

May 2016

The Lesser of Two Evils: Exploring the Constitutionality of Indefinite Detentions of Terror Enemy Combatants Following the End of “Combat Operations” in Afghanistan

Justin A. Thatch

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Constitutional Law Commons](#), and the [National Security Law Commons](#)

Repository Citation

Justin A. Thatch, *The Lesser of Two Evils: Exploring the Constitutionality of Indefinite Detentions of Terror Enemy Combatants Following the End of “Combat Operations” in Afghanistan*, 24 Wm. & Mary Bill Rts. J. 1205 (2016), <https://scholarship.law.wm.edu/wmborj/vol24/iss4/7>

Copyright c 2016 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

THE LESSER OF TWO EVILS: EXPLORING THE CONSTITUTIONALITY OF INDEFINITE DETENTIONS OF TERROR ENEMY COMBATANTS FOLLOWING THE END OF “COMBAT OPERATIONS” IN AFGHANISTAN

Justin A. Thatch*

INTRODUCTION

In the summer of 1787, the delegates to the Constitutional Convention in Philadelphia crafted a document poised to organize the U.S. government for all future generations.¹ Despite the protections afforded by the implicit organizational elements for the separation of powers and checks and balances, the delegated powers in the document, both explicit and implicit, could not account for every situation and crisis bound to face the nation.

Historically, the United States has faced national security threats from foreign nations, pirates, and even a separatist segment of its own people. The terrorist attacks of September 11, 2001, however, created a new chapter in the history book of American national security and related law. Following the tragedy of the attacks, there was a serious fear of continued threats, and the United States responded with measures to prevent threats of future violence and bring the perpetrators to justice.

The American response led to a “War on Terror” that continues to this day.² Over the course of two administrations, the war against al Qaeda and other terrorist groups has been immensely controversial from both a political and legal standpoint.³ At the forefront of debate has been the treatment and detention of terror suspects.⁴ The

* J.D. Candidate, William & Mary Law School, 2016; B.A., University of North Carolina at Chapel Hill, 2013. I would like to thank my family and friends for their constant support. I would also like to thank the editorial board and staff of Volume 24 of the *William & Mary Bill of Rights Journal* for their hard work on this Note. Any errors are my own.

¹ *Constitutional Convention and Ratification, 1787–1789*, U.S. DEP’T ST. OFF. HISTORIAN, <https://history.state.gov/milestones/1784-1800/convention-and-ratification> [<http://perma.cc/2BGS-JBUE>].

² “*War on Terrorism*,” GLOBAL POL’Y F., <https://www.globalpolicy.org/war-on-terrorism.html> [<http://perma.cc/2R2C-37AV>].

³ See Jonathan Hafetz, Opinion, *Targeted Killing and the ‘War on Terror,’* AL JAZEERA (Oct. 19, 2011, 7:15 PM), <http://www.aljazeera.com/indepth/opinion/2011/10/2011101872910456159.html> [<http://perma.cc/7FLV-3AAL>]; see also Scott Shane, Mark Mazzetti & Robert F. Worth, *Secret Assault on Terrorism Widens on Two Continents*, N.Y. TIMES (Aug. 14, 2010), <http://www.nytimes.com/2010/08/15/world/15shadowwar.html>.

⁴ See Brendan M. Fischer & Lