NOTES

PINCHING THE PRESIDENT'S PROSECUTORIAL PREROGATIVE: CAN CONGRESS USE ITS PURSE POWER TO BLOCK KHALID SHEIKH MOHAMMED'S TRANSFER TO THE UNITED STATES?

Nicolas L. Martinez*

"We have been unable to identify any parallel . . . in the history of our nation in which Congress has intervened to prohibit the prosecution of particular persons or crimes." So wrote Attorney General Eric Holder in a December 2010 letter addressed to the leadership of the Senate, in response to proposed congressional funding restrictions that would have forbidden the executive branch from using any appropriated funds to transfer non-American Guantanamo detainees held by the Department of Defense—Khalid Sheikh Mohammed in particular—to the United States. Those funding restrictions have since been signed into law on multiple occasions.

There is little doubt that these restrictions destroyed any hope the Obama Administration had of prosecuting the alleged 9/11 plotters in federal civilian court. What is in doubt, however, is whether Congress had the power to enact these restrictions in the first place. Congress's actions have been labeled by the Attorney General as "dangerous precedent" and by the President as a "violat[ion] of separation of powers principles" under certain circumstances. Yet no legal scholarship has been published that analyzes whether Congress's exercise of its purse power unconstitutionally infringed on either the President's au-

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thority as commander-in-chief or the executive's monopoly over the federal prosecution of named individuals. This Note aims to be the first voice on the issue.

Using both a separation of powers balancing analysis and a tripartite framework that builds on the work of Charles Tiefer, this Note concludes that while Congress has indeed stretched the permissible limits of its purse power in this instance, the legislature has not violated the Constitution. The analysis reveals, moreover, that Congress's funding restrictions infringed less on the President's military authority as commander-in-chief than on his prosecutorial authority. Ultimately, this Note also raises the question of whether Congress's actions to effectively forbid the prosecution of named individuals in federal court, even if constitutional, are still bad policy.

INTRODUCTION

Amidst a spirited defense of congressional apportionment in *The Federalist No. 58*, James Madison presciently wrote: "This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people . . . ."[1] While Congress's purse power is as formidable today as Madison envisioned it to be in 1788, this authority has limits.[2] Nonetheless, the extent to which Congress

1. THE FEDERALIST NO. 58, at 356, 359 (James Madison) (Clinton Rossiter ed., 1961).

2. For instance, the "doctrine of unconstitutional conditions" posits that Congress may not condition funding on the surrender of a constitutional right, even if such funding could be withheld altogether. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989); *see also* Kate Stith, *Congress' Power of the Purse*, 97

may wield its power of the purse to infringe upon the constitutional powers committed to the other branches of government—the executive in particular—remains blurry. The clash between Congress's power to appropriate and the President's Article II authority has rarely been more intense in American history than during the present Global War on Terror. For years, members of Congress (primarily Democrats) have sponsored legislation attempting to use Congress's purse power to hasten U.S. withdrawal from Iraq[3] and to dictate military policy in Afghanistan.[4] These measures have prompted fierce debate on the floor of Congress and in the court of public opinion, and they have even led to presidential vetoes.[5]

More recently, however, Congress has taken the unprecedented step of prohibiting the executive branch from using any appropriated funds to transfer foreign detainees held by the Department of Defense—Khalid Sheikh Mohammed in particular—from Guantanamo Bay, Cuba, to the United States.[6] In so doing, Congress has encroached not only on the President's power as commander-in-chief of the armed forces, but also on the traditionally executive function of criminal prosecution. The question this Note aims to answer is whether that encroachment has unconstitutionally infringed on presidential authority, or whether, in light of historical precedent, Congress has merely exercised its own constitutional prerogative to check the President's war powers and prosecutorial powers.

Attorney General Eric Holder shared his candid views on that question in a December 2010 letter to the Senate leadership: "We have been unable to identify any parallel to [the funding restrictions] in the history of our nation in which Congress has intervened to prohibit the prosecution of particular persons or

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YALE L.J. 1343, 1351 (1988) ("Although Congress holds the purse-strings, it may not exercise this power in a manner inconsistent with the direct commands of the Constitution.").

3. *See, e.g.*, U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, H.R. 1591, 110th Cong. § 1904.

4. *See, e.g.*, Responsible End to the War in Afghanistan Act, H.R. 780, 112th Cong. (2011).

5. President George W. Bush vetoed House Bill 1591 on May 1, 2007, noting in his veto message that "[t]his legislation is objectionable because it would set an arbitrary date for beginning the withdrawal of American troops without regard to conditions on the ground." 153 CONG. REC. H4315 (daily ed. May 2, 2007).

6. *See, e.g.*, Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1112, 125 Stat. 38, 104-05. This Note only addresses the funding restrictions impacting the transfer of Guantanamo detainees to the United States. In both the 2011 and 2012 defense authorization bills, for instance, Congress also passed less onerous restrictions on the President's ability to transfer Guantanamo detainees to foreign countries. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1028, 125 Stat. 1298, 1567-69 (2011); Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1033, 124 Stat. 4137, 4351-52 (2010). Though President Obama also objected to these provisions in his signing statements to both laws, they are beyond the scope of this Note.

crimes."[7] Attorney General Holder considered Congress's singling out of Khalid Sheikh Mohammed "an extreme and risky encroachment on the authority of the Executive branch" that would establish a "dangerous precedent."[8] For his part, President Barack Obama has issued sternly worded signing statements in which he has labeled the restrictions, inter alia, "a dangerous and unprecedented challenge to critical executive branch authority to determine when and where to prosecute Guantanamo detainees."[9] Though President Obama has stopped short of calling Congress's actions unconstitutional, he has recently indicated that these funding prohibitions would, in some circumstances, "violate constitutional separation of powers principles."[10] The President has yet to elaborate on what exactly these circumstances might be. Whereas the President, perhaps for political reasons, has largely chosen not to challenge the constitutionality of the congressional funding constraints, this Note aims to be the first piece of scholarship to do just that.[11]

In order to examine the constitutionality of Congress's decision to deny funding for the transfer of Guantanamo detainees, this Note will first sketch the background leading up to that decision, including a brief look at U.S. efforts to prosecute Khalid Sheikh Mohammed. Congress's first series of funding restrictions passed in 2009 made no explicit mention of Khalid Sheikh Mohammed[12] and generated little public pushback from the Obama White House.[13] But less than five months after Congress first inserted Mohammed's name into

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7. Letter from Eric Holder, U.S. Attorney Gen., to Harry Reid, U.S. Senate Majority Leader, and Mitch McConnell, U.S. Senate Minority Leader (Dec. 9, 2010) [hereinafter Holder Letter], *available at* http://www.justice.gov/opa/pr/2010/December/10-ag-1411.html.

8. *Id.*

9. Statement on Signing the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 2011 DAILY COMP. PRES. DOC. 263, at 1 (Apr. 15, 2011) [hereinafter P.L. 112-10 Signing Statement], *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201100263/pdf/DCPD-201100263.pdf.

10. Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 978, at 3 (Dec. 31, 2011) [hereinafter P.L. 112-81 Signing Statement], *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201100978/pdf/DCPD-201100978.pdf.

11. Other scholars have written on these congressional funding restrictions in passing, and some have even mentioned that their constitutionality is the subject of debate. *See, e.g.*, Kristine A. Huskey, *Guantanamo and Beyond: Reflections on the Past, Present, and Future of Preventive Detention*, 9 U.N.H. L. REV. 183, 193 (2011). But none appear to have evaluated the constitutionality of the funding bans head-on.

12. *See, e.g.*, Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 14103, 123 Stat. 1859, 1920-21.

13. President Obama's statement after his signing of Public Law 111-32 expressly objected to five of the bill's sections. The President did not, however, object to section 14103, which restricts funds for the transfer or release of Guantanamo detainees into the United States. Statement on Signing the Supplemental Appropriations Act, 2009, 2009 DAILY COMP. PRES. DOC. 512 (June 24, 2009) [hereinafter P.L. 111-32 Signing Statement], *available at* http://www.gpo.gov/fdsys/pkg/DCPD-200900512/pdf/DCPD-200900512.pdf.

the funding restrictions,[14] the Department of Justice announced it would no longer seek to try him and four other alleged 9/11 plotters in federal court.[15] This Note's second Part will summarize the principal constitutional powers implicated by this scenario—namely, Congress's war power and power of the purse, and the President's commander-in-chief and prosecutorial powers.

Third, this Note will analyze how Congress may use its purse power to constrain the commander-in-chief. In particular, this Part will examine historical precedent of Congress drawing the purse strings during wartime, and will then examine two frameworks in which to evaluate the constitutionality of Congress's funding restrictions in this case: a separation of powers balancing analysis and a tripartite framework reminiscent of Justice Jackson's famed concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*).[16] The fourth Part will shift the focus to the President's prosecutorial power and the extent to which Congress may use its purse power to direct the handling of individual prosecutions. Unable to identify any historical parallel to the restrictions at issue here, this Part will extend the two analytical frameworks developed in Part III in order to assess whether Congress has overstepped its constitutional boundaries by forcing the executive branch to try Khalid Sheikh Mohammed and four alleged co-conspirators before military commissions.

Finally, this Note concludes that while Congress has indeed stretched the permissible limits of its purse power in this instance, the legislature has not violated the Constitution by prohibiting the executive from spending any appropriated funds to transfer non-American Guantanamo detainees to the United States. The analysis will reveal, however, that Congress's funding bans infringed less on the President's military authority as commander-in-chief than on his prosecutorial authority. In the end, this Note raises the question of whether these funding restrictions, even if constitutional, should still be cause for great concern.

I. CONGRESSIONAL FUNDING BANS AND THE PROSECUTION OF KHALID SHEIKH MOHAMMED

Khalid Sheikh Mohammed, the self-described mastermind of the September 11 terrorist attacks, has been in the custody of the United States since

14. The first explicit mention of Khalid Sheikh Mohammed's name in connection with the congressional funding restrictions appeared in the version of the 2011 Full-Year Continuing Appropriations Act passed by the House on December 8, 2010. H.R. 3082, 111th Cong. § 1116 (as passed by House, Dec. 8, 2010). It was this initial reference to Khalid Sheikh Mohammed in section 1116 that compelled Attorney General Holder to write a letter to the Senate leadership before they considered the House's bill. *See* Holder Letter, *supra* note 7.

15. Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES, Apr. 5, 2011, at A1.

16. 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

2003.[17] Mohammed had been on the radar of federal law enforcement ever since his involvement in a 1994 plot to assassinate President Bill Clinton in Manila, and one month after the 9/11 attacks, the FBI added him to its list of the twenty-two most-wanted terrorists.[18] After eluding American forces for over seventeen months, Mohammed was captured during a nighttime CIA raid in Rawalpindi, Pakistan, on March 1, 2003.[19] Mohammed spent the next few years at various secret prisons overseen by the CIA, during which time he was reportedly waterboarded more than 180 times.[20] Around September 2006, Mohammed was transferred to the detention facility at Guantanamo Bay, Cuba, along with thirteen other high-value al Qaeda detainees.[21] Although the George W. Bush Administration had intended to try Mohammed and four other alleged co-conspirators under the Military Commissions Act of 2006,[22] the new Attorney General Eric Holder announced on November 13, 2009, that the five detainees would instead be transferred to the Southern District of New York for trial in federal court.[23]

Anticipating that the Obama Administration would seek to try Khalid Sheikh Mohammed in federal court, Congress passed the first round of funding restrictions on June 24, 2009,[24] nearly five months before Attorney General Holder announced that Mohammed's trial would be moved to Manhattan. These initial constraints were considerably more flexible than the ones eventually passed in 2011 by the 112th Congress. In particular, section 14103 of the June 2009 Supplemental Appropriations Act prohibited the use of funds from that or any prior act for the transfer of any individual detained, as of the date of enactment, at Guantanamo to the United States for the purposes of detention or prosecution until forty-five days after Congress received from the President a plan regarding what was to be done with that individual.[25] Unlike future restrictions,

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17. Scott Shane, *Inside the Interrogation of a 9/11 Mastermind*, N.Y. TIMES, June 22, 2008, at A1.

18. *Times Topics: Khalid Sheikh Mohammed*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/m/khalid_shaikh_mohammed/index.html (last updated May 7, 2012).

19. Shane, *supra* note 17.

20. *See* Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. TIMES, Apr. 20, 2009, at A1 (reporting that Khalid Sheikh Mohammed was waterboarded 183 times in March 2003).

21. *Bush Admits to CIA Secret Prisons*, BBC NEWS (Sept. 7, 2006, 4:18 AM GMT), http://news.bbc.co.uk/2/hi/americas/5321606.stm.

22. Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of the U.S. Code).

23. Charlie Savage, *U.S. to Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. TIMES, Nov. 14, 2009, at A1.

24. Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 14103, 123 Stat. 1859, 1920-21.

25. *Id.* The written presidential plan, submitted in classified form, was to include the following: (1) an assessment of the risk to national security posed by the transfer; (2) an assessment of the costs associated with transferring the individual; (3) the legal rationale and

this first iteration made no explicit mention of Khalid Sheikh Mohammed. Moreover, instead of wholly precluding the President from using congressional funds to transfer detainees to the United States, section 14103 merely delayed any proposed transfers until a month and a half after the President submitted a report to Congress stating the reasons for his decision.[26] Perhaps because these initial restrictions were not so onerous as to forbid the Attorney General from bringing Khalid Sheikh Mohammed to trial in federal court, President Obama refrained from objecting to section 14103 in his signing statement, even though he demurred to five other sections contained in the same bill.[27]

Throughout the rest of 2009, Congress routinely attached similar language to various other appropriations and authorization bills.[28] Neither President Obama nor Attorney General Holder publicly protested these funding conditions, and plans to try Khalid Sheikh Mohammed proceeded as scheduled. However, almost immediately following Attorney General Holder's November 2009 announcement that the Department of Justice would prosecute Mohammed in a Manhattan federal court, a chorus of heated opposition erupted,[29] even from some typically loyal Democrats.[30] Other politicians, such as New York City Mayor Michael Bloomberg, initially supported the President's plan but soon grew to oppose it, citing concerns that holding the trial so near where the 9/11 attacks occurred would "cost an awful lot of money and disturb an awful lot of people."[31] Though the Obama Administration spent much of 2010 investigating alternative sites for trying Khalid Sheikh Mohammed in federal

associated court demands for the transfer; (4) a plan to mitigate security risks involved with the transfer; and (5) a copy of a notification to the governor of the state (or the mayor, with respect to the District of Columbia) to which the individual would be transferred with a certification by the Attorney General that the detainee poses little or no security risk. *Id.* § 14103(d).

26. These initial constraints were broader than their successors, however, in one key respect: they applied to *all* individuals detained at Guantanamo, regardless of whether they were American citizens or detained by an entity other than the Department of Defense.

27. P.L. 111-32 Signing Statement, *supra* note 13.

28. *See, e.g.*, Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 9011, 123 Stat. 3409, 3466-68 (2009); Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 532, 123 Stat. 3034, 3156-57 (2009); National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1041, 123 Stat. 2190, 2454-55 (2009).

29. *See, e.g.*, Peter King, Op-Ed., *O's Terrible Call—Will Terrorists Walk Free?*, N.Y. POST, Nov. 14, 2009, at 19. Congressman King went on to introduce the Stopping Criminal Trials for Guantanamo Terrorists Act in the House of Representatives on January 27, 2010, which would have prohibited the Department of Justice from using any congressional funds to prosecute a Guantanamo detainee in any federal civilian court in the United States. Press Release, Representative Peter King, King Bill Will Stop NYC Trial for Khalid Sheik Mohammed and Other 9/11 Terrorists (Jan. 28, 2010), *available at* http://peteking.house.gov/trials.shtml.

30. *See* Danny Hakim, *Paterson Calls Obama Wrong on 9/11 Trial*, N.Y. TIMES, Nov. 17, 2009, at A26.

31. Michael Barbaro & Al Baker, *Bloomberg Balks at 9/11 Trial, Dealing Blow to White House*, N.Y. TIMES, Jan. 28, 2010, at A1.

court—including the Eastern District of Virginia[32]—Congress rang the death knell for Attorney General Holder's plans in December of that year.

Building on the momentum from the 2010 midterm elections, Republican members of Congress were able to secure passage of the most severe Guantanamo transfer restrictions to have been placed on the President up to that point.[33] Section 1032 of the 2011 National Defense Authorization Act provided:

> None of the funds authorized to be appropriated by this Act for fiscal year 2011 may be used to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions of Khalid Sheikh Mohammed or any other detainee who—
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> (1) is not a United States citizen or a member of the Armed Forces of the United States; and
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> (2) is or was held on or after January 20, 2009, at United States Naval Station, Guantanamo Bay, Cuba, by the Department of Defense.[34]

President Obama signed this provision into law on January 7, 2011, but not without expressing serious reservations about the congressional funding ban.[35] Now that the funding constraints went beyond simply delaying a proposed transfer until forty-five days after the administration submitted a report to Congress, President Obama lambasted them as "a dangerous and unprecedented challenge to critical executive branch authority to determine when and where to prosecute Guantanamo detainees, based on the facts and the circumstances of each case and our national security interests."[36] Some of the President's advisers suggested he use the signing statement to declare Congress's restrictions an unconstitutional usurpation of executive power,[37] but he stopped short of doing

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32. Charlie Savage, *White House Postpones Picking Site of 9/11 Trial*, N.Y. TIMES, Mar. 6, 2010, at A13.

33. The Illinois delegation spearheaded the Republican campaign to insert language prohibiting the use of funds for the transfer of Khalid Sheikh Mohammed, or any other foreign detainee, to the United States for detention or prosecution. *See* Frank Oliveri, *Guantánamo Transfer Changes Struck from Defense Policy Bill*, CQ.COM (Dec. 17, 2010, 1:13 PM), http://www.cq.com/doc/news-3782629; *see also* Press Release, Representative Aaron Schock, Schock and Kirk Successful in Preventing the Transfer of GITMO Detainees to Illinois (Dec. 17, 2010), *available at* http://schock.house.gov/News/DocumentSingle.aspx?DocumentID=218512. They did so, in large part, to ensure that a vacant maximum-security prison near Thomson, Illinois, would not be used to house detainees formerly held at Guantanamo. *See* Charlie Savage, *Illinois Site May Be Path to Closing Cuba Prison*, N.Y. TIMES, Nov. 16, 2009, at A12.

34. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351 (2010).

35. Statement on Signing the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, 2011 DAILY COMP. PRES. DOC. 10, at 1 (Jan. 7, 2011) [hereinafter P.L. 111-383 Signing Statement], *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201100010/pdf/DCPD-201100010.pdf.

36. *Id.*

37. *See* Charlie Savage, *New Measure to Hinder Closing of Guantanamo*, N.Y. TIMES, Jan. 8, 2011, at A11.

so. Instead, President Obama emphasized that his administration would "work with the Congress to seek repeal of these restrictions, w[ould] seek to mitigate their effects, and w[ould] oppose any attempt to extend or expand them in the future."[38]

Exactly two months after the congressional funding ban was signed into law, President Obama, unable to gain traction on Capitol Hill to repeal the restrictions, announced that military commissions would resume at Guantanamo.[39] In response to the President's decision, Attorney General Holder lamented that "some in Congress have unwisely . . . impos[ed] restrictions that challenge the Executive Branch's ability to bring to justice terrorists who seek to do Americans harm."[40] With no money available to transfer the purported 9/11 mastermind and his alleged co-conspirators to the United States for trial in federal court, the Attorney General begrudgingly announced on April 4, 2011, that Khalid Sheikh Mohammed would, at last, be tried before a military commission at Guantanamo.[41] Attorney General Holder branded the congressional restrictions "unwise and unwarranted," and he stressed that decisions on "who, where, and how to prosecute have always been—*and must remain*—the responsibility of the executive branch."[42] Conceding that the funding ban was "unlikely to be repealed in the immediate future," the Attorney General officially referred the 9/11 prosecution to the Department of Defense in order to eliminate any further delay.[43] Eight years after Khalid Sheikh Mohammed was first captured by the United States, the federal government had finally decided on the forum in which he would be brought to justice—though it was not the forum the current President had wanted.

For good measure, Congress kept language virtually identical to section 1032 from the 2011 National Defense Authorization Act in an appropriations bill passed ten days after Attorney General Holder's announcement.[44] In fact, section 1112 of the new defense appropriations bill proved even more sweeping than the previous ban, prohibiting not just the use of funds appropriated by the present Act, but also the use of funds appropriated by "any other Act" as

38. P.L. 111-383 Signing Statement, *supra* note 35, at 1.

39. Scott Shane & Mark Landler, *Obama, in Reversal, Clears Way for Guantanamo Trials to Resume*, N.Y. TIMES, Mar. 8, 2011, at A19.

40. Press Release, Eric Holder, U.S. Attorney Gen., Statement of the Attorney General on Guantanamo Bay and Detainee Policy (Mar. 7, 2011), *available at* http://www.justice.gov/opa/pr/2011/March/11-ag-287.html.

41. Savage, *supra* note 15.

42. For a video of Attorney General Holder's press conference, see *Military Trials for Alleged Terrorists*, C-SPAN VIDEO LIBR. (Apr. 4, 2011), http://www.c-spanvideo.org/program/Trialsf [hereinafter Holder Video] (emphasis added) (transcript available at http://www.lawfareblog.com/2011/04/ag-holders-statement-on-the-prosecution-of-the-911-conspirators-and-link-to-the-sdny-indictment).

43. *See id.*

44. Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1112, 125 Stat. 38, 104-05.

well.[45] President Obama, upon signing the provision into law on April 15, 2011, once again condemned the funding restrictions as "dangerous and unprecedented" but elected not to declare them unconstitutional.[46] Notwithstanding the President's "strong objection" to these provisions,[47] preparation for the military trials of Khalid Sheikh Mohammed and four other alleged co-conspirators has proceeded, with their formal arraignment on terrorism and murder charges taking place on May 5, 2012.[48]

Even though the protracted battle over the venue of Mohammed's prosecution has come to an end, the controversy surrounding the congressional funding bans has only heated up. For example, the version of the 2012 defense authorization bill that passed the House in May 2011 would have extended the funding restrictions to the transfer of *all* non-American detainees held abroad by the Department of Defense, not just those incarcerated at Guantanamo.[49] Despite the language in the House bill, which the President threatened to veto,[50] the Obama Administration announced on July 5, 2011, that it would try Ahmed Abdulkadir Warsame—an alleged leader of the militant Somali group al Shabaab—in federal civilian court.[51] This move prompted strong criticism from House Republican leaders, many of whom believed transferring Warsame to the United States for trial contravened Congress's intent.[52] The final version of the 2012 National Defense Authorization Act, however, did not contain a broad prohibition on the transfer to the United States of all non-Americans detained abroad, returning instead to the language barring the use of any funds to transfer Khalid Sheikh Mohammed and other non-American detainees held at Guantanamo only.[53] As the President signed this bill into law on December 31, 2011,[54] Congress's funding restrictions will remain in place and largely unchanged through the 2012 fiscal year.

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45. *Id.*

46. P.L. 112-10 Signing Statement, *supra* note 9, at 1.

47. *Id.*

48. Charlie Savage, *At a Hearing, 9/11 Detainees Show Defiance*, N.Y. TIMES, May 6, 2012, at A1.

49. National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1039 (as passed by House, May 26, 2011).

50. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 1540—NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2012, at 2-3 (2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr1540r_20110524.pdf.

51. Charlie Savage & Eric Schmitt, *U.S. to Prosecute a Somali Suspect in Civilian Court*, N.Y. TIMES, July 6, 2011, at A1.

52. *See id.*

53. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1027, 125 Stat. 1298, 1566-67 (2011).

54. David Nakamura, *Obama Reluctantly Signs Defense Spending Bill*, WASH. POST, Jan. 1, 2012, at A6.

Lastly, and perhaps most significantly, President Obama issued two signing statements in late December 2011 that finally questioned the constitutionality of these congressional funding bans. Upon signing the 2012 omnibus appropriations act into law on December 23, 2011, the President objected to the funding prohibitions targeting Khalid Sheikh Mohammed and asserted, for the first time, that they "could, under certain circumstances, violate constitutional separation of powers principles."[55] President Obama also stated his "intent to interpret and apply [the funding restrictions] in a manner that avoids constitutional conflicts."[56] Furthermore, the President expressed his constitutional opposition to section 1027 of the 2012 defense authorization bill, which he signed eight days later, in slightly stronger terms: "Section 1027 . . . intrudes upon critical executive branch authority to determine when and where to prosecute Guantanamo detainees . . . . Moreover, this intrusion *would*, under certain circumstances, violate constitutional separation of powers principles."[57] Should the President determine that this provision runs afoul of separation of powers principles, the Obama Administration "*will* interpret [it] to avoid the constitutional conflict."[58]

These two signing statements unquestionably contain the most assertive language that President Obama has used to express his constitutional disapproval of Congress's funding constraints. Noticeably, however, these statements still do not label the restrictions unconstitutional.

II. THE CONSTITUTIONAL POWERS

Congress's decision to forbid the President from using any funds to transfer foreign Guantanamo detainees to the United States primarily implicates four constitutional powers. Three of these powers are expressly mentioned in the text of the Constitution: Congress's war power and power of the purse, and the President's commander-in-chief power. One power, the President's authority to conduct prosecutions, is implied from the text. This Part will briefly enumerate the textual bases for these four powers, thus laying the groundwork for later Parts to examine the interplay of these authorities at different times in American history as well as in the context of Khalid Sheikh Mohammed's prosecution.

55. Statement on Signing the Consolidated Appropriations Act, 2012, 2011 DAILY COMP. PRES. DOC. 966, at 1 (Dec. 23, 2011) [hereinafter P.L. 112-74 Signing Statement], *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201100966/pdf/DCPD-201100966.pdf.

56. *Id.* at 3.

57. P.L. 112-81 Signing Statement, *supra* note 10, at 2-3 (emphasis added).

58. *Id.* at 3 (emphasis added).

A. *Congress's War Power*

The Framers, fearful of vesting too much power in one person,[59] granted Congress the exclusive authority to "declare War."[60] An earlier draft of the Constitution would have empowered Congress to "make war," but several of the Framers, including James Madison and Charles Pinckney, thought that such phrasing might preclude the President from conducting war in the event of a sudden invasion.[61] While the President's power to "conduct war" was originally limited to repelling sudden attacks,[62] the Framers understood Congress's war power to include the authority to prepare for war, prevent war, and even terminate a war.[63] However, the practical effect of Congress's power to declare war has been severely limited over the past century,[64] as Presidents have routinely committed U.S. armed forces abroad without prior congressional authorization.[65] President Obama's decision in March 2011 to send American servicemembers to participate in the bombing of Libya without first obtaining approval from Congress is emblematic of the recent trend favoring executive primacy in the war power domain.[66]

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59. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 75 (2d ed. 1996) (arguing that the Framers "considered the power to declare war too important to entrust to the President" alone).

60. U.S. CONST. art. I, § 8, cl. 11.

61. LOUIS FISHER, PRESIDENTIAL WAR POWER 6 (1995).

62. *Id.* at 6-7; *see also* Michael J. Glennon, *Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions*, 60 MINN. L. REV. 1, 7-9 (1975) ("[O]riginal constitutional materials indicate that the Framers intended a narrowly circumscribed presidential war-making power, with the commander-in-chief clause conferring minimal policy-making authority and no authority to independently commit the armed forces to combat, except in order to repel 'sudden attacks.'" (footnote omitted)). *But see* John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002) (arguing for a flexible view of constitutional war powers whereby the President possesses the power to initiate and conduct hostilities as commander-in-chief, checked primarily by Congress's power of the purse).

63. HENKIN, *supra* note 59, at 67, 76. In support of the broad nature of Congress's war power, Henkin notes that "[t]he Supreme Court has never declared any limit to the war powers of Congress during war or peace, or even intimated where such limits might lie." *Id.* at 67.

64. Throughout American history, Congress has only formally declared war against eleven nations over the course of five armed conflicts: the War of 1812, the Mexican-American War, the Spanish-American War, World War I, and World War II. RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R41677, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2010, at ii (2011).

65. Authority to Use Military Force in Libya, 35 Op. O.L.C., 2011 WL 1459998, at *7 (Apr. 1, 2011), *available at* http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf. Prior memos from the Office of Legal Counsel have identified at least 125 instances in which the President has acted to commit American troops abroad without prior express authorization from Congress. *See, e.g.*, Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 331 (1995), *available at* http://www.justice.gov/olc/bosnia2.htm.

66. Charlie Savage, *Attack Renews Debate over Congressional Consent*, N.Y. TIMES, Mar. 22, 2011, at A14.

In addition to Congress's power to declare war, the Constitution also commits to the legislature the powers to "raise and support Armies,"[67] "provide and maintain a Navy,"[68] "make Rules for the Government and Regulation of the land and naval Forces,"[69] and call forth, organize, arm, and discipline the militia.[70] Thus, the old adage goes, without congressional action there can be no military for the President to command.[71] Notwithstanding the sizeable role the Framers clearly intended for Congress in the management of the nation's armed forces, members of Congress rarely, if ever, invoked the legislature's war or military powers to justify the funding restrictions imposed on the transfer of Guantanamo detainees to the United States. Instead, supporters of the congressional funding bans have principally relied on the legislature's power of the purse in defending their enactment.[72]

B. *Congress's Purse Power*

The Constitution bestows on Congress exclusive powers to appropriate funds and to tax and spend on behalf of the country, which taken together comprise Congress's power of the purse. The Appropriations Clause provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."[73] While there appears to be no record of any debate regarding the Appropriations Clause at the Constitutional Convention,[74] Gouverneur Morris warned on September 8, 1787, that if Congress did not have the power to make peace, "[it] will be apt to effect [its] purpose in the more disagreeable mode, of negativing the supplies for the war."[75] Morris's admonition indicates that Congress could use its appropriations power to cut off funds for an ongoing war. Furthermore, Alexander Hamilton later observed that "[t]he design of the Constitution in [the Appropriations Clause] was, as I conceive, to secure these important ends—that the *purpose*, the *limit*, and the *fund*

67. U.S. CONST. art. I, § 8, cl. 12.

68. *Id.* cl. 13.

69. *Id.* cl. 14.

70. *Id.* cls. 15-16.

71. FRANCIS D. WORMUTH ET AL., TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW 88 (1986).

72. *See, e.g.*, 157 CONG. REC. H2575 (daily ed. Apr. 11, 2011) (statement of Rep. Rogers); Eric Cantor, Op-Ed., *Keep Gitmo Terrorists Out of Virginia*, VIRGINIAN-PILOT, at B9 (Mar. 4, 2009), *available at* http://www.majorityleader.gov/newsroom/seven/cantor-oped-keep-gitmo-terrorists-out-of-virginia.html.

73. U.S. CONST. art. I, § 9, cl. 7.

74. WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 29 (1994).

75. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 602 (Ohio Univ. Press indexed ed. 1984) (1840). I am grateful to Michael W. McConnell for alerting me to this source.

of every expenditure should be ascertained by a previous law."[76] Scholars more recently have argued that the congressional power to appropriate not only implies a right to specify how appropriated moneys shall be spent,[77] but also a duty to appropriate funds for the activities within the independent constitutional authority of other branches.[78]

Unlike the negative proscription of the Appropriations Clause, the Taxing and Spending Clause vests with Congress the affirmative power to "lay and collect Taxes . . . to pay the Debts and provide for the common Defence and general Welfare of the United States."[79] Whether and how much to spend depends both on available resources and budgetary priorities, negotiated oftentimes with the President, but Congress maintains the constitutional prerogative "to spend or not to spend for the common defense or the general welfare" as it sees fit.[80]

Two additional points bear mentioning with regard to Congress's purse power in the context of detainee transfer restrictions. First, the Framers intended to keep the power of the purse and the power of the sword in separate hands.[81] James Madison, for one, supported keeping the power of the purse at arm's length from the war power,[82] and George Mason likewise counseled that the "purse & the sword ought never to get into the same hands."[83] As a result, the purse power was probably meant to be Congress's primary tool for checking or even directing executive conduct, especially in the realm of war. Second, Congress is generally prohibited from using appropriations measures to achieve unconstitutional results, even if it could achieve a similar result through a simple failure to appropriate money.[84] This "doctrine of unconstitutional conditions," which posits that Congress may not condition funding on the surrender of a constitutional right by private citizens,[85] has been extended by some scholars to relations with the executive branch.[86] Under this view, Congress may not

76. 8 ALEXANDER HAMILTON, *Explanation* (Nov. 11, 1795), *in* THE WORKS OF ALEXANDER HAMILTON 122, 128 (Henry Cabot Lodge ed., 1904).

77. *See* Stith, *supra* note 2, at 1353.

78. *See* HENKIN, *supra* note 59, at 115.

79. U.S. CONST. art. I, § 8, cl. 1.

80. HENKIN, *supra* note 59, at 115.

81. *See* Louis Fisher, *The Spending Power*, *in* THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 227, 237 (David Gray Adler & Larry N. George eds., 1996) (asserting that the Framers feared the union of purse and sword out of concern for individual liberties).

82. FISHER, *supra* note 61, at 9.

83. *Id.*

84. JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., RL33837, CONGRESSIONAL AUTHORITY TO LIMIT U.S. MILITARY OPERATIONS IN IRAQ 46 (2008), *available at* http://www.fas.org/sgp/crs/natsec/RL33837.pdf.

85. Sullivan, *supra* note 2, at 1415.

86. *See, e.g.*, John Norton Moore, *Do We Have an Imperial Congress?*, 43 U. MIAMI L. REV. 139, 145 n.25 (1988).

condition funding on the President's surrender of his own constitutionally grounded rights and duties in the arena of foreign or military affairs.[87] But even proponents of the President's position in the debate over the funding ban on detainee transfers would likely concede that Congress has not conditioned appropriations on President Obama abdicating a specific constitutional entitlement. Rather, Congress has avoided any potential unconstitutional conditions problem by simply denying the President the funds altogether. The question remains, however, whether such a denial was itself constitutionally permissible.

C. *The President's Commander-in-Chief Power*

Congress's decision to bar the executive from spending any appropriated funds to transfer certain detainees captured during the Global War on Terror was arguably an impermissible infringement on the President's authority as commander-in-chief of the armed forces.[88] Article II of the Constitution provides: "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 . . . ."[89] Just as the Framers likely intended Congress to possess a fairly broad war power, the President's role as commander-in-chief was meant to be limited in scope.[90] Alexander Hamilton, for example, viewed the commander-in-chief power as "nothing more than the supreme command and direction of the military and naval forces,"[91] while other Framers, such as George Mason, expressed concern that a President assuming personal command of the armed forces might use them to overthrow the republic.[92] Starting with cases from the Civil War era, however, the Supreme Court has shown greater willingness to defer to the executive on matters of war,[93] and this deference mostly expanded during the twentieth century.[94]

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87. *Id.*

88. In general, Congress may not legislate in a manner that impermissibly undermines the powers of another branch. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856-57 (1986).

89. U.S. CONST. art. II, § 2, cl. 1.

90. But the commander-in-chief power likely included the ability to protect Americans from sudden attack or to repel an unexpected invasion. *See* Glennon, *supra* note 62, at 8-9.

91. THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 1, at 414, 418.

92. *See* WORMUTH ET AL., *supra* note 71, at 109.

93. *See, e.g.*, The Prize Cases, 67 U.S. (2 Black) 635 (1863) (upholding the blockade of Southern ports instituted by President Lincoln at a time when Congress was not in session).

94. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (noting in dicta that the President, rather than Congress, has a better opportunity to understand the conditions that prevail in foreign countries, especially in times of war). *But see* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 643-44 (1952) (Jackson, J., concurring) ("[T]he Constitution did not contemplate that the title Commander in Chief *of the Army and Navy* will constitute him also Commander in Chief of the country, its industries and its inhabitants. He has no monopoly of 'war powers,' whatever they are.").

For many years there was a broad scholarly consensus that Congress may not interfere with the President's day-to-day command of troops on the battlefield or his ability to defend Americans against a sudden attack.[95] However, a recent pair of voluminous law review articles by David J. Barron and Martin S. Lederman has cast doubt on this assumption, observing instead that "there is surprisingly little Founding-era evidence supporting the notion that the conduct of military campaigns is beyond legislative control."[96] They go on to conclude that members of Congress can cite two hundred years of historical precedent when resisting the "new and troubling claim," primarily advanced by the George W. Bush Administration, that "the President is entitled to unfettered discretion in the conduct of war."[97]

With respect to the Global War on Terror, the Bush Administration argued repeatedly that the Commander-in-Chief Clause vests the President with the authority to capture and detain suspected terrorists such as Khalid Sheikh Mohammed.[98] While the Obama Administration has noticeably dropped that argument, relying instead on the 2001 Authorization for Use of Military Force (AUMF)[99] and 2012 National Defense Authorization Act[100] to justify executive detention authority, it is not clear that the current President has rejected the Bush Administration's position altogether.[101] What remains clear, however, is

95. *See, e.g.*, BANKS & RAVEN-HANSEN, *supra* note 74, at 150; *cf. Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring) ("[Congress's war] power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief.").

96. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 696 (2008) [hereinafter Barron & Lederman, *Framing*]; *see also* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) [hereinafter Barron & Lederman, *Constitutional History*].

97. Barron & Lederman, Part II, *supra* note 96, at 1112.

98. *See, e.g.*, *Oversight of the Department of Justice: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 33 (2002) (statement of Att'y Gen. John Ashcroft) (asserting that Congress has no constitutional authority to interfere with the President's decision to detain enemy combatants pursuant to his commander-in-chief authority).

99. *See* Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Keynote Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm ("[T]he Obama Administration has not based its claim of authority to detain those at GITMO and Bagram on the President's Article II authority as Commander-in-Chief. Instead, we have relied on legislative authority expressly granted to the President by Congress in the 2001 AUMF.").

100. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011).

101. For an argument that the Obama Administration has conspicuously failed to reject the commander-in-chief rationale to justify detention of enemy combatants, see Jack Goldsmith, *Detention, the AUMF, and the Bush Administration—Correcting the Record*, LAWFARE (Sept. 14, 2010, 3:06 PM), http://www.lawfareblog.com/2010/09/detention-the-aumf-and-the-bush-administration-correcting-the-record.

that the Obama Administration has rarely criticized the congressional funding ban for the transfer of Guantanamo detainees on the grounds that it dangerously infringes on the President's constitutional authority as commander-in-chief.[102] A presidential administration that relies more consistently on a broad interpretation of the executive's commander-in-chief power might well have objected to the congressional funding restrictions on these grounds.[103] It thus remains worthwhile to examine whether the appropriations bans have impermissibly encroached upon the commander-in-chief authority.

D. *The President's Prosecutorial Power*

Unlike the three powers already discussed, the President's prosecutorial authority is not explicitly mentioned in the Constitution. Rather, executive primacy over federal prosecutions has been inferred from the text of Article II and historical practice, which from the early Founding of the republic saw Presidents directing local and federal prosecutions.[104] Thomas Jefferson suggested, for instance, that the Pardon Clause of Article II[105] confers on the President implicit control over criminal prosecutions.[106] The Supreme Court, for its part, has found that the Article II requirement that the President "take Care that the Laws be faithfully executed"[107] confers on the executive an implied right to conduct criminal prosecutions.[108] Even though the Court in *Morrison v. Ol-*

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102. *See, e.g.*, P.L. 112-10 Signing Statement, *supra* note 9 (no mention of commander-in-chief power). *But see* P.L. 112-81 Signing Statement, *supra* note 10, at 2 ("My Administration has worked tirelessly to reform or remove the provisions described above in order to facilitate the enactment of this vital legislation, but certain provisions remain concerning. My Administration will aggressively seek to mitigate those concerns through the design of implementation procedures and other authorities available to me as Chief Executive and Commander in Chief . . . .").

103. In a signing statement regarding the Detainee Treatment Act of 2005, for instance, President George W. Bush proclaimed that he would construe the law "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief." Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 2 PUB. PAPERS 1901, 1902 (Dec. 30, 2005), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=65259#axzz1oVVOH5aU.

104. *See* Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 527-28 (2005) (arguing that there was an early consensus among the three branches of government that the President could control official prosecutions brought by employees of the federal or state governments).

105. U.S. CONST. art. II, § 2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.").

106. Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 140, 141 (Paul Leicester Ford ed., 1899) (noting that the authority to dismiss Sedition Act prosecutions flowed from the pardon power).

107. U.S. CONST. art. II, § 3, cl. 4.

108. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor

son[109] upheld the constitutionality of the independent counsel and the "good cause" standard for his removal by the Attorney General, the majority conceded that the prosecutorial and investigative duties of the independent counsel were "'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch."[110] In the wake of *Morrison*, however, various scholars cast doubt on the executive's putative monopoly over criminal prosecutions,[111] with at least one commentator suggesting that prosecution may be as much a judicial function as an executive one.[112]

While scholarly debate about the true nature of the prosecutorial authority remains contentious, the current administration has averred, quite unequivocally, that criminal prosecution is a responsibility exclusive to the executive branch. The most prominent advocate for this view has been Attorney General Holder, who, during his April 2011 press conference announcing that Khalid Sheikh Mohammed would be tried before a military commission, declared that criminal prosecution is a "unique executive branch function."[113] As indicated above, President Obama has repeatedly labeled the decision of when, how, and where to prosecute Guantanamo detainees a "critical executive branch authority" in his signing statements objecting to the congressional funding prohibitions.[114] Though public support for the administration's position has been anything but resounding, some commentators have gone even further than

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in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3, cl. 4)).

109. 487 U.S. 654 (1988).

110. *Id.* at 691. Justice Scalia, in the case's lone dissent, took a stronger view of the executive's prosecutorial power: "Governmental investigation and prosecution of crimes is a quintessentially executive function." *Id.* at 706 (Scalia, J., dissenting). Justice Scalia went even further, concluding that "the President's *constitutionally* assigned duties include *complete* control over investigation and prosecution of violations of the law." *Id.* at 710 (first emphasis added).

111. *See, e.g.*, Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 278 (1989) (arguing that criminal law enforcement cannot be considered a core or exclusive power of the executive branch); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 15-16 (1994) (claiming that the Framers did not understand prosecution to be within the exclusive domain of the President). *But see* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1003 & n.63 (2006) (observing that, despite some attempts by the above scholars to suggest otherwise, "investigating and prosecuting crimes are executive powers").

112. *See* William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 502 (1989).

113. *Holder Blames Congress for Forcing Hand on Military Commissions for 9/11 Detainees*, FOX NEWS (Apr. 4, 2011), http://www.foxnews.com/politics/2011/04/04/Khalid-sheikh-mohammad-military-commission-trial; *see also* Holder Video, *supra* note 42, at 11:33.

114. *See, e.g.*, P.L. 112-81 Signing Statement, *supra* note 10, at 2.

President Obama and argued that the detainee transfer restrictions unconstitutionally infringe on the President's "core" constitutional duties as "chief federal law enforcement officer and prosecutor."[115] Before assessing the merits of this bold claim in Part IV, however, this Note will first examine the extent to which the funding bans intrude on the constitutional prerogative of the President in a role explicitly mentioned in our country's founding document: the role of commander-in-chief.

III. PURSE STRINGS AS A CONSTRAINT ON THE COMMANDER-IN-CHIEF

Legislatures have been pinching the purse strings on executives and monarchs during times of war since at least the age of Restoration England in the late seventeenth century.[116] And Congress has been doing so through appropriations riders going back as far as the 1790s.[117] Since much has been written about Congress's ability to wield its power of the purse to constrain or at times dictate the conduct of the President as commander-in-chief,[118] this Part aims merely to synthesize some general principles advanced in the literature and apply those principles to Congress's 2011-2012 ban on funding for Guantanamo detainee transfers.

This Part will begin by looking briefly at two twentieth-century instances of Congress using its purse power to constrain the commander-in-chief: the end of the Vietnam War and the Boland Amendments to curb funding for the Contras in Nicaragua. Next, this Part will develop two distinct approaches for analyzing the constitutionality of the congressional funding restrictions: a separation of powers balancing analysis and a tripartite framework that echoes Justice Jackson's concurrence in *Steel Seizure*.[119] Finally, this Part will apply these two approaches to the case at hand and conclude that Congress's funding prohibition on the transfer of Khalid Sheikh Mohammed and other Guantanamo detainees did not unconstitutionally infringe on the President's military authority for two reasons. First, the restrictions did not unduly impact the core commander-in-chief powers to command, dispose of forces, or conduct a military campaign. Second, historical precedent demonstrates that Congress has previ-

115. David B. Rivkin, Jr. & Lee A. Casey, Op-Ed., *The Wrong Way to Stop Civilian Terror Trials*, WALL ST. J., Dec. 21, 2010, at A17.

116. *See* Gerhard Casper, *Appropriations of Power*, 13 U. ARK. LITTLE ROCK L.J. 1, 3-5 (1990).

117. *See* Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 125-29 (1998).

118. *See, e.g.*, HENKIN, *supra* note 59, at 112-15; Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT'L L. 758 (1989); Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833 (1994); Charles Tiefer, *Can Appropriation Riders Speed Our Exit from Iraq?*, 42 STAN. J. INT'L L. 291 (2006).

119. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

ously utilized its power of the purse in ways that more directly hamstrung more fundamental commander-in-chief responsibilities.

A. *Historical Precedent: Vietnam and the Boland Amendments*

Before detailing the analytical frameworks that will be applied to the congressional funding restrictions on transferring Guantanamo detainees, two historical instances where Congress's purse power and the President's commander-in-chief power collided deserve brief mention. More than six years after the 1964 Gulf of Tonkin Resolution authorized President Lyndon Johnson to "take all necessary measures to repel any armed attack against the forces of the United States" in Southeast Asia,[120] Congress enacted an appropriations rider providing that "none of the funds appropriated by this Act shall be used to finance the introduction of American ground combat troops into Laos or Thailand."[121] Frustrated by the failure of this appropriations measure and others[122] to eliminate U.S. combat missions in Indochina, Congress passed—and President Nixon reluctantly signed—an appropriations bill on July 1, 1973, that effectively ended U.S. military involvement in Vietnam by declaring:

> None of the funds herein appropriated under this Act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam, and South Vietnam . . . by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other Act may be expended for such purpose.[123]

A decade later, Congress once again faced the challenge of trying to use its power of the purse in order to halt overseas military activities, this time in Central America. In total, the Boland Amendments comprised at least thirteen congressional funding restrictions on U.S. aid to the Contras,[124] an amalgamation of rebel groups fighting against the leftist Sandinista government of Nicaragua in the 1980s. A typical example of these restrictions would bar the CIA, Department of Defense, or any other agency or entity involved in collecting intelligence for the United States from spending any congressionally appropriated funds "for the purpose . . . of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, move-

120. Gulf of Tonkin Resolution of 1964, Pub. L. No. 88-408, § 1, 78 Stat. 384, 384, *repealed by* Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055.

121. Department of Defense Appropriations Act, 1970, Pub. L. No. 91-171, § 643, 83 Stat. 469, 487 (1969).

122. *E.g.*, Act of Nov. 17, 1971, Pub. L. No. 92-156, § 601(a), 85 Stat. 423, 430 (Mansfield Amendment).

123. Second Supplemental Appropriations Act, 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99, 129. A few months later, Congress passed the War Powers Resolution over President Nixon's veto, which sought to limit the ability of the President to commit U.S. troops abroad without congressional authorization. 50 U.S.C. §§ 1541-1548 (2006).

124. Raven-Hansen & Banks, *supra* note 118, at 837.

ment, or individual."[125] While these funding prohibitions did not end covert American support for the Contras, they provided the statutory basis for the subsequent congressional investigation into the Iran-Contra Affair.[126]

Compared to the historical precedent of Congress using its appropriations power to terminate a major U.S. war in Vietnam and curtail a prolonged covert war in Nicaragua, the 2011-2012 congressional funding bans on the transfer of Guantanamo detainees to the United States appear well within the range of constitutionally acceptable uses of Congress's purse power.[127] In both instances, though particularly in the Vietnam example, the legislature wielded its power of the purse to constrain the commander-in-chief in a more direct and consequential manner than Congress did with the passage of the 2011 and 2012 defense authorization bills. Moreover, both the July 1973 Vietnam War funding cutoff and the 1984 Boland Amendments impacted the core of the commander-in-chief's principal powers to dispose of the forces under his command and to conduct, either overtly or in secret, a military campaign. The extent to which Congress's funding prohibition on transferring non-American Guantanamo detainees to the United States infringed upon President Obama's core commander-in-chief authority will be examined below.

B. *Separation of Powers Balancing and a Tripartite Framework*

Though historical precedent can be informative in assessing the constitutionality of Congress's funding ban on Guantanamo detainee transfers, it cannot replace independent constitutional analysis. Separation of powers balancing, similar to the functionalist approach taken by the majority in *Morrison v. Olson*,[128] is one established framework in which to analyze the constitutionality of Congress's decision to bar the use of funds for the transfer of Guantanamo detainees to the United States.[129] This approach asks if Congress's funding ban

125. Department of Defense Appropriations Act, 1985, Pub. L. No. 98-473, § 8066(a), 98 Stat. 1904, 1935 (1984). Initially, the Boland Amendments only prohibited support for groups or individuals seeking to overthrow the Sandinista government, thus allowing continued U.S. support to the Contras for the purpose of interdicting arms shipments from the Sandinistas to neighboring countries. But once the Reagan Administration took the view that it was in compliance with the congressional restrictions so long as the U.S. government itself was not seeking to overthrow the Sandinistas, Congress broadened the scope of the funding bans. BANKS & RAVEN-HANSEN, *supra* note 74, at 137-38.

126. Raven-Hansen & Banks, *supra* note 118, at 865.

127. For a persuasive argument that the July 1973 Vietnam War funding cutoff and the 1984 Boland Amendments were constitutional, see BANKS & RAVEN-HANSEN, *supra* note 74, at 148-57. *But see* H.R. REP. NO. 100-433, S. REP. NO. 100-216, at 450-51 (1987) (minority report) (arguing that the Boland Amendments were "clearly unconstitutional" to the extent that they interfered with the President's diplomatic authority).

128. 487 U.S. 654 (1988).

129. For a comprehensive summary of other approaches to separation of powers analysis, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011).

has prevented the President from "accomplishing [his] constitutionally assigned functions," and, if so, whether that prevention was "justified by an overriding need to promote objectives within the constitutional authority of Congress."[130] A balancing approach is appropriate in this case because, unlike in *United States v. Lovett*,[131] where the appropriations measure in question was deemed to violate the express constitutional prohibition on bills of attainder,[132] the congressional funding ban here does not contravene any explicit constitutional command limiting Congress's legislative power.[133] The Supreme Court has also indicated that, when conducting this type of separation of powers balancing, generalized and undifferentiated claims made by one branch should usually yield to the more specific claims of another.[134] Finally, some have argued that where, as here, Congress's purse power is balanced against the President's commander-in-chief authority, the purse power "carries special historical weight."[135]

A second possible approach for analyzing the constitutionality of the congressional funding restrictions on Guantanamo detainee transfers parallels the tripartite framework first proposed by Justice Robert H. Jackson in his venerable *Steel Seizure* concurrence sixty years ago.[136] In *Steel Seizure*, the Supreme Court was asked to rule on the constitutionality of President Harry Truman ordering Secretary of Commerce Charles Sawyer to seize the nation's steel mills and operate them on behalf of the United States during the Korean War.[137] To decide this question, Justice Jackson, in a concurring opinion, proposed evaluating the President's actions in terms of three separate categories. First, the President's "authority is at its maximum" when he "acts pursuant to an express or implied authorization of Congress."[138] Second, when acting in the "absence of either a congressional grant or denial of authority," the President operates in a "zone of twilight" in which "he can only rely upon his own independent pow-

130. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977).

131. 328 U.S. 303 (1946).

132. *Id.* at 315; *see also* U.S. CONST. art. I, § 9, cl. 3.

133. As Banks and Raven-Hansen have pointed out, the only relevant textually explicit prohibitions related to national security appropriations are the Appropriations Clause, U.S. CONST. art. I, § 9, cl. 7, and the two-year limit on appropriations for the Army, *id.* § 8, cl. 12, neither of which was violated by Congress's funding ban on Guantanamo detainee transfers. BANKS & RAVEN-HANSEN, *supra* note 74, at 146.

134. *See* United States v. Nixon, 418 U.S. 683, 706-07 (1974) (holding that the judicial branch's interest in achieving justice during a particular criminal prosecution trumped President Nixon's broad, undifferentiated claim of a need for confidentiality in presidential communications).

135. *See* BANKS & RAVEN-HANSEN, *supra* note 74, at 148.

136. *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

137. *See* Patricia L. Bellia, *The Story of the* Steel Seizure *Case*, *in* PRESIDENTIAL POWER STORIES 233, 243 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

138. *Steel Seizure*, 343 U.S. at 635 (Jackson, J., concurring).

ers."[139] Third, the President's power to act is "at its lowest ebb" when he "takes measures incompatible with the expressed or implied will of Congress, . . . for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress."[140] Using this framework, Justice Jackson found President Truman's actions to fall within this third category.[141] Since the President did not possess inherent constitutional powers sufficient to overcome those of Congress in the context of a domestic wartime seizure of private property,[142] Justice Jackson found the President's actions unconstitutional. Justice Jackson's tripartite rubric has since become the "accepted framework" for Supreme Court analysis of presidential power claims.[143]

In a well-conceived 2011 law review article, Charles Tiefer built on Justice Jackson's framework to advance a novel three-pronged approach that focuses specifically on the constitutionality of war-related congressional appropriations "riders"—substantive conditions or policy requirements attached to war funding measures.[144] In Tiefer's first category, Congress has passed an appropriations rider that invades the core of one of three central commander-in-chief powers: command, disposition of forces, or military campaigning.[145] Such a provision would be presumptively unconstitutional. The second category involves appropriations riders that invade only the periphery of one of the three principal commander-in-chief powers.[146] An example of the second category would be an appropriations measure that infringes on a central commander-in-chief power, but does so outside of the zone of combat.[147] These measures should engender material doubts as to their constitutionality. The third and final category includes appropriations riders that impact a shared issue of congressional and presidential power—one that implicates Congress's Article I powers without colliding directly with the President's powers of command, disposition of troops, or military campaigning.[148] Rather than presumptions or material doubts against their constitutionality, category-three riders seeking to step up a war effort should carry "a clean slate" or, at most, bear only a "plain doubt"

139. *Id.* at 637.

140. *Id.*

141. *Id.* at 640.

142. *See id.* at 645-46.

143. Medellin v. Texas, 552 U.S. 491, 524 (2008).

144. Charles Tiefer, *Can Congress Make a President Step Up a War?*, 71 LA. L. REV. 391, 400 (2011) ("Although the main focus is to contextualize provisions for stepping up a war, the [three-pronged] approach also yields insight regarding all war-related appropriation riders.").

145. *Id.* at 417. *But see* Barron & Lederman, *Framing*, *supra* note 96, at 696-98 (suggesting that these central commander-in-chief powers may be more subject to congressional regulation than previously realized).

146. Tiefer, *supra* note 144, at 417.

147. *Id.* at 417-18.

148. *Id.* at 418.

(rather than a "material doubt") as to their constitutionality.[149] One could argue that Tiefer's categories are all just variations on Justice Jackson's third category because each of them involves conflict between the powers of Congress and the President to differing degrees. Though this point merits further expansion, it lies beyond the scope of this Note.

While Tiefer's assignment of constitutionality benchmarks may be suitable in the context of congressional appropriations riders striving to escalate a war effort, a power that Congress arguably does not even possess,[150] greater deference should be owed to the legislature where, as in this case, Congress has exercised its constitutional authority to prohibit the use of funds for a certain executive branch activity.[151] As such, this Note will modify Tiefer's analysis to place only a simple doubt of constitutionality, not a material doubt, on invasions of the periphery (category two). A "simple doubt" (or "plain doubt") here means something less than a "material doubt," which Tiefer defines as a "doubt of some weight."[152] A simple doubt thus requires less evidence of congressional authority to act than a material doubt would in order to prove that Congress acted constitutionally. In addition, this Note will modify Tiefer's formula to accord a rebuttable presumption of constitutionality where Congress uses its purse power in matters of shared authority with the President (category three)—matters that, by definition, do not invade the essential commander-in-chief powers to command, move troops, or conduct a military campaign. This Note will, however, maintain a presumption of unconstitutionality where Congress wields its purse power to invade the core of a central commander-in-chief authority (category one). These slight but important modifications are appropriate given the complete authority the Framers intended Congress to have regarding its exclusive power to appropriate from the Treasury.

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149. *Id.*

150. Escalating a war, in my view, seems more akin to "making war"—language that was rejected by the Framers before ultimately vesting Congress with the power to "declare War." Escalating a war also sounds more like "conducting war," which has been textually committed, in no insignificant amount, to the President as commander-in-chief. *See supra* notes 61-63 and accompanying text; *see also* 6 JAMES MADISON, *Letters of Helvidius, No. 1* (Aug.-Sept. 1793), *in* THE WRITINGS OF JAMES MADISON 138, 148 (Gaillard Hunt ed., 1906) ("Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced*, *continued*, or *concluded*."). Madison, thus, appears to have supported a Congress with the power to declare and terminate war on the one hand, and a President with the power to conduct war on the other.

151. *Cf.* Tiefer, *supra* note 144, at 416-17 ("[H]istory suggests that Congress may use certain kinds of appropriation provisions to impact a war, but that the strongest case by far concerns limitation amendments. The [three-pronged] formula treats less deferentially the constitutionality of provisions to step up a war.").

152. *Id.* at 417.

C. *Congress's Funding Ban Did Not Unconstitutionally Limit the Commander-in-Chief*

A separation of powers balancing approach reveals that the specific and textually rooted constitutional claims of authority by Congress outweigh the generalized and implied commander-in-chief claims of authority in this case. Although the Obama Administration has rarely justified its objections to Congress's Guantanamo detainee transfer restrictions on the grounds of the President's commander-in-chief authority, President Obama could argue, as the Bush Administration likely would have, that the funding prohibitions unconstitutionally intrude on the executive's inherent power to determine where to hold particular detainees during wartime. However, nothing in the text of the Constitution explicitly grants the President the power of wartime detention, and the Supreme Court has refused to answer whether the executive power to detain can even be implied from Article II.[153] Similarly, despite the implication of Attorney General Holder's December 2010 letter to the Senate leadership,[154] nothing in the text of Article II expressly grants the commander-in-chief the exclusive power to decide where to prosecute those accused of the criminal offense of terrorism. While President Obama undeniably plays a vital role as commander-in-chief in protecting the nation, his authority in this regard remains circumscribed by the Article I requirement that Congress "provide for the common Defence" of the country.[155]

In contrast to the President's implicit commander-in-chief authority to detain Khalid Sheikh Mohammed and determine his venue for trial, the Constitution grants Congress several explicit powers that sufficiently justify the 2011-2012 funding restrictions at issue here. In addition to its "common Defence" responsibility derived from the purse power, Congress also has the exclusive constitutional power to "define and punish . . . Offences against the Law of Nations,"[156] which probably include international terrorist acts as heinous as those committed on 9/11.[157] As mentioned previously, Congress was also acting pursuant to its exclusive power to appropriate funds from the Treasury.[158] Federal courts have accorded this complete authority over appropriations great defer-

153. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004) ("We do not reach the question whether Article II provides [plenary detention] authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF.").

154. Holder Letter, *supra* note 7.

155. U.S. CONST. art. I, § 8, cl. 1.

156. *Id.* cl. 10.

157. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987) ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as . . . attacks on or hijacking of aircraft . . . and perhaps certain acts of terrorism . . . .").

158. *See* U.S. CONST. art. I, § 9, cl. 7; *see also* 157 CONG. REC. H2575 (daily ed. Apr. 11, 2011) (statement of Rep. Rogers).

ence in the past,[159] and Congress, with its power to "raise and support Armies,"[160] maintains a legitimate interest in the prosecution of individual detainees held at a military installation whose continued existence is a function of congressional appropriations. Finally, Congress could even cite its plenary authority over immigration law[161] to justify the funding restrictions in question, because most Guantanamo detainees would be barred from entering the United States as alleged terrorists under the Immigration and Nationality Act.[162]

Just as a separation of powers balancing analysis demonstrates that Congress's decision to prohibit the use of funds for the transfer of non-American Guantanamo detainees did not unconstitutionally invade the commander-in-chief's detention authority, an examination of the funding restrictions under the modified version of Tiefer's tripartite framework leads to the same result. First, the 2011-2012 funding restrictions did not constrain the core of President Obama's ability to command troops on the battlefield, dispose of American armed forces as he saw fit in the theater of war, or conduct a specific military campaign in the zone of combat. Despite the House's effort to broaden the restrictions,[163] the congressional funding bans still apply only to detainees held at Guantanamo, which cannot reasonably be considered part of the "battlefield" or "theater of war," let alone the "zone of combat."[164] The restrictions, moreover, do not impact the chain of command, nor do they involve Congress assigning commander-in-chief duties to an inferior military officer[165] or requiring particular personnel to assume operational or tactical command of the armed forces.[166] Therefore, the funding restrictions at issue do not fall within category one and thus are not presumptively unconstitutional.

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159. For a rare example of a federal court invalidating a congressional appropriations rider related to national security for unconstitutionally intruding on executive power, see *National Federation of Federal Employees v. United States*, 688 F. Supp. 671, 685 (D.D.C. 1988).

160. U.S. CONST. art. I, § 8, cl. 12.

161. For an account of the Supreme Court's development of the plenary power doctrine in the context of federal immigration law, see Anne E. Pettit, Note, *"One Manner of Law": The Supreme Court, Stare Decisis and the Immigration Law Plenary Power Doctrine*, 24 FORDHAM URB. L.J. 165, 172-85 (1996).

162. 8 U.S.C. §§ 1182(a)(3)(B), 1227(a)(4)(B) (2006).

163. *See supra* note 49 and accompanying text.

164. *See* Boumediene v. Bush, 553 U.S. 723, 769-70 (2008) ("In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States. . . . [T]he United States is, for all practical purposes, answerable to no other sovereign for its acts on the base. Were that not the case, *or if the detention facility were located in an active theater of war*, arguments that issuing the writ would be 'impracticable or anomalous' would have more weight." (emphasis added)).

165. Even Barron and Lederman concede that, under the principle of superintendence, Congress may not assign ultimate command decisionmaking authority to any other individual, such as an inferior military officer. Barron & Lederman, *Framing*, *supra* note 96, at 696-97.

166. For an argument that the President alone, as commander-in-chief, may choose the particular personnel who are to exercise operational and tactical command functions over the

Second, the Obama Administration could argue more plausibly that the Guantanamo transfer funding restrictions infringed on the periphery of the President's command, disposition of forces, or military campaigning authority. A broad reading of the executive's command authority might suggest that the 2011-2012 funding bans interfered with the President's implicit command to his inferiors that Article III courts be used, where possible, to try detainees accused of terrorist crimes.[167] Similarly, an expansive interpretation of President Obama's power to conduct a military campaign could support a finding that Congress's funding restrictions fall within category two, because determining the proper venue in which to detain and try enemy combatants is an important part of conducting the ongoing Global War on Terror. President Obama might also argue that his plans to close the detention facility at Guantanamo, and incidentally his authority to shift the personnel and resources committed to that facility elsewhere, have been thwarted by the congressional funding prohibitions. While each of these explanations might be plausible given the right set of facts and more nuanced analysis, they appear far-fetched. The Obama Administration, moreover, has not publicly relied on any of these arguments and has referred to the first argument only in passing.[168] Given the attenuated nature of these possible explanations, the funding restrictions in question probably do not belong in category two, so no doubt is raised about their constitutionality.

Consequently, the prohibitions on the use of congressional funds for the transfer of Guantanamo detainees to the United States most appropriately fall within category three, and, under the modified approach developed in Part III.B, these restrictions are a presumptively constitutional exercise of Congress's purse power. The separation of powers analysis above demonstrates that, at a minimum, Congress and the commander-in-chief share constitutional authority over the disposition of Guantanamo detainees accused of committing acts of terrorism.[169] While the presumption of constitutionality in category three is indeed rebuttable, there appears to be no independent and compelling commander-in-chief authority in this case to justify overriding Congress's presumptively constitutional use of its power of the purse.

IV. PURSE STRINGS AS A CONSTRAINT ON THE CHIEF PROSECUTOR

Separation of powers balancing and a modified tripartite framework showed that the funding ban on Guantanamo detainee transfers did not unconstitutionally restrict the commander-in-chief, and the same dual analysis demonstrates, albeit less confidently, that Congress's exercise of its purse pow-

U.S. military, see Placing of U.S. Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C. 182 (1996), *available at* http://www.justice.gov/olc/hr3308.htm.

167. *See* Holder Letter, *supra* note 7.

168. *Id.*

169. *See supra* notes 155-57 and accompanying text.

er in this case did not unconstitutionally infringe on the prosecutorial prerogative of the President. In reaching that conclusion, this Part will first assess the Obama Administration's claim that the funding restrictions, by singling out Khalid Sheikh Mohammed, were an unprecedented use of the power of the purse. Finding no specifically similar precedent, this Part will proceed to analyze the independent constitutionality of the 2011-2012 funding prohibitions vis-à-vis the executive branch's longstanding authority over individual criminal prosecutions. To do so, this Part will conduct a separation of powers balancing analysis and extend the modified version of Tiefer's tripartite framework to the President's putative authority as what some have called the "chief prosecutor."[170]

A. *Historical Precedent: Is There Any?*

As indicated previously, President Obama has repeatedly used signing statements to label the restrictions banning the use of funds for the transfer of Guantanamo detainees as "unprecedented."[171] Attorney General Holder, in his December 2010 letter to the Senate leadership opposing the restrictions, went even further: "We have been unable to identify any parallel to [the funding restrictions] *in the history of our nation* in which Congress has intervened to prohibit the prosecution of particular persons or crimes."[172] Even assuming that Attorney General Holder's statement is correct,[173] Congress has certainly acted in the past to limit the executive's monopoly over criminal prosecution, such as by creating the independent counsel with the Ethics in Government Act of 1978.[174] Proponents of an exclusive executive authority over criminal prosecution would retort, however, that despite the Supreme Court upholding the constitutionality of an independent counsel,[175] Congress allowed the position to lapse in 1999 and has not reauthorized it since.[176] While there exists ample evidence that Congress historically has played a critical role in framing the scope

170. *See, e.g.*, Prakash, *supra* note 104, at 521.

171. *E.g.*, P.L. 112-10 Signing Statement, *supra* note 9, at 1.

172. Holder Letter, *supra* note 7 (emphasis added).

173. My research failed to unearth any exact parallels to the 2011-2012 funding prohibitions, which effectively precluded the prosecution of a named individual, Khalid Sheikh Mohammed, in federal court. Though beyond the scope of this Note, some have argued that the President has the authority to use nonappropriated funds to sidestep congressional funding prohibitions he considers unconstitutional. *See* Fisher, *supra* note 118, at 764 (noting Lt. Col. Oliver North's controversial argument during the Iran-Contra affair that the President was entitled to continue supporting the Contras with nonappropriated funds from private donors or foreign sources).

174. Pub. L. No. 95-521, § 601, 92 Stat. 1824, 1867-73 (1978) (codified as amended at 28 U.S.C. §§ 591-599 (2006)) (providing guidelines for appointment of a special prosecutor, later renamed "independent counsel").

175. Morrison v. Olson, 487 U.S. 654 (1988).

176. Prakash, *supra* note 104, at 525 & n.25; *see also* 28 U.S.C. § 599 (implementing sunset provision for the independent counsel provisions).

and nature of criminal prosecutions,[177] Attorney General Holder's assertion above has remained largely unchallenged by legislators and academics.

B. *Congress's Funding Ban Did Not Unconstitutionally Limit the Chief Prosecutor*

Just as historical precedent cannot prove dispositively that the funding ban on transferring Guantanamo detainees to the United States was constitutional,[178] neither does a lack of specific historical precedent necessarily render an exercise of Congress's purse power unconstitutional. A separation of powers analysis that balances Congress's purse power against the executive's prosecutorial authority reveals once again that the funding restrictions precluding the transfer of non-American Guantanamo detainees to the United States did not prevent the President from "accomplishing [his] constitutionally assigned functions."[179] As mentioned earlier, the Constitution does not explicitly endow the President with the authority to oversee or conduct criminal prosecutions,[180] so proponents of exclusive executive control over criminal prosecution have inferred that power from the Article II Vesting Clause,[181] Pardon Clause,[182] Take Care Clause,[183] and historical practice.[184] Furthermore, the Obama Administration, much like the Nixon Administration during Watergate,[185] has relied primarily on generalized claims of "unique executive branch" authority to justify its absolute right to prosecute Khalid Sheikh Mohammed in the venue it sees fit.[186]

By contrast, Congress possesses several specific textual sources of authority for the enactment of the restrictions banning the use of appropriated funds to transfer Guantanamo detainees. In addition to the many textual bases enumerated in Part III.C above—including Congress's appropriations power, spending power, and power to define and punish offenses against the law of nations[187]—the Constitution also vests Congress with the exclusive power "[t]o constitute

177. *See* Lessig & Sunstein, *supra* note 111, at 14-21 (detailing Congress's longstanding role in the expansion of federal criminal prosecution and concluding that the decision of "who should prosecute whom" was not always committed solely to the executive branch).

178. *See supra* Part III.A.

179. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977).

180. *See supra* Part II.D.

181. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

182. *Id.* § 2, cl. 1.

183. *Id.* § 3, cl. 4.

184. *See, e.g.*, Prakash, *supra* note 104, at 537-43 (detailing historical and textual bases for the President's exclusive constitutional authority over criminal prosecution).

185. *See* United States v. Nixon, 418 U.S. 683, 706-07 (1974).

186. *See, e.g.*, Holder Video, *supra* note 42, at 11:33.

187. *See supra* notes 156-58 and accompanying text.

Tribunals inferior to the supreme Court,"[188] as well as to determine the venue of criminal prosecutions for crimes "not committed within any state."[189] These constitutional provisions lend support at a minimum to the view that Congress possesses the authority to regulate criminal prosecutions, especially where, as here, it could be argued that the criminal acts of planning the 9/11 attacks were committed outside of the United States. Bolstering this claim is the fact that Khalid Sheikh Mohammed, as a noncitizen and nonresident of the United States, might not be constitutionally entitled to a trial by a jury of the vicinage.[190] Considering once more that the federal courts have long accorded great deference to Congress's exercise of its purse power, even in the realm of national security,[191] it would be reasonable to conclude that Congress's funding restrictions in this case—including the singling out of Khalid Sheikh Mohammed—did not impermissibly violate the separation of powers principle.

Assuming for the sake of argument that the modified version of Tiefer's tripartite framework developed above could be extended further to examine the constitutionality of Congress's use of the purse power in relation to the President's prosecutorial authority, the Obama Administration could raise considerable misgivings as to the constitutionality of the funding restrictions in this case. If the central commander-in-chief powers include the authority to command troops, dispose of the armed forces, and conduct military campaigns, the principal prosecutorial powers might include the authority to bring or decline to bring charges, to determine the proper venue for prosecution, and to plea bargain with the defendant.[192] Extending the tripartite framework to the case of Khalid Sheikh Mohammed, the question for category one becomes whether Congress's decision to proscribe the expenditure of funds for his transfer to the United States intruded on the core of the executive's authority to charge a defendant, determine the locale for his prosecution, or plea bargain with him. Even without considering the dearth of precise historical precedent for Congress using its purse power to direct the prosecution of a particular individual, the Obama Administration has a strong argument that the funding restrictions effectively forced the executive branch to try Mohammed and the four alleged co-conspirators before military commissions at Guantanamo, a direct intrusion on the core of a central prosecutorial power. In addition, Congress has arguably

188. U.S. CONST. art. I, § 8, cl. 9.

189. *Id.* art. III, § 2, cl. 3.

190. In his trial before a military commission, Khalid Sheikh Mohammed almost certainly is not entitled to a Sixth Amendment right to a jury trial. *See Ex parte* Quirin, 317 U.S. 1, 40 (1942) ("[W]e must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission . . . .").

191. BANKS & RAVEN-HANSEN, *supra* note 74, at 109, 147.

192. These three powers are often considered essential elements of prosecutorial discretion, which is virtually unreviewable. *See* Teah R. Lupton, *Prosecutorial Discretion*, 90 GEO. L.J. 1279, 1280-82 (2002) (detailing federal case law supporting exclusive prosecutorial authority over each of these three elements, as well as several others).

infringed on the Obama Administration's authority to plea bargain with the 9/11 defendants. For example, during Attorney General Holder's April 4, 2011, press conference announcing that Khalid Sheikh Mohammed and four others would be tried by military commissions, he remarked: "It's an open question about whether or not somebody can plead guilty in a military commission and still receive the death penalty."[193] This argument has been tempered, however, by the enactment of the 2012 National Defense Authorization Act, which clarified that defendants before military commissions may in fact plead guilty in capital cases and still receive the death penalty.[194] Were a federal court applying this framework to find nonetheless that Congress's funding prohibitions fell into category one, the restrictions would be presumptively unconstitutional.

Congressional proponents could certainly argue that the funding restrictions in this case fall more appropriately under category two, raising only a simple doubt of, rather than a presumption against, constitutionality. First, they might argue that the executive branch does not have absolute control over the location of a criminal prosecution because it shares the prerogative of determining where to prosecute an individual with the judiciary. The federal courts, for instance, have the power to grant transfer motions based on either prejudice or convenience under Rule 21 of the Federal Rules of Criminal Procedure.[195] Of course, the Federal Rules themselves are promulgated by the Supreme Court through the Judicial Conference and are subject to congressional amendment. Second, congressional proponents may argue that, in this particular case, Congress's funding ban only impacted the periphery of the executive's power to determine where to prosecute an individual. Because the language of the funding restrictions did not expressly direct a specific venue for Khalid Sheikh Mohammed's prosecution, the argument goes, Congress cannot be said to have intruded on the core of a central executive prosecutorial authority. Such an argument, however, raises the problem of whether the President could have, within the bounds of constitutionality, transferred Khalid Sheikh Mohammed to the United States anyway. The question of whether a President may secure nonappropriated funds to circumvent what he deems an unconstitutional exercise of Congress's purse power remains beyond the scope of this Note.[196] But a President who augments congressional appropriations by other means to carry out a purely governmental function, such as transferring Khalid Sheikh Mohammed to the U.S. mainland, would violate Congress's exclusive constitutional authority over appropriations. Thus, if President Obama had no other

193. Jason Ryan & Huma Khan, *In Reversal, Obama Orders Guantanamo Military Trial for 9/11 Mastermind Khalid Sheikh Mohammed*, ABC NEWS (Apr. 4, 2011), http://abcnews.go.com/Politics/911-mastermind-khalid-sheikh-mohammed-military-commission/story?id=13291750&singlePage=true.

194. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1030, 125 Stat. 1298, 1570 (2011) (to be codified at 10 U.S.C. § 949i(c)).

195. FED. R. CRIM. P. 21(a), (b).

196. *See supra* note 173.

constitutionally permissible options that would have allowed him to transfer Mohammed to the United States for trial, the 2011-2012 funding prohibitions essentially compelled the executive to try the alleged 9/11 conspirators before military commissions (or not try them at all).

Finally, proponents of a broad congressional purse power might even argue that the restrictions in this case fall under category three because Congress and the President share authority over the prosecution of alleged terrorists, whether in federal courts or military commissions. Congressional proponents could argue that because Congress has the unique constitutional powers to create the federal courts[197] and to regulate the location of trials for crimes not committed within any state,[198] and because Congress itself enacted the military commissions statutes, the legislature possessed at least some authority to exercise its purse power to direct where Khalid Sheikh Mohammed would be brought to justice. Because there are plausible arguments that the funding restrictions at issue in this case could fit under any of the three categories, it once again would be reasonable to conclude—though admittedly with less confidence than in the commander-in-chief analysis—that Congress's funding restrictions did not unconstitutionally infringe on the executive's prosecutorial prerogative.

CONCLUSION

Commenting on the work of the Constitutional Convention, Thomas Jefferson once wrote: "We have already given . . . one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."[199] A trove of historical evidence suggests that many of the other Framers, like Jefferson, envisioned a robust congressional purse power, especially as a check on the President's conduct during wartime.[200] Consequently, Congress deserves substantial deference when examining whether it has pulled the purse strings in a way that unconstitutionally intrudes on either the President's authority as commander-in-chief or as the supposed "chief prosecutor." Although this Note ultimately finds that Congress's decision to prohibit the executive from using any appropriated funds to transfer Khalid Sheikh Mohammed or any other non-American Guantanamo detainee to the United States was a constitutionally permissible exercise of its purse power, Congress may have stretched the constitutional limits of that power near the breaking point.

Given how close Congress appears to have come to crossing the line of constitutionality, one naturally wonders what an unconstitutional restriction

197. U.S. CONST. art. I, § 8, cl. 9.

198. *Id.* art. III, § 2, cl. 3.

199. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1958) (footnote omitted).

200. BANKS & RAVEN-HANSEN, *supra* note 74, at 27-32.

would actually look like in this case. If one accepts the "doctrine of unconstitutional conditions,"[201] Congress probably could not have compelled the executive to release Khalid Sheikh Mohammed by conditioning funding for his continued detention on the executive's holding his trial in a specific venue of Congress's choosing, because doing so would invade the executive's core prosecutorial and law enforcement authorities.[202] While the end result of such a brazen restriction might also have been trial before a military commission at Guantanamo, forcing the executive into a choice between releasing an alleged terrorist or trying him before a military commission would seem to be a step too far. Furthermore, Congress probably would have violated the Constitution if it had conditioned funding for Mohammed's trial or transfer on the executive ceding prosecutorial authority over the case to an independent or private actor. Such a restriction would force the executive to wholly abdicate its generally accepted authority over federal criminal prosecutions in order to have Khalid Sheikh Mohammed brought to justice. In the words of *Morrison v. Olson*, such a restriction would "'impermissibly undermine[]' the powers of the Executive Branch" and "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions."[203]

Even though this Note determines in the end that the congressional funding prohibitions at issue in this case were a constitutional use of the legislature's purse power, a President with a more expansive view of executive power might still challenge these restrictions in the future. If President Obama's December 2011 signing statements disputing the constitutionality of the funding bans are any indication,[204] he may finally be prepared to fight Congress on this issue, especially if he hopes to maintain his 2008 campaign promise to close the detention facility at Guantanamo. Furthermore, President Obama and Attorney General Holder may nevertheless be correct in their view that Congress's actions were "dangerous and unprecedented."[205] Whether a congressional measure is constitutional and whether that measure is desirable from a policy perspective are two different questions. While the mounting political pressures to bring the alleged 9/11 conspirators to justice ten years on probably influenced the President's decision to accept the funding restrictions, the Obama Administration may still have been right to oppose congressional meddling in the prosecution of particular individuals—especially in a prosecution as public and politically sensitive as Mohammed's. Only time will tell how dangerous this precedent might become.

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201. *See supra* notes 85-87 and accompanying text.

202. Congress would almost surely cross the constitutional line if the specified venue were, say, the U.S. Capitol.

203. 487 U.S. 654, 695 (1988) (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977)).

204. *See* P.L. 112-81 Signing Statement, *supra* note 10; P.L. 112-74 Signing Statement, *supra* note 55.

205. *E.g.*, P.L. 112-10 Signing Statement, *supra* note 9, at 1.