-held POWs were transferred to British control, shipped into Egypt as British POWs, and then restored to the United States.⁶⁰

Although relatively few POWs were captured in the Pacific theatre during World War II, the United States nevertheless made arrangements to turn POWs captured there over to foreign control. Japanese forces that were captured in the "Southwest Pacific Area" were transferred to the control of the Commonwealth of Australia, largely because the United States lacked

⁵³ *Id.* at 106, 119.

⁵⁴ *Id.* at 120-23.

⁵⁵ *Id.* at 204, 241-43.

⁵⁶ *Id.* at 177.

⁵⁷ *Id.* at 241.

⁵⁸ *Id.* at 201.

⁵⁹ *Id.*

⁶⁰ *Id.* at 202-03.

sufficient rear area facilities and personnel to adequately maintain the POWs itself.⁶¹ Similar complications in the "China-Burma-India Theater" led the United States to turn all POWs captured in that vicinity over to the nearest British headquarters.⁶²

The United States also on several occasions during World War II agreed to accept control of prisoners of war captured by its Allies; in August of 1942, for example, the Joint Chiefs of Staff agreed to accept 150,000 POWs from the British because the British were having a difficult time mustering sufficient supplies to sustain them.⁶³ A similar arrangement was agreed to in November of 1942 whereby 25,000 Italian POWs captured by the British in Kenya were shipped to the United States and maintained there under United States control.⁶⁴ Finally, at the outset of the joint American-British invasion of North Africa in 1943 it was agreed that all POWs captured in Northwest Africa by either nation would be considered to be under the control of the United States.⁶⁵

Vietnam.⁶⁶ The United States did not have to develop a detailed prisoner of war policy during the Vietnam War, as it agreed early on in the hostilities to transfer all enemy soldiers that it captured in Vietnam to the custody and control of the South Vietnamese government.⁶⁷ This arrangement was formalized by the commander of the United States forces in Vietnam and the South Vietnamese Minister of Defense in the Westmoreland-Co Agreement on September 27, 1965.⁶⁸ The United States was not satisfied with the efforts made by the South Vietnamese government to exchange POWs for captured American soldiers, however, and therefore seized on an opportunity that materialized in July of 1966 to retain some POWs under its own control when the crewmembers of several North Vietnamese patrol torpedo boats ("PT boats") were captured in the Gulf of Tonkin.⁶⁹ The State and Defense Departments worked jointly to establish the conditions under which the POWs were confined and interrogated, and later worked jointly to try to repatriate the prisoners to North Vietnam in exchange for the release of American POWs.⁷⁰ The Defense Department ordered that the Geneva Convention guidelines be strictly adhered to with respect to the PT boat prisoners in order to put pressure on North Vietnam to accord captured Americans similarly humane treatment.⁷¹ When it became obvious that no formal exchange agreement would be secured, the State department ordered that all of the POWs be released anyway in the hope that the release might induce North Vietnam to voluntarily reciprocate.⁷²

⁶¹ *Id.* at 247.

⁶² *Id.* at 260.

⁶³ *Id.* at 83.

⁶⁴ *Id.* at 88.

⁶⁵ *Id.* at 90 n.43.

⁶⁶ We do not here discuss the disposition of POWs during the Korean War because POW policy was established by the United Nations Command and not by the United States.

⁶⁷ See Major General George S. Prugh, *Law at War: Vietnam 1964-1973*, at 62-65 (Dep't. of the Army 1975).

⁶⁸ See Vernon E. Davis, *The Long Road Home: U.S. Prisoner of War Policy and Planning in Southeast Asia* 94 (2000).

⁶⁹ See *id.* at 94.

⁷⁰ *Id.*

⁷¹ *Id.* at 94-95.

⁷² *Id.* at 95.

Panama. At the conclusion of Operation Just Cause in Panama in 1990, approximately 4,000 military detainees were transferred to the control of Panamanian authorities.⁷³ Although the Panamanian detainees were accorded POW treatment as a matter of policy, the Bush administration never reached “any conclusion that the United States was obligated to do so as a matter of law.”⁷⁴ Thus, Operation Just Cause provides an additional example of the unilateral transfer by the President of military detainees who were not entitled to prisoners of war status to the custody of a foreign nation.

The Gulf War. The United States transferred thousands of captured Iraqi soldiers to the custody of Saudi Arabia during the Gulf War.⁷⁵ No statute authorized the President to transfer the detainees, yet Congress did not protest the transfers and took no action indicating that it believed that it had authority under the Constitution to address them.

Conclusion. Since the Founding, no one has seriously questioned that the Constitution’s vesting of the Commander-in-Chief and Chief Executive powers in the President constitutes an affirmative grant of authority to the President to “dispose of the liberty” of prisoners of war. Control over prisoners has been considered the prerogative of army commanders in chief throughout American history. With the exception of the statutes passed during the Quasi-War with France and the War of 1812 authorizing the President to take and retaliate against prisoners of war, Congress has never sought to regulate the disposition of POWs or asserted that it has any authority over them. Indeed, even the statutes from the Quasi-War with France and the War of 1812 did not truly “regulate” the disposition of POWs, but rather, without providing binding rules or standards, authorized and provided financial support for vigorous Presidential action. The unbroken historical chain of exclusive Presidential control over enemy soldiers and agents captured in time of war establishes that the President’s powers have been understood by the political branches to include the inherent authority to develop and implement United States policy respecting prisoners of war.

Moreover, historical practice clearly demonstrates that the President’s inherent authority over prisoners of war includes discretion to transfer custody and control over prisoners of war to other sovereign nations. There is a rich historical tradition of such transfers, beginning as far back as the Revolutionary War and with the most prominent examples occurring in World War II and Vietnam. The admittedly considerable expanse of time during which no such transfers were effected by the United States, which spans the War of 1812, the Mexican War, the Civil War, and the Spanish-American War, is easily explained by the absence of any allies in those wars to which a POW transfer might have been deemed desirable. The advent of alliance warfare during World War I provided the United States with its first opportunity in over a century to engage in prisoner of war transfers, but the military made the policy determination – without ever disclaiming the authority to engage in POW transfers – that it preferred to retain control over all soldiers that it captured. The extensive use of prisoner of war transfers during subsequent conflicts, however, confirms the widespread acceptance of the President’s authority and discretion to dispose of the liberty of captured enemy personnel as he sees fit. During this

⁷³ See F. Borch, *Judge Advocates in Combat* 105 (2001).

⁷⁴ See Letter for Richard L. Thornburg, Attorney General, from Abraham D. Sofaer, Legal Adviser, Department of State (January 31, 1990).

⁷⁵ *Conduct of the Persian Gulf War: Department of Defense Final Report to Congress* 520 (1992).

history, neither Congress nor the Judiciary ever challenged or called into question the power of the President to do so.

In sum, the power of the President to set forth and establish all aspects of the prisoner of war policy of the United States, including the power to transfer prisoners of war to the custody and control of other nations, has always been understood as being within the Commander-in-Chief power. Further, it has never been challenged or called seriously into question by the coordinate branches of the government.

3. Commander-In-Chief Control Of Captured Individuals Not Entitled To POW Status

The President's power as Commander in Chief to dispose of the liberty of individuals captured during military engagements is not limited to those who are entitled to prisoner of war status. During the Civil War, for example, the President negotiated terms for the exchange of civilian prisoners captured by the Union army during military operations.⁷⁶ And during World War II, the Commander in Chief of the Allied Expeditionary Force issued regulations governing the disposition of captured individuals not in uniform. Those regulations provided that "unless they can produce evidence to prove that they have the right to treatment as Prisoners of War, [captured personnel not in uniform] will be detained as civilian suspects. Those of FRENCH nationality may be handed over to the FRENCH while those of other nationalities will be retained in custody."⁷⁷ Finally, even though Viet Cong captured in South Vietnam during the Vietnam War were indigenous rebels and therefore arguably not entitled to prisoner of war status, the United States nevertheless transferred them to the custody and control of South Vietnam.⁷⁸ In sum, historical practice firmly supports the power of the President to transfer and otherwise dispose of the liberty of *all* individuals captured incident to military operations, and not merely those individuals who may technically be classified as prisoners of war under relevant treaties.

B. Limitations on POW Transfers Imposed by the Geneva Convention

It has long been a recognized international practice for one nation to transfer prisoners of war that it has captured to the custody and control of other nations that are either neutral countries or co-belligerents.⁷⁹ Articles drawn up at an international conference in Brussels in 1874 expressly provided for the transfer of prisoners of war to neutral countries during ongoing hostilities, and the 1929 Geneva Convention Relating to Prisoners of War also authorized such transfers under certain circumstances.⁸⁰ Indeed, the 1929 Convention expressly distinguished the obligations of the "Capturing Power" from the obligations of the "Detaining Power," implicitly recognizing that the two Powers frequently would not be one and the same. Rather than

⁷⁶ Lewis & Mewha, *supra* note 3, at 29.

⁷⁷ *Id.* at 215.

⁷⁸ See Prugh, *supra* note 67, at 62.

⁷⁹ See William E.S. Flory, *Prisoners of War: A Study in the Development of International Law* 45 (1942).

⁸⁰ See The American National Red Cross, *Historical Background of International Agreements Relating to Prisoners of War* 56-59 (1943).

authorize transfer, these agreements appear to have recognized and codified pre-existing practice under the customary laws of war.

The historical practice of POW transfer is perhaps most explicitly recognized and regulated by the most recent international agreement on the subject, the 1949 GPW. Among other things, the GPW establishes rules governing the transfer of POWs between sovereign nations. Article 12 states that “[p]risoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.” Articles 109 and 110 provide for the accommodation of POWs in neutral countries under certain circumstances. Although these provisions are intended to *limit* the circumstances under which POWs can be transferred between nations, their inclusion in the Convention establishes that in their absence commanders-in-chief have virtually unfettered discretion to transfer custody of POWs to other nations under international law.

It is exactly this legal rule that applies to al Qaeda and Taliban prisoners. The GPW’s protections for POWs apply only in “all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”⁸¹ As this Office has concluded elsewhere, members of al Qaeda have no rights under GPW because al Qaeda, as a non-state terrorist organization, is not a “High Contracting Party” to the Geneva Conventions. See GPW Memo. GPW, therefore, does not apply to the conflict between the United States and al Qaeda and any members of al Qaeda who are captured consequently are not legally entitled to POW status.

On the other hand, both the United States and Afghanistan are High Contracting Parties to the Geneva Conventions. GPW entered into force in the United States on February 2, 1956, and Afghanistan acceded to it on September 26, 1956.⁸² As this Office has concluded elsewhere, however, the President has the authority to interpret the GPW to find that members of the Taliban are not legally entitled to GPW status because they do not meet the requirements for POWs set out in GPW Article 4. See GPW Memo. Individuals are not entitled to POW status under GPW unless they meet certain standards, including being a member of an armed force or related militia or volunteer corps that wears uniforms, bears arms openly, and obeys the laws of war. On February 7, 2002, the President exercised this authority and found that none of the Taliban prisoners are entitled to POW status. Consequently, GPW’s limitations on the ability to transfer POWs do not apply. GPW establishes no minimum standards regulating the transfer of combatants who do not meet the definition of a POW under Article 4.

Thus, although the transfer provisions of GPW are inapplicable to members of al Qaeda or the Taliban militia, the President could, of course, decide to transfer members of al Qaeda or the Taliban consistent with GPW. If the President were to decide to apply GPW, it would govern POW transfer in the following fashion. Article 12 provides that “[p]risoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.” The GPW thus imposes two initial limitations on transfers of

⁸¹ See GPW, Article 2.

⁸² See 30 ILM 397 (1951).

prisoners of war. The first requirement, which holds that the Transferee Power must be a party to the GPW, is both easy to understand and relatively unproblematic, as virtually every nation in the world has signed it.⁸³ The requirement that the Detaining Power “satisfy itself” that the Transferee Power is “willing” to apply the GPW, however, is considerably more vague. The International Committee of the Red Cross (“ICRC”) has expressed the opinion that the Detaining Power can fulfill its obligation only through a prior investigation, which it suggests be conducted under the auspices of the Power assigned to protect the prisoners. See 3 *The Geneva Conventions of 12 August 1949: Commentary* 136 (Jean S. Pictet ed., ICRC 1960). We do not agree, however, that Article 12 requires that the Detaining Power have actual knowledge of the conditions in which the other power will keep a transferred POW, or that the other power guarantee a certain kind of treatment. The phrase “satisfy[y] itself,” certainly does not require a prior investigation of the sort contemplated by the ICRC, but instead suggests that whether the receiving nation will meet with GPW is for the transferring country to determine. Further, Article 12 does not state that the Detaining Power must satisfy itself that the transferee nation will honor the strict letter of the GPW in every respect. Rather, a separate sentence of Article 12 indicates that the Detaining Power’s responsibility is limited to ascertaining that the transferee nation will not breach the GPW “in any important respect.”⁸⁴ The ICRC has interpreted that phrase to mean “systematic violations of the Convention,” breaches causing “serious prejudice to the prisoners,” and “grave breaches of the Convention” as defined by Article 130. Pictet, *supra*, at 138. Even the ICRC, therefore, acknowledges that the Detaining Power need not satisfy itself that the transferee nation will meet every requirement of GPW in its treatment of POWs.

Once a POW is formally transferred, GPW establishes that the Detaining Power is no longer responsible for the treatment that the POW receives.⁸⁵ If, however, the “Protecting Power” – typically the ICRC – complains that the Transferee Nation is not honoring GPW’s limitations, the Detaining Power must investigate the Protecting Power’s claim, and might even be required to request the return of the prisoner. Like the up-front limitations on POW transfers, however, these back-end GPW requirements are entirely self-enforcing and subject to interpretation, and the manner in which the United States elects to uphold its treaty obligations is left entirely to its own discretion. Your Department would likely have more information that the Department of Justice concerning United States practice, if any, under this provision.

C. Limitations Imposed on the Transfer Of Detainees By the Torture Convention

In addition to GPW, the Torture Convention establishes certain restrictions on the ability of state parties to transfer individuals within its control. The Torture Convention prohibits contracting parties from transferring individuals who are in their custody within their territory to the control of foreign governments that are more likely than not to torture them. Article 3 of the Torture Convention specifies that “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁸⁶ Article 2 provides that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other

⁸³ 30 ILM 397.

⁸⁴ GPW, Article 12 (emphasis added).

⁸⁵ GPW, Article 12.

⁸⁶ 23 I.L.M. at 1028.

public emergency, may be invoked as a justification of torture.”⁸⁷ The United States is a party to the Convention. President Reagan signed the Convention on April 18, 1988, and the Senate consented to it on October 27, 1990.

Two of the Senate’s reservations, understandings, and declarations accompanying the Convention are worth mentioning here. First, the United States expressed the understanding that the phrase “substantial grounds for believing that he would be in danger of being subjected to torture” in Article 3 means that “it is more likely than not that he would be tortured.”⁸⁸ Second, the United States expressly declared that Article 3 of the Convention is not self-executing.⁸⁹ As a non-self-executing treaty, the Torture Convention does not, without implementing legislation, provide a private cause of action in federal court for an individual to oppose his expulsion or extradition. *See generally* Memorandum for Mary B. DeRosa, Legal Adviser, National Security Counsel, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Re: Identifying Self-Executing Treaty Provisions* at 1-2 (Dec. 26, 2000); 1 *Restatement (Third) of the Foreign Relations Law of the United States* § 111 & cmt. h (1987). Thus, the Torture Convention does not itself provide a prisoner with the legal grounds to ask a federal court to block his transfer to another country.

Congress has also passed laws implementing the Torture Convention, however, and such laws generally are domestically enforceable. First, Congress has required all “heads of appropriate agencies” to “prescribe regulations to implement the obligations of the United States under Article 3” of the Convention. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 2242(b), 112 Stat. 2681, 2681-822 (1998); 18 U.S.C. § 1231 note (1994). This provision does not concern us here, as no regulations that have been promulgated pursuant to it are applicable to military transfers.⁹⁰ Congress has also broadly proclaimed, however, that “[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.” *Id.* § 2242(a), 112 Stat. at 2681-822; 18 U.S.C. § 1231 note. This provision largely tracks the language of the Torture Convention, but it significantly extends the Convention’s protections to persons who are not physically present in the United States. Congress expressly referred to this proclamation as a “policy statement,” *id.*, indicating that it should not be construed as an actual interpretation of the treaty language or as a provision creating judicially enforceable rights. *See Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 454-55 (1988) (holding with respect to statutory language similarly setting forth the “policy of the United States” that “[n]owhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights”); *Attakai v. United States*, 746 F. Supp 1395, 1405 (D. Arizona 1990) (same). Furthermore, even if it were an interpretation of the Convention, the interpretation would not be binding on the Executive, and indeed it would arguably constitute unconstitutional interference with the President’s constitutional authority over treaties. *See generally* Memorandum for John

⁸⁷ *Id.*

⁸⁸ 136 Cong. Rec. 36,193 (1990).

⁸⁹ *Id.*

⁹⁰ As is discussed below, the Torture Convention does not apply extraterritorially. Thus, the Department of Defense was not required to promulgate regulations with respect to military transfers.

Bellinger, III, Senior Associate Counsel to the President and Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* (Nov. 15, 2001) (the "ABM Suspension Memo").

The non-self-executing nature of the Torture Convention does not answer the question whether the executive branch has a legal obligation to enforce the treaty by refusing to transfer individuals, held in custody in United States territory, to foreign governments under circumstances where it is more likely than not that they will be tortured.⁹¹ But we need not address this latter issue because the Torture Convention has no extraterritorial effect (except in the case of extradition) and, hence, cannot apply to al Qaeda and Taliban prisoners detained *outside* of United States territory at Guantanamo Bay or in Afghanistan. Although the United States Supreme Court has never interpreted the scope of Article 3, under which the United States cannot "expel," "return," or "extradite" individuals to countries in which it is more likely than not that they will be tortured, it has interpreted identical language elsewhere. As the Supreme Court has held, a treaty's use of the words "return" and "expel" means that the treaty's requirements apply only to individuals being held within the territory of the United States. *See Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (construing the same words as used in the Conventions Relating to the Status of Refugees). The Court explained that the word *expel* "refers to the deportation or expulsion of an alien who is already present in the host country." *Id.* at 180. The word *return*, on the other hand, which the treaty defines in part by a parenthetical reference to the French word "refouler," "has a legal meaning [that is] narrower than its common meaning." *Id.* "Refouler" is not a synonym for the English word "return," but rather means to "repulse," "repel," or "drive back." *Id.* at 180-81. Thus, in the context of international treaties such as the Torture Convention, the word "return" refers to the involuntary removal of individuals who have not been legally admitted into the territory of the host country, but rather have been turned back or detained at the border.⁹² *Id.* at 181-82. "A treaty cannot impose unanticipated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent." *Id.* at 183.⁹³

Given the Supreme Court's interpretation of identical language in the Refugee Convention, it makes no sense to view the Torture Convention as affecting the transfer of prisoners held outside the United States to another country.⁹⁴ Our conclusion receives further support from the canon of construction that statutes and treaties are not to be read to have extraterritorial effect unless Congress clearly states its intentions otherwise in the text. *See, e.g.,*

⁹¹ Torture Convention, 23 I.L.M. at 1028.

⁹² Thus, the word "return" as used in the Convention does not apply to individuals who are apprehended or turned back while on the high seas. *See Sale*, 509 U.S. at 181-83.

⁹³ In the present context, we need not examine whether the Torture Convention's prohibition of extradition applies extraterritorially.

⁹⁴ To the extent that it might be argued that customary international law prohibits the transfer of individuals to countries in which it is likely that they will be tortured, such an international norm would not be binding on the President. Although the courts have sometimes suggested that customary international law is incorporated by the Constitution into the domestic law of the United States, *see The Paquete Habana*, 175 U.S. 677, 700 (1900) ("[i]nternational law is part of our law"), when doing so they have always emphasized that customary international law is superseded for domestic purposes by "controlling executive or legislative act[s]." *Id.* The President's authorization of a POW transfer would constitute a controlling executive act, and for domestic law purposes would displace any otherwise applicable norms of customary international law. *See GPW Memo* at 32-37.

Sale, 509 U.S. at 177-87. That presumption plays an important role in ensuring that the political branches have the discretion to manage the Nation's foreign affairs, unless there is a clear intention to regulate such matters by statute or treaty. See *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963). Furthermore, we must interpret statutes and treaties so as to protect the President's constitutional powers from impermissible encroachment and thereby to avoid any potential constitutional problems. Cf. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989). Here, reading the Torture Convention to apply extraterritorially would interfere with the President's powers as Commander in Chief and Chief Executive to direct the operations of the military. We do not read the Torture Convention to have such an effect without a clear statement in the text of the treaty or any implementing legislation.

Further, construing the Torture Convention as applying to the extraterritorial detention of prisoners of war would create an unacceptable conflict with the GPW. As noted earlier, the GPW establishes a legal regime for the treatment of prisoners of war. The highly detailed provisions of GPW are designed to provide a comprehensive set of requirements defining the full set of obligations that signatories undertake with respect to the subject matter covered. In generally prohibiting the extradition, expulsion, or return of individuals under certain conditions, the Torture Convention does not displace the GPW's distinct and specialized body of law in its sphere of operation. To the contrary, the standard rule of construction, applicable to both treaties and statutes, is that the specific governs the general. Thus "where there is no *clear* intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (emphasis in original) (internal quotation marks and citations omitted). See also *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general").

Thus, the United States is free from any constraints imposed by the Torture Convention in deciding whether to transfer detainees that it is holding abroad to third countries.

D. Criminal Penalties for Conspiring to Commit Acts of Torture Abroad

Although the President is free from *ex ante* constitutional and domestic law constraints on his ability to transfer military detainees held outside the United States to the custody of foreign nations, criminal penalties could apply to such transfers if they were deemed to be part of a conspiracy to commit an act of torture abroad. 18 U.S.C. § 2340A(a) (1994), provides:

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

18 U.S.C.A. § 2340A(c) (2000), amended by USA Patriot Act, Pub. L. No. 107-56, sec. 811(g), 115 Stat. 272, 381 (2001), provides that the same penalties are applicable to "[a] person who conspires to commit an offense under this section." This law applies to official conduct engaged

in by United States military personnel, as 18 U.S.C. § 2340 (1994) defines "torture" to mean "an act committed by a person acting under the color of law," and 18 U.S.C. § 2340A(b)(1) explicitly provides United States courts with jurisdiction where "the alleged offender is a national of the United States."

The scope of the provision is limited by its applicability only to acts of torture committed "outside the United States." *Id.* § 2340A(a). Because conspiracy liability under section 2340(c) is predicated on an individual's having conspired to perform an act that would have constituted an offense under section 2340(a), section 2340(c) applies only to conspiracies the object of which is the commission of acts of torture abroad. We do not, however, read the statute to exclude from its coverage conspirators who are inside the United States at the time that they enter into an otherwise covered conspiracy. So long as the design of a conspiracy is to commit an act of torture abroad, the locus of the conspirators at the time that they agree to commit the act of torture is irrelevant under the statute.

The statute therefore would provide criminal penalties for any transfer that is found to be part of a conspiracy to commit torture abroad. Under the general federal criminal conspiracy statute, to establish the existence of a criminal conspiracy a prosecutor must demonstrate beyond a reasonable doubt :

- (1) that two or more people agreed to pursue an unlawful objective; (2) that the defendant voluntarily agreed to join the conspiracy; and (3) that one or more members of the conspiracy committed an overt act in furtherance of the conspiracy.

United States v. Loe, 262 F.3d 427, 432-33 (5th Cir. 2001) (referring to 18 U.S.C. § 371), *cert. denied*, No. 01-919, 2002 WL 233060 (Feb. 19, 2002). The Supreme Court has read the first two of these general requirements into other statutes criminalizing "conspiracies" without further defining the term. *See, e.g., Salinas v. United States*, 522 U.S. 52, 63-65 (1997) (reading the requirements into the RICO statute, 18 U.S.C. § 1962(d)). The Court has ruled, however, that the requirement of an overt act is a statutory creation that should not be read into statutes that do not expressly provide for it. *See id.* at 64; *Fiswick v. United States*, 329 U.S. 211, 216 n.4 (1946). It is irrelevant for present purposes whether an overt act is required under the criminal torture statute, however, as the transfer of an individual would almost certainly itself be sufficient to qualify as the requisite overt act.

Thus, to fully shield our personnel from criminal liability, it is important that the United States not enter into an agreement with a foreign country, explicitly or implicitly, to transfer a detainee to that country for the purpose of having the individual tortured. Such an agreement would not have to be explicit to be prosecuted, as an agreement "can instead be inferred from the facts and circumstances of the case." *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975). So long as the United States does not intend for a detainee to be tortured post-transfer, however, no criminal liability will attach to a transfer, even if the foreign country receiving the detainee does torture him. For criminal liability to attach, the accused must be shown to have intended to effectuate the criminal object of the conspiracy. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978). Thus, so long as the United States personnel who agree to transfer a

detainee do not intend to effectuate the criminal object that is forbidden by the criminal torture statute – here, the torturing of the detainee – they cannot be prosecuted under the statute.

II. DOMESTIC RULES GOVERNING EXTRADITION

Extradition is “the normal process by which individuals charged with or convicted of a crime against the law of one state and found in a second state are returned by the second state to the first for trial or punishment.”⁹⁵ It is a highly specialized process, the basic characteristics of which are outlined below, and it is accordingly subject to its own particularized set of rules and limitations. Thus, the more generic restrictions that the Geneva Convention places on transfers of prisoners of war do not apply to requests for extradition, and, reciprocally, the specialized rules and requirements that are applicable to the extradition process do not restrict other methods of transfer. Extradition requests typically relate to individuals being held within a nation’s territorial jurisdiction, and it is therefore unlikely that the process can be invoked with respect to alien combatants captured in Afghanistan and detained in Guantanamo Bay or Afghanistan. See Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Patrick F. Philbin, Deputy Assistant Attorney General and John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba* (Dec. 28, 2001). Although we do not believe that extradition is involved in the extraterritorial transfer of prisoners of war, in the interests of fully informing you of the different legal regimes that might apply in the future we will analyze the applicable procedural requirements and legal restrictions.

A. Extradition Must Be Authorized by Law

In *Valentine v. United States ex rel. Neidecker*, the Supreme Court ruled that “the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against him must be authorized by law. There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law.” 299 U.S. 5, 9 (1936). Although *Valentine* was decided in the context of an attempt to extradite a citizen of the United States, its requirement that all executive initiatives to surrender individuals to foreign governments must be authorized by law has consistently been applied by the lower courts to attempted extraditions of foreign nationals.⁹⁶ See, e.g., *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999), *cert. denied*, 528 U.S. 1135 (2000).

Valentine establishes that the executive’s power to extradite an individual “must be found [in a] statute or treaty [that] confers the power.” *Valentine*, 299 U.S. at 9. Where an extradition treaty is in force between the United States and a country to which the executive wishes to extradite an individual, the treaty will establish most of the terms and requirements for

⁹⁵ Barry E. Carter & Phillip R. Trimble, *International Law* 813 (2d ed. 1985). See also *Jimenez v. United States Dist. Ct. for the So. Dist. of Florida*, 84 S. Ct. 14 (1963).

⁹⁶ As has been noted, the Commander-in-Chief power constitutes an independent substantive grant of authority to the President to dispose of the liberty of military detainees, and is itself sufficient to satisfy the constitutional concerns articulated by *Valentine* with respect to military transfers. 299 U.S. at 9. The holding of *Valentine*, however, is that the President does not enjoy a comparable grant of inherent constitutional authority with respect to extradition. *Id.* at 8.

extradition. Some generalizations about extradition procedures can be made, however, on the basis of applicable statutes. First, no person can be surrendered absent "the requisition of the proper authorities of [a] foreign government." 18 U.S.C. § 3184 (Supp. II 1996). Second, the crime that is the subject of the requisition request must be listed in the applicable treaty, must not be a crime that is purely political in nature,⁹⁷ must have taken place "within the jurisdiction of [the] foreign government," and must be considered a crime under United States law. *Id.* Additionally, a court reviewing the extradition request must "deem[] the evidence sufficient to sustain the charge" before the individual can be extradited. *Id.*⁹⁸

These same procedural rules also apply to extradition authorized by statute rather than by treaty. *Id.* The most significant statutory provision that allows the executive to extradite individuals without regard to the existence of a treaty is 18 U.S.C. § 3181(b) (Supp. II 1996), which, in the interest of comity with foreign nations, authorizes "the surrender of persons, other than citizens, nationals, or permanent residents of the United States, who have committed crimes of violence against nationals of the United States in foreign countries." The predicate crime justifying extradition under section 3181 must be a crime of violence as defined by 18 U.S.C. § 16 (1994) and cannot be political in nature. Section 3181 is relatively narrow in scope. The person to be surrendered cannot be a United States citizen and must have committed a crime of violence against a United States national while outside of United States territory.

B. Domestic Law Limitations on Extradition Based on the Torture Convention

Once all of the applicable procedures have been followed and the statutory or treaty-based requirements have been met, the Secretary of State has virtually absolute discretion whether or not to extradite the individual in question. There are some significant domestic law constraints, however, imposed by statutes and regulations that implement the Torture Convention.

As has been noted, in 1998 Congress passed a statute requiring "the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3" of the Torture Convention, "subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention." Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 2242(b), 112 Stat. 2681, 2681-822 (1998); 18 U.S.C. § 1231 note (1994). Pursuant to this statute, the State Department has issued a set of regulations designed to implement the Convention. Those regulations declare that "to implement the obligation assumed by the United States pursuant to Article 3 of the Convention, the Department considers the question of whether a person facing extradition from the U.S. 'is more likely than not' to be

⁹⁷ Treaties almost universally provide that political offenses are not the proper subject of an extradition request.

⁹⁸ One additional limitation may be implied from 18 U.S.C. § 3186 (1994), which provides that once all requirements for extradition have been met "the Secretary of State may order the person... to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged" (emphasis added). This language could be construed to require that the Secretary extradite an individual only if the Secretary believes that the extradition request is not a sham and that the requesting country will in fact afford the extradited individual a trial.

tortured in the State requesting extradition.”⁹⁹ 22 C.F.R. § 95.2(2)(b) (2001). The regulations go on to specify that “where allegations relating to torture are made or the issue is otherwise brought to the Department’s attention, appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary,” and further provide that “[b]ased on the resulting analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions.” *Id.* § 95.3. In this way, the State Department regulations preserve the Secretary’s discretion and avoid the imposition of any hard-and-fast rules concerning the circumstances under which extradition is permissible.

The failure of the regulations to establish any definable standards does not necessarily give the Secretary *carte blanche* to do as he pleases, however. By stating that Convention protections are to be extended to individuals whenever it is found that it “is more likely than not” that they will be tortured if they are extradited, 22 C.F.R. § 95.2 at the very least strongly suggests that the Secretary *should not* surrender individuals to foreign countries that are likely to torture them. But the provision does not create any judicially enforceable rights, and 22 C.F.R. § 95.4 specifies that “[d]ecisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review.” *But see Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1014 (9th Cir. 2000) (dicta “that the Secretary’s duty to implement the [Foreign Affairs Reform & Restructuring] Act is non-discretionary and that the statute does not preclude review, [such that] a fugitive fearing torture may petition for review of the Secretary’s decision to surrender him”).

Applicable statutes provide the Secretary with yet more flexibility. Even if the regulation were construed to *forbid* the Secretary to hand individuals over to foreign nations whenever it is “more likely than not” that they will be tortured, Pub. L. No. 105-277, § 2242(c) nevertheless provides the Secretary some discretion by minimizing the protections that are accorded to certain classes of aliens. Section 2242(c) excludes from the coverage of all regulations implementing the Convention those aliens that are listed in 18 U.S.C. § 1231(b)(3)(B) “[t]o the maximum extent consistent with the obligations of the United States under the Convention.” This exclusion extends to aliens who have been convicted of a serious crime and are deemed a danger to the community, aliens who have committed serious nonpolitical crimes outside of the United States, aliens who are deemed a threat to national security, and aliens who have “ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual’s race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1231(b)(3)(B) (2000), INA § 241(b)(3)(B). The fact that the statute requires that the “obligations of the United States under the Convention” be honored means that the statutory exception does not actually provide all that much additional flexibility, as surrendering an individual with knowledge that he will be tortured is clearly forbidden by the Convention. Pub. L. No. 105-277, § 2242(c). In borderline cases, however, it does provide the Secretary with additional discretion that may prove useful.

⁹⁹ Although the Torture Convention prohibits parties from returning, expelling, or extraditing individuals “where there are *substantial grounds* for believing that he would be in danger of being subjected to torture,” 23 I.L.M. at 1028 (emphasis added), a Senate understanding interprets that phrase to mean “if it is *more likely than not* that he would be tortured.” 136 Cong. Rec. 36,193 (1990) (emphasis added).

In conclusion, extradition may in certain cases provide a practical means by which to transfer individuals in our custody to foreign nations. Although such transfers might violate our treaty obligations if extradition is to a country where torture is likely, the applicable domestic law constraints arguably amount to little more than precatory policy statements. Moreover, judicial interference in an extradition proceeding is extremely unlikely, as the Convention is not self-executing, *see Akhtar v. Reno*, 123 F. Supp. 2d 191, 196 (S.D.N.Y. 2000), judicial review of statutory Convention-based claims is expressly limited by Pub. L. No. 105-277, § 2242(d) and 22 C.F.R. § 95.4, and the traditional "rule of non-inquiry" prohibits courts from taking into account the treatment that an individual is likely to receive in a foreign nation once transferred in rendering rulings concerning extradition. *See generally Jacques Semmelman, Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 Cornell L. Rev. 1198 (1991).

III. DOMESTIC RULES GOVERNING REMOVAL

Removal rules govern only aliens who are being held within the territory of the United States. Thus, the following discussion is not applicable to the Taliban and al Qaeda detainees presently being held at Guantanamo Bay. Nevertheless, we provide an analysis of the removal rules so that you will know the full range of options in the event that detainees are held within the United States in the future.

Normal removal procedures – those that apply to the vast majority of aliens who are illegally in the United States – strictly limit the places to which an alien can legally be removed. There are special procedures, however, that govern the removal of alien terrorists and other aliens posing a threat to our national security, and those procedures accord the Attorney General a great deal of flexibility in determining the place to which an alien should be removed. Nonetheless, the Torture Convention prohibits the removal of an alien to a country where it is "more likely than not" that the alien will be tortured. Moreover, statutes implementing the Convention establish that it is "the policy of the United States" not to remove aliens to countries in which it is likely that they will be tortured, and implementing regulations promulgated by the Department of Justice flatly prohibit removal under such circumstances. Thus, the vast discretion that is effectively afforded the Attorney General by the alien terrorist removal procedures can be employed to remove an alien only to a country where it is unlikely that he will be tortured.

A. Normal Removal Procedures

1. Designated Place of Removal Under the Normal Removal procedures

Under the statutory guidelines, the place to which an alien is to be removed depends on whether the alien was ever lawfully admitted to the United States. Aliens who are stopped upon their arrival at the United States "shall be removed to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States." 8 U.S.C. § 1231(b)(1)(A), INA § 241(b)(1)(A). If the alien arrived from a foreign territory contiguous to the United States or an island adjacent to the United States but is not a citizen of that territory or island, the alien

shall be removed "to the country in which the alien boarded the vessel that transported the alien to the territory or island." *Id.* § 1231(b)(1)(B), INA § 241(b)(1)(B). If, and only if, the designated country is unwilling to accept the alien, the alien may be removed to a country of which the alien is a citizen, subject, or national, the country in which the alien was born, or a country in which the alien has a residence. *Id.* § 1231(b)(1)(C), INA 241(b)(1)(c). If each of these three options is found to be "impracticable, inadvisable, or impossible," then the alien may be removed to any country that is willing to accept him. *Id.*

All other aliens who are subject to removal under the normal removal procedures are generally allowed to designate the country to which they wish to be relocated. *Id.* § 1231(b)(2)(A), INA § 241(b)(2)(A). The Attorney General may ignore that designation, however, if he "decides that removing the alien to the country is prejudicial to the United States." *Id.* § 1231(b)(2)(C)(iv), INA § 241(b)(2)(C)(iv). The Attorney General must then remove the alien "to a country of which the alien is a subject, national, or citizen" unless the governments of all of the applicable countries either refuse to accept the alien or fail to send word of their acceptance or non-acceptance of the alien to the Attorney General within 30 days. *Id.* § 1231(b)(2)(D), INA § 241(b)(2)(D). In the event that an alien is not removed pursuant to any of these provisions, the Attorney General is granted a range of options as to where he may send the alien, including - *if and only if* it is determined that all of the other available options are "impracticable, inadvisable, or impossible...another country whose government will accept the alien into that country." *Id.* § 1231(b)(2)(E)(vii), INA § 241(b)(2)(E)(vii).

Special provisions govern the removal of aliens when the United States is at war. Upon a finding that a war has rendered it "inadvisable, inconvenient, or impossible" to utilize normal removal procedures, the Attorney General has two options. If the government of the country of which the alien is a citizen is in exile, the alien may be removed to the country that is hosting the exiled government. *Id.* § 1231(b)(2)(F), INA § 241(b)(2)(F). If, on the other hand, the government of which the alien is a citizen is not in exile, the alien may be removed to "a country that is very near the country of which the alien is a citizen or subject, or, with the consent of the government of the country of which the alien is a citizen or subject, to another country." *Id.* In certain cases, the wartime removal procedures could prove to be quite useful. For example, an alien who is a citizen of a Middle Eastern country could probably be removed to nearby Egypt, while a citizen of Afghanistan could be removed to nearby Russia or India. As there are no court decisions that address the scope of these special provisions outside of the context of formal, congressionally declared wars however, it is possible that the courts could deny them any effect during times of more limited military engagements.

In conclusion, the normal removal procedures allow for transfer an alien to a country of the Attorney General's choice only in certain circumstances. Aliens who were never legally admitted to the United States are typically returned to the country from whence they came, while aliens who were lawfully admitted to the United States are typically permitted to designate a country of their choice to which they wish to be removed. In those instances in which this first removal option proves to be unavailable, the statutes accord what amounts to a right of first refusal to the country in which the alien resides and to the country of the alien's citizenship to be the place to which the alien will be removed. Only when all of the statutorily designated countries are either unwilling to accept the alien or are deemed prejudicial to the United States

by the Attorney General does authority devolve to the Attorney General to designate the country to which the alien will be removed. Simply put, this convoluted process does not provide a reliable mechanism for transferring aliens to particular countries of the Attorney General's choosing.

2. Domestic Law Limitations on Place of Removal

There are several statutory and regulatory constraints limiting the authority of the Attorney General to remove aliens to foreign nations in which it is likely that they will be tortured or otherwise persecuted. The removal statute provides that "the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A), INA § 241(b)(3)(a). This provision should not present an obstacle to removing an alien terrorist to a country of the Attorney General's choice, however. First, any persecution that a terrorist might suffer would likely be attributable not to his "race, religion, nationality, membership in a particular social group, or political opinion," but to his participation in an illegal terrorism campaign. *Id.* Second, the provision is expressly made inapplicable to an alien if, among other things, the alien "ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion." *Id.* § 1231(b)(3)(B), INA § 241(b)(3)(B). This provision could cover virtually every alien terrorist who is apprehended in the United States, as it is the express goal of al Qaeda terrorists to persecute United States citizens because of their nationality. Even where that exception is inapplicable, however, an exemption is also provided where "there are reasonable grounds to believe that the alien is a danger to the security of the United States." *Id.* This second provision provides the Attorney General with a flexible catch-all that should cover virtually any alien who is involved in planning terrorist activities.

As has been noted, Congress imposed additional domestic law restrictions on removal when it implemented the Torture Convention. *See* Pub. L. No. 105-277, § 2242, 8 U.S.C. § 1231 note. Congress further required that all "appropriate agencies" promulgate regulations designed to implement the Convention. *Id.* § 2242(b). The statute does, however, exclude certain aliens from the protection of domestic regulations – those aliens that are listed in 8 U.S.C. § 1231(b)(3)(B), which, as has been noted, should encompass any alien who is suspected of having engaged in terrorism. *Id.* § 2242(c). This exclusion is limited in effect, however, stripping the listed aliens of regulatory protections only "[t]o the maximum extent consistent with the obligations of the United States under the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention." *Id.* Given the broad sweep of the Convention and the very limited scope of the Senate's reservations, understandings, and declarations, this exclusion is not particularly broad.

The regulations found at 8 C.F.R. § 208.16-18 (2001) generally implement the Convention, establishing procedures whereby aliens can seek to have their removal either deferred or withheld on the grounds that it is "more likely than not" that they will be tortured in the country to which they were ordered removed. No statute or regulation specifies precisely

how an alien is supposed to initiate an application for withholding or deferral of removal, but it is apparent from the structure of 8 C.F.R. Part 208, entitled "Procedures for Asylum and Withholding of Removal," that aliens must use the same procedures that apply to applications for asylum. Upon filing, the burden of proof is on the alien applicant "to establish [before an immigration judge] that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 208.16(c)(2). "If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Torture Convention." *Id.* § 208.16(4). The alien's removal must then be withheld *unless* the alien falls within the categories listed in 8 U.S.C. § 1231(b)(3)(B), which are set forth above.

If an alien does fall into one of the categories listed in 8 U.S.C. § 1231(b)(3)(B) – as it can be expected that most alien terrorists will – the alien is to be granted a deferral of removal pursuant to 8 C.F.R. § 208.17 instead of a withholding of removal pursuant to § 208.16. A deferral of removal confers no lawful immigration status upon the alien and does not require that the alien be released from custody. Moreover, a deferral can be terminated whenever an immigration judge determines that circumstances have changed such that it is no longer "more likely than not" that the alien will be tortured in the country to which he has been ordered removed. *Id.* § 208.17(b). The Attorney General may also himself terminate an order withholding or deferring removal "[i]f the Secretary of State forwards assurances...to the Attorney General" that "the Secretary has obtained from the government of a specific country assurances that an alien would not be tortured there if the alien were removed to that country." *Id.* § 208.18(c). The Attorney General's termination of a withholding or deferral order prevents any further consideration of the alien's claim for protection under the Convention "by an immigration judge, the Board of Immigration Appeals, or an asylum officer." *Id.* § 208.18(c)(3).

None of the protections and procedures discussed in this section apply to unadmitted aliens who are stopped upon their arrival in the United States and are determined to be terrorists, threats to national security, or otherwise harmful to the foreign policy interests of the United States. *See* 8 U.S.C. § 1225(c) (2000), INA § 235(c); 8 C.F.R. § 208.18(d). Such aliens are instead afforded Convention protections according to the procedures applicable to alien terrorists, which are outlined below.

B. Special Removal Procedures for Alien Terrorists

1. Securing an Order of Removal

Special statutory procedures govern the removal of alien terrorists. These procedures provide the Attorney General with the best and most flexible option for removing alien terrorists to a country of his choice. To secure such a removal order, the Department of Justice must prove to an immigration judge (1) that the targeted alien is a terrorist and (2) that removal of the alien under the normal procedures "would pose a risk to the national security of the United States." 8 U.S.C. § 1533(a)(1)(D) (2000), INA § 503(a)(1)(D). The statute defines an alien terrorist as an alien "who has engaged, is engaged, or at any time after admission engages in any terrorist activity," *Id.* § 1227(a)(4)(B), INA § 237(a)(4)(B), including hijacking, sabotage, hostage taking, assassination, violent attacks upon internationally protected persons, and the use of explosives,

firearms, or biological and chemical agents with intent to endanger safety or property (other than for purely personal monetary gain). *Id.* § 1182(a)(3)(B), INA § 212(a)(3)(B). The government is permitted to use classified information to make its case against an alien, in which case the information is reviewed by the judge *ex parte* and *in camera*. The hearing is otherwise open to the public, however, and the alien must be afforded the right to counsel and the right to introduce evidence. *Id.* § 1534, INA § 504. A trial judge's order of removal can be appealed to the United States Court of Appeals for the District of Columbia Circuit. *Id.* § 1535, INA § 505.

The statute provides that alien terrorists who are ordered removed "shall be [removed] to any country which the alien shall designate." *Id.* § 1537(b)(2)(A), INA § 507(b)(2)(A). The alien need not be removed to the country selected by the alien, however, "if the Attorney General, in consultation with the Secretary of State, determines that removal of the alien to the country so designated would impair a treaty obligation or adversely affect United States foreign policy." *Id.* § 1537(b)(2)(B), INA § 507(b)(2)(B). If the alien is not removed to the country of his designation, "the Attorney General shall cause the alien to be removed to any country willing to receive such alien." *Id.* Thus, so long as a legitimate foreign policy interest supports the Attorney General's refusal to remove an alien to the country of his designation, the alien can legally be removed to any country of the Attorney General's choice.

2. Convention Limitations on Removal

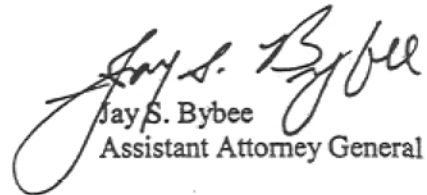
The Department of Justice has promulgated two sets of regulations respecting the removal of alien terrorists to implement the Torture Convention. The regulations establish that alien terrorists *are not entitled* to apply for withholding or deferral of removal under the Torture Convention. *Id.* § 1534(k); 8 C.F.R. § 208.18(d). Instead, "the [Immigration and Nationalization] Service will assess the applicability of Article 3 through the removal process to ensure that a removal order will not be executed under circumstances that would violate the obligations of the United States under Article 3." 8 C.F.R. § 208.18(d). The regulations further provide that "[a] removal order under [8 U.S.C. 1531-37] shall not be executed in circumstances that would violate Article 3 of the United Nations Torture Convention...as implemented by [Pub. L. No. 105-277 § 2242, 8 U.S.C. § 1231 note]. Convention claims by aliens subject to [such] removal...shall be determined by the Attorney General, in consultation with the Secretary of State." 8 C.F.R. § 507.1 (2001). Although the regulations leave the ultimate determination regarding the protection of alien terrorists to the discretion of the Attorney General, that discretion is constrained by the regulations' requirement that the Attorney General ensure that no removal would violate Article 3 of the Convention.

Conclusion

We conclude that as Commander in Chief and Chief Executive, the President has the plenary constitutional power to detain and transfer prisoners captured in war. We also conclude that neither the GPW nor the Torture Convention restrict the President's legal authority to transfer prisoners captured in the Afghanistan conflict to third countries. Although the GPW places conditions on the transfer of POWs, neither al Qaeda nor Taliban prisoners are legally entitled to POW status, and hence there are no GPW conditions placed on their transfer. While the Torture Convention arguably might govern transfer of these prisoners, it does not apply

extraterritorially. If detainees in the future are held within the territory of the United States, however, a more complex set of rules would apply.

Please let us know if we can provide any further assistance.



Jay S. Bybee
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