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Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

June 27, 2002

Memorandum for Daniel J. Bryant
Assistant Attorney General, Office of Legislative Affairs

Re: Applicability of 18 U.S.C. § 4001(a) to Military Detention of United States Citizens

You have asked us whether the detention of United States citizens as enemy belligerents by the U.S. Armed Forces violates 18 U.S.C. § 4001(a) (2000). We understand that the question has arisen in briefings before the Senate Judiciary Committee and the Senate Select Committee on Intelligence concerning the recent transfer of Jose Padilla, aka Abdullah al Mujahir, from the custody of the Department of Justice to the control of the Department of Defense.

Section 4001 of Title 18 states:

- (a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.
- (b)
 - (1) The control and management of Federal penal and correctional institutions, except military and naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended and the applicable regulations.
 - (2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

18 U.S.C. § 4001.

As we explain below, the President's authority to detain enemy combatants, including U.S. citizens, is based on his constitutional authority as Commander in Chief. We conclude that section 4001(a) does not, and constitutionally could not, interfere with that authority.

I.

In order to understand the scope of section 4001(a), we first set out the proper context established by the President's authority to detain enemy combatants during war. That authority arises out of the President's constitutional status as Commander in Chief. Under the Commander in Chief Clause, the President is authorized to detain all enemy combatants, including U.S.

citizens. Finally, we note that Congress has specifically authorized the President to use force against enemy combatants in response to the terrorist attack of September 11.

A.

Article II of the Constitution vests the entirety of the “executive power” of the United States government “in a President of the United States of America,” and expressly provides that “[t]he President shall be Commander in Chief of the Army and Navy of the United States.” U.S. Const. art. II, § 1, cl. 1; *id.*, § 2, cl. 1. Because both “[t]he executive power and the command of the military and naval forces is vested in the President,” the Supreme Court has unanimously stated that it is “*the President alone* [] who is constitutionally invested with the *entire charge of hostile operations*.” *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874) (emphasis added). As Commander in Chief, the President possesses the full powers necessary to prosecute successfully a military campaign. As the Supreme Court has recognized, “[t]he first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution.” *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950) (citation omitted).

By their terms, these provisions vest full control of the military operations of the United States in the President. It has long been the view of this Office that the Commander in Chief Clause is a substantive grant of authority to the President, *see, e.g.*, Memorandum for Honorable Charles W. Colson, Special Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President and the War Power: South Vietnam and the Cambodian Sanctuaries* (May 22, 1970); Memorandum for Timothy E. Flanagan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sep. 25, 2001). This authority includes all those powers not expressly delegated by the Constitution to Congress that have traditionally been exercised by commanders in chief of armed forces. *See, e.g.*, Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: The President’s Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations* (March 13, 2002).

One of the core functions of the Commander in Chief is that of capturing and detaining members of the enemy. *See id.* at 3 (“the Commander-in-Chief Clause constitutes an independent grant of substantive authority to engage in the detention and transfer of prisoners captured in armed conflicts”). It is well settled that the President may seize and detain enemy combatants, at least for the duration of the conflict.¹ Numerous Presidents, for example, have ordered the capture and detention of enemy combatants during virtually every major conflict in the Nation’s history, including recent conflicts such as the Gulf, Vietnam, and Korean wars.

¹ The practice of capturing and detaining enemy combatants is as old as war itself. *See* Allan Rosas, *The Legal Status of Prisoners of War 44-45* (1976). In modern conflicts, the practice of detaining enemy combatants and hostile civilians generally has been designed to balance the humanitarian purpose of sparing lives with the military necessity of defeating the enemy on the battlefield. *Id.* at 59-80.

Recognizing this authority, Congress *never* has attempted to restrict or interfere with the President's authority on this score. It is obvious that the current President plainly has authority to detain enemy combatants in connection with the present conflict, just as he has in every previous armed conflict.

The Supreme Court has also recognized the President's authority as Commander in Chief to order to capture and detention of enemy belligerents. For example, in *Ex parte Quirin*, 317 U.S. 1 (1942), the Supreme Court unanimously stated as follows:

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

Id. at 30-31 (emphasis added and footnotes omitted). See also *id.* at 31 n.8 (citing authorities); *Duncan v. Kahanamoku*, 327 U.S. 304, 313-14 (1946); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946); *Ex parte Toscano*, 208 F. 938, 940 (S.D. Cal. 1913); L. Oppenheim, *International Law* 368-69 (H. Lauterpacht ed., 7th ed. 1952).

We should emphasize here that military detention of enemy combatants serves a particular goal, one that is wholly distinct from that of detention of civilians for ordinary law enforcement purposes. The purpose of law enforcement detention is punitive: to punish individuals, to collect evidence establishing that a crime may have been committed, to ensure that an individual will appear at a criminal trial, or for other related purposes. The purpose of military detention, by contrast, is exclusively preventive. See, e.g., *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) ("The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front."); *Ex parte Toscano*, 208 F. 938, 941 (S.D. Cal. 1913) ("Internment is not a punishment for crime. . . . [B]elligerent troops are disarmed as soon as they cross the neutral frontier, and detained in honorable confinement until the end of the war.") (quotations omitted). As Commander in Chief, the President may order the detention of enemy combatants in order to prevent the individual from engaging in further hostilities against the United States, to deprive the enemy of that individual's service, and to collect information helpful to the United States' efforts to prosecute the armed conflict successfully. See *Quirin*, 317 U.S. at 28 ("An important incident to the conduct of war is the adoption of measures by the military command . . . to seize . . . those enemies who . . . attempt to thwart or impede our military effort"). While enemy combatants also may be subject to criminal prosecution under United States or international law, see *id.* at 28-29 (President's war power to detain enemy combatants includes power to "subject to disciplinary measures those enemies who . . . have violated the law of war"), evidence of criminal liability is legally unnecessary in order for the U.S. Armed Forces to detain an enemy combatant.

B.

It is also settled that the President's authority to detain an enemy combatant is not diminished by a claim, or even a showing, of American citizenship. See, e.g., *id.* at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequence of a belligerency which is unlawful."); *In re Territo*, 156 F.2d at 144 ("[I]t is immaterial to the legality of petitioner's detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America."); *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956), cert. denied 352 U.S. 1014 (1957) ("[T]he petitioner's citizenship in the United States does not ... confer upon him any constitutional rights not accorded any other belligerent under the laws of war.").

The fact that a detainee is an American citizen, thus, does not affect the President's constitutional authority as Commander in Chief to detain him, once it has been determined that he is an enemy combatant. As the Supreme Court has unanimously held, all individuals, regardless of citizenship, who "associate" themselves with the "military arm of the enemy" and "with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war." 317 U.S. at 37-38. Nothing further need be demonstrated to justify their detention as enemy combatants. The individuals need not be caught while engaged in the act of war or captured within the theatre of war. See *id.* at 38 ("Nor are petitioners any the less belligerents if . . . they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations."). They need not be found carrying weapons. See *id.* at 37 ("It is without significance that petitioners were not alleged to have borne conventional weapons . . ."). Nor must their acts be targeted at our military. See *id.* ("It is without significance that . . . their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. [The rules of land warfare] plainly contemplate that the hostile acts and purposes for which unlawful belligerents may be punished are not limited to assaults on the Armed Forces of the United States."). Accordingly, all "those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants . . ." *Id.* at 35.

For example, in *Quirin*, several members of the German armed forces who had covertly entered the United States with the objective of committing acts of sabotage were seized and ultimately tried by military commission. The FBI captured the saboteurs within the United States after they had hidden their uniforms and infiltrated into New York and Chicago. The Supreme Court concluded that they were properly held by the military and tried by military commission even though one of the defendants (Haupt) was allegedly a citizen, their plans occurred behind the front lines within states unthreatened by war, and the courts within the United States were operating openly.

Ex parte Milligan, 71 U.S. 2 (1866), does not affect this conclusion. In *Milligan*, Union forces in the state of Indiana had seized a civilian named Milligan and tried him by military commission on various charges including giving aid and comfort to the enemy, conspiring to seize weapons in federal arsenals, and planning to liberate Confederate prisoners of war.

Milligan was a U.S. citizen and resident of Indiana. He had not, however, ever been a resident of one of the Confederate states, nor had he crossed into enemy territory, nor been a member of the military of the United States, nor, it appears, of the Confederacy. It is unclear from the case whether Milligan actually ever communicated with members of the Confederate government or armed forces.

The Supreme Court held that Milligan could not be constitutionally subjected to trial by military commission. It found that the military could not apply the laws of war to citizens in states in which no direct military threat exists and the courts are open. It is worth quoting the relevant passage:

[the laws of war] can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service.

71 U.S. at 121-22. Thus, the Court made clear that the military could not extend its authority to try violators of the laws of war to citizens well behind the lines who are not participating in the military service.

Milligan left open, however, whether the laws of war could apply to a person who was more directly associated with the forces of the enemy, and hence could be detained as a prisoner captured during war. The government argued that Milligan was such a prisoner of war. The Court, however, rejected that claim because Milligan had not committed any "legal acts of hostilities against the government," but instead had "conspired with bad men to assist the enemy." As the Court explained:

But it is insisted that Milligan was a prisoner of war, and, therefore, excluded from the privileges of the statute [of habeas corpus]. It is not easy to see how he can be treated as a prisoner of war, when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles [i.e., the Civil War], a resident of any of the states in rebellion. If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

Id. at 131.² Thus, the Supreme Court concluded that Milligan could not be held as a prisoner of war because his actions were not sufficient "acts of hostility" to place him within the category of enemy belligerents.

² The end of this passage might be read to suggest that the government may apply the laws of war only to lawful combatants. That is plainly incorrect, as the Supreme Court itself explained in *Quirin*: "Unlawful combatants

In *Quirin*, the Court clarified and restricted the scope of its earlier holding in *Milligan*. The Court found that *Milligan* does not apply to enemy belligerents captured within the United States. The status of the saboteurs in *Quirin* as enemy belligerents, rather than non-belligerent civilians, was easily determined due to their training in the German Reich, their membership in its Marine Infantry, their transportation by German submarine, and their initial dress in German uniforms. The Court expressly distinguished *Milligan* on the basis that Milligan had been a civilian, and not an enemy belligerent. From the facts of *Milligan*, "the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established." 317 U.S. at 45 (emphasis added). In some ways, Milligan appeared to be an enemy sympathizer, but he could not really be said to be part of the enemy forces. Because the Nazi saboteurs were belligerents, by contrast, the *Quirin* Court found that *Milligan* did not apply.

We accordingly conclude that, under *Milligan* and *Quirin*, the President's constitutional authority as Commander in Chief to detain enemy combatants extends to U.S. citizens and non-citizens alike.

C.

Finally, we note that the President's constitutional authority to detain enemy combatants during the present conflict is bolstered by Senate Joint Resolution 23, which went into effect on September 18, 2001. That resolution recognizes that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Authorization for Use of Military Force, Pub. L. No. 107-40, preamble, 115 Stat. 224 (2001). Additionally, the resolution explicitly authorizes "the President . . . to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." *Id.*, § 2(a). Thus, Congress has specifically endorsed the use not only of deadly force, but also of the lesser-included authority to detain enemy combatants to prevent them from furthering hostilities against the United States.

II.

Section 4001(a) cannot be read to interfere with the President's constitutional authority as Commander in Chief to detain enemy combatants. When examined in the context of section 4001 and of the U.S. Code as a whole, it becomes apparent that subsection (a) does not attempt to reach so broadly. In fact, the canon of construction that statutes be construed to avoid constitutional defects requires section 4001(a) to be given this reading.

are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." 317 U.S. at 31.

To be sure, section 4001(a) uses broad language. It neither draws a distinction between differing types of detention nor mentions military detention for explicit inclusion or exclusion.³ It is important, however, to examine section 4001 in its entirety to understand the scope of subsection (a). See *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) ("When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature.'") (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)).

Nothing in section 4001 indicates that its provisions were meant to reach the President's authority, as Commander in Chief, to detain enemy combatants. To the contrary, section 4001 addresses the Attorney General's authority with respect to the federal civilian prison system, rather than the President's constitutional power as Commander in Chief to detain enemy combatants. Congress specifically added subsection (a) to 18 U.S.C. § 4001 in 1971. Act of Sep. 25, 1971, Pub. L. No. 92-128, § 1, 85 Stat. 347 (adding new language to section 4001 of title 18). Prior to 1971, section 4001 simply gave the Attorney General the power to "control and manage[]" the federal civilian prison system. Act of June 25, 1948, ch. 645, § 4001, 62 Stat. 683, 847. The earlier language was identical to subsection (b) as it is now. Then, as now, the plain terms of the provision specifically carve out "military or naval institutions" from the statute's coverage of "Federal penal and correctional institutions." Construing the scope of subsection (a) broadly to cover all types of detention is difficult to reconcile with its coupling with subsection (b). The better reading is that subsections (a) and (b) have the same scope, which is applies exclusively to the federal civilian prison system.

As a structural matter, the placement of section 4001(a) in the United States Code signifies that it was not intended to govern the detention of enemy combatants by the U.S. Armed Forces. Title 18 of the United States Code covers "Crime and Criminal Procedure." Statutes concerning the military and national security, by contrast, are generally found in Title 10 ("Armed Forces") and in Title 50 ("War and National Defense"). Moreover, the particular part of Title 18 in which section 4001 is located contains chapters governing exclusively federal criminal confinement. Part III of Title 18, which contains section 4001, is entitled "Prisons and Prisoners" and contains chapters relating to the Bureau of Prisons, good time allowances, parole, and institutions for women, among other topics. Nothing in those provisions can plausibly be construed to apply to the detention of enemy combatants. Congress's decision to place section 4001(a) in this particular provision of the U.S. Code thus provides further support for our conclusion that subsection (a) does not apply to the President's constitutional power to detain enemy combatants. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J. concurring) ("The meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.").

³ Courts have found section 4001(a) to be judicially enforceable through the writ of habeas corpus. See, e.g., *Lono v. Fenton*, 581 F.2d 645 (7th Cir. 1978).

Congress likewise has effectively construed section 4001(a) not to restrict the President's constitutional power as Commander in Chief to detain enemy combatants.

In 1984, thirteen years after the enactment of section 4001(a), Congress added section 956 to Title 10 of the U.S. Code, which specifically governs the U.S. Armed Forces. That statute explicitly authorizes the U.S. Armed Forces to use any funds appropriated to the Department of Defense to pay for the detention of prisoners of war and other enemy combatants. Specifically, 10 U.S.C. § 956 (2000) states that:

[f]unds appropriated to the Department of Defense may be used for . . . expenses incident to the maintenance, pay, and allowances of prisoners of war, other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war, and persons detained in the custody of the Army, Navy, or Air Force pursuant to Presidential proclamation.

This provision plainly contemplates that the President has the power to detain prisoners of war and other enemy combatants, presumably as an exercise of his constitutional authority as Commander in Chief, notwithstanding the prior enactment of section 4001(a). The language of 10 U.S.C. § 956 is thus difficult to reconcile with section 4001(a) unless subsection (a) does not interfere with the President's constitutional power to detain enemy combatants. When it enacted 10 U.S.C. § 956, Congress must have understood that the President already had the authority to direct the U.S. Armed Forces to detain prisoners of war, and that the enactment of section 4001(a) had done nothing to undermine that authority.

More recently, as discussed in Section I, last September Congress recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and specifically authorized "the President . . . to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Pub. L. No. 107-40, preamble & § 2(a), 115 Stat. 224 (2001). Nothing in that resolution contemplates that the President's authority to detain enemy combatants is limited to non-U.S. citizens, or that section 4001(a) could be read to so limit that authority. If anything, the joint resolution provides further support to the President's existing constitutional authority to detain enemy combatants, even those who enjoy the status of citizens.⁴

We also note that no court has ever construed section 4001(a) to apply to the detention of enemy belligerents in an armed conflict, or to restrict the President's constitutional authority to

⁴ Last October the Congressional Research Service issued a report analyzing the power of the Executive Branch to detain individuals during the current conflict in the interest of national security. See Jennifer Elsea, Congressional Research Service, *Race-based Civil Detention for Security Purposes*, Order Code RS21039 (2001). That report specifically discusses 18 U.S.C. § 4001(a). It concludes that section 4001(a) was "intended to prevent the President from authorizing *civil* detention of citizens without an act of Congress." *Id.* at 3 (emphasis added). Notably, the report makes no mention of military detention of U.S. citizens who are enemy combatants, and does not even hint at the possibility that section 4001(a) has any application outside of ordinary civilian detention.

detain enemy combatants. See *Howe v. Smith*, 452 U.S. 473, 479 (1981) (noting “the authority of the Federal Government, in the official person of the Attorney General, to receive and to hold [state convicts subsequently transferred to] a federal penitentiary,” (citing 18 U.S.C. §§ 4001(a) & 5003));⁵ see also *Lono v. Fenton*, 581 F.2d 645, 648 (7th Cir. 1978) (section 4001(a) “forbid[s] non-statutory confinement in federal prisons”); *Seller v. Ciccone*, 530 F.2d 199, 201 (8th Cir. 1976) (section 4001(b) vests Attorney General with “[t]he administration of the rehabilitative programs for federal prisoners”); *Marchesani v. McCune*, 531 F.2d 459, 461 (10th Cir. 1974) (section 4001 vests Attorney General with discretion to classify prisoners); *Bono v. Saxbe*, 462 F. Supp. 146, 148 (E.D. Ill. 1978) (section 4001 authorizes Attorney General “to manage and control the federal prison system”).

Our conclusion that section 4001(a) does not interfere with the President’s constitutional authority as Commander in Chief is compelled by the well established canon of statutory construction that statutes are not to be construed in a manner that presents constitutional difficulties so long as a reasonable alternative construction is available. See, e.g., *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979)) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, [courts] will construe [a] statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”). This canon of construction applies where an act of Congress could be read to encroach upon powers constitutionally committed to a coordinate branch of government. See, e.g., *Franklin v. Massachusetts*, 505 U.S. 788, 800-1 (1992) (citation omitted) (“Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the [Administrative Procedure Act]. We would require an express statement by Congress before assuming it intended the President’s performance of his statutory duties to be reviewed for abuse of discretion.”); *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 465-67 (1989) (construing Federal Advisory Committee Act not to apply to advice given by American Bar Association to the President on judicial nominations, to avoid potential constitutional question regarding encroachment on Presidential power to appoint judges).

In the area of foreign affairs, and war powers in particular, the avoidance canon has special force. See, e.g., *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988) (“unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”); *Japan Whaling Ass’n v.*

⁵ Under 18 U.S.C. § 5003(a) (2000), “[t]he Attorney General . . . is . . . authorized to contract with the proper officials of a State or Territory for the custody . . . of persons convicted of criminal offenses in the courts of such State or Territory: *Provided*, That any such contract shall provide for reimbursing the United States.” *Howe*, 452 U.S. at 475 n.1. In *Howe*, the Court held that section 5003(a) constituted sufficient statutory authority to authorize federal detention of state prisoners under section 4001(a). We note that there is loose language in *Howe* that might be mistakenly read to apply section 4001(a) to the President’s constitutional authority to detain enemy combatants. The Court noted that “the plain language of § 4001(a) proscrib[es] detention of *any kind* by the United States, absent a congressional grant of authority to detain. If the petitioner is correct that neither § 5003 nor any other Act of Congress authorizes his detention by federal authorities, his detention would be illegal even though that detention is on behalf, and at the pleasure, of the State of Vermont.” *Howe*, 452 U.S. at 479 n.3. This passage simply states that § 4001(a) applies to the entire federal criminal prison system, regardless of how each federal prisoner was originally taken into custody. It does not address any other form of detention by the United States, such as detention of enemy combatants pursuant to the President’s authority as Commander in Chief.

American Cetacean Soc'y, 478 U.S. 221, 232-33 (1986) (construing federal statutes to avoid curtailment of traditional presidential prerogatives in foreign affairs). We do not lightly assume that Congress has acted to interfere with the President's constitutionally superior position as Chief Executive and Commander in Chief in the areas of foreign affairs and national security, and the Supreme Court's consistent view that "foreign policy [is] the province and responsibility of the Executive." *Egan*, 484 U.S. at 529 (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)). See also *Agee*, 453 U.S. at 291 (deference to Executive Branch is "especially" appropriate "in the areas of foreign policy and national security"). As the Court has repeatedly emphasized, the President's foreign affairs power necessarily exists independently of Congress: "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. . . . [I]t is the very delicate, plenary and exclusive power of the President as sole organ of the federal government in the field of international relations – a power which does not require as a basis for its exercise an act of Congress." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 320 (1936).

As we have already explained, the most reasonable construction of section 4001(a) is that it does not restrict the President's constitutional authority as Commander in Chief to detain U.S. citizens who are enemy combatants. Any other construction would raise serious constitutional questions. The President's power to detain enemy combatants, including U.S. citizens, arises out of his constitutional authority as Commander in Chief. As our office has consistently held during this Administration and previous Administrations, Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his authority as Commander in Chief to control the conduct of military operations during the course of a campaign. See, e.g., Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from Patrick Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Swift Justice Authorization Act* (Apr. 8, 2002); Memorandum for Timothy E. Flanagan, Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sep. 25, 2001); Memorandum for Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Defense Authorization Act* (Sep. 15, 1995). Congress may no more regulate the President's ability to detain enemy combatants than it may regulate his ability to direct troop movements on the battlefield. Accordingly, we would construe section 4001(a) to avoid this constitutional difficulty, and conclude that subsection (a) does not apply to the President's detention of enemy combatants pursuant to his Commander in Chief authority.

III.

A review of the legislative history of 18 U.S.C. § 4001(a) underscores our conclusion that Congress never intended that provision to restrict the President's constitutional authority as Commander in Chief to detain enemy combatants. While some in Congress questioned the law's scope as potentially infringing on the President's war powers, others assured members that the statute could not extend so far. At best, the legislative history demonstrates that Congress had no fully shared understanding that section 4001 either regulated the President's Commander in

Chief authority or did not. The inconclusive nature of the legislative history, therefore, requires us to rely upon the scope of the President's war power, the structure of section 4001 and its placement in the U.S. Code, and the canon of avoidance.

First, the 1971 addition of section 4001(a) was accompanied by, and closely identified with, the repeal of the Emergency Detention Act of 1950, ch. 1024, 64 Stat. 1019, 1019-31, codified at 50 U.S.C. §§ 811-826, *repealed by* Pub. L. No. 92-128, 85 Stat. 347. That Act authorized the federal government *exclusively* to detain individuals suspected of violating certain criminal statutes. Specifically, it empowered the Attorney General to "to apprehend and by order detain . . . each person as to whom there is [a] reasonable ground to believe that such person . . . will engage in, or probably will conspire with others to engage in, acts of espionage or . . . sabotage." *Id.* at 1021.⁶ Espionage and sabotage were expressly defined in relation to particular sections of Title 18 of the United States Code. *Id.* In other words, the Act authorized detention of individuals based on suspected criminal conduct. Accordingly, we view the repeal of the 1950 Act, and the accompanying codification of section 4001(a), to address similar forms of detention and *not* the detention of enemy combatants.

Second, an earlier version of the legislation enacting section 4001(a) suggests that the provision was not intended to reach the detention of enemy combatants. The original version of the House bill ultimately enacted, H.R. 234, did not include the language "except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). Instead, it more broadly prohibited the detention of any U.S. citizen "except in conformity with the procedures and the provisions of title 18." H.R. Rep. No. 92-116 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1437. A Department of Justice witness objected to the language on the ground that the drafters had incorrectly assumed that "all provisions for the detention of convicted persons are contained in title 18." *Id.* at 1437. The witness went on to list the numerous other federal statutes, outside of title 18, authorizing the confinement of persons convicted of federal crimes. *See id.* (citing, among others, provisions dealing with crimes involving narcotics in title 21, Internal Revenue violations in title 26, and crimes involving aircraft hijacking, carrying explosives aboard an aircraft and related crimes in title 49). The Committee accepted the witness's objection and recommended an amendment that changed the language to "except pursuant to an Act of Congress." *Id.* Notably, neither the witness nor any member of the Committee ever mentioned expanding the scope of the prohibition beyond detention related to criminal activity. Thus, the change in the legislation occurred in order to recognize other forms of detention of "convicted persons" under the federal criminal laws, and not the preventive detention of enemy combatants that occurs pursuant to the President's Commander in Chief authority.

Third, the House floor debate fails to demonstrate a universal, shared understanding of section 4001(a) as an effort to regulate or interfere with the President's Commander in Chief

⁶ The Attorney General's authority was made available when the President proclaimed an emergency pursuant to one of three triggering events: invasion, declaration of war, and insurrection. The detainee was to be released by an order of release, or at the termination of the emergency by proclamation of the President or by concurrent resolution of the Congress. Orders of release could issue from the Attorney General, the Board of Detention Review (established by the Act), or a United States court, after reviewing the action of the Board of Detention Review or upon a writ of habeas corpus. The Act authorized the Attorney General to issue warrants for the apprehension of persons believed to fall within the statutory language.

authority to detain enemy combatants. Over a two-day period in September, 1971, the House debated two competing bills: H.R. 234, reported out of the Judiciary Committee, which repealed the Emergency Detention Act and added section 4001(a), and H.R. 820, reported out of the Internal Security Committee, which acted to amend the Emergency Detention Act to prohibit its use "solely on account of race, color, or ancestry." 117 Cong. Rec. at 31754 (1971). The House floor debate reflected the presence of three distinct views of the legislation.

In the first camp, there was wide support for eliminating the possibility of any future use or creation of civilian detention camps. The internment of Japanese-Americans during World War II, without regard to their status as non-combatants, was frequently invoked by members of Congress to highlight the need for statutory action. Noting that the Emergency Detention Act was not in place during World War II, proponents of H.R. 234 argued that a simple repeal of the Emergency Detention Act would not necessarily eliminate the possibility of future creation or use of detention camps. See 117 Cong. Rec. at 31541 (statement of Cong. Kastenmeier) ("It has been suggested that repeal alone would leave us where we were prior to 1950. The committee believes that imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an act of Congress, exists. This will assure that no detention camps can be established without at least the acquiescence of the Congress."). Such concern was the impetus for the addition of the language now found in 18 U.S.C. § 4001(a). This view was not at odds with our interpretation of section 4001(a), as the Japanese-Americans detained during World War II were not held as enemy combatants, and so any decision to prevent similar forms of detention in the future would not reach the President's Commander in Chief power on that score.

Members of the second camp, however, feared that the legislation went too far and violated the principle of separation of powers because it infringed upon the President's constitutional powers and duties. See 117 Cong. Rec. at 31542 (statement of Cong. Ichord) ("[The amendment] would deprive the President of his emergency powers and his most effective means of coping with sabotage and espionage agents in war-related crises. Hence the amendment also has the consequence of doing patent violence to the constitutional principle of separation of powers. . . . Although many Members of this House are committed to the repeal of the Emergency Detention Act of 1950, they have no purpose, I am sure, to confound the President in his exercise of his constitutional duties to defend this Nation, nor would they wish to render this country helpless in the face of its enemies."). These critics of the legislation appear to have suggested that the law's broad language could be read to interfere with the President's power to detain enemy combatants. We would note, however, that they did not offer this reading as an authoritative interpretation of the statute's meaning, but as an effort to narrow its scope.

Finally, then Congressman Abner Mikva, responding to both groups, stated that, while Congress indeed lacked the authority to interfere with the President's constitutional powers, H.R. 234 should not be interpreted to do so. He argued:

If there is any inherent power of the President of the United States, either as the Chief Executive or Commander in Chief, under the Constitution of the United States, to authorize the detention of any citizen of the United States, nothing in

[H.R. 234] interferes with that power, because obviously no act of Congress can derogate the constitutional power of a President.

Id. at 31555. Moments later, Mikva elaborated on this point:

The next group of opinion would hold that the Federal Government does have certain emergency powers which can be exercised if necessary for self-preservation. Some in this group would give extensive latitude to the President to exercise such war powers, finding the justification in his [powers] as Commander in Chief of the Armed Forces, as well as in his sworn duty to uphold the Constitution and to preserve the Republic. Once again, it is difficult to see how proponents of this view could consistently oppose H.R. 234 on the grounds that it would undercut the President's ability to act in an emergency. After all, if the President's war powers are inherent, he must have the right to exercise them without regard to congressional action. Arguably, any statute which impeded his ability to preserve and protect the Republic from imminent harm could be suspended from operation. It is a contradiction in terms to talk of Congress limiting or undercutting an inherent power given by the Constitution or some higher authority.

...

The conclusion to be drawn from all of this is that, historical and philosophical questions aside, the repeal of the Emergency Detention Act which is proposed in H.R. 234 would have no measurable effect on the war powers of the President, whatever those powers are deemed to be at present.

Id. at 31557.

This discussion demonstrates that there was no agreement in Congress that the law would reach enemy combatants, or that section 4001(a) could regulate the President's authority as Commander in Chief to detain such individuals. The legislative history of section 4001(a), therefore, cannot be read to undermine our conclusion, and the apparent conclusion of subsequent sessions of Congress, that subsection (a) does not apply to the detention of U.S. citizens held as enemy combatants by U.S. Armed Forces under the direction of the President in the exercise of his constitutional authority as Commander in Chief.

If I can be of further assistance, please let me know.

Sincerely,

A handwritten signature in dark ink, appearing to read "John C. Yoo", with a stylized flourish at the end.

John C. Yoo
Deputy Assistant Attorney General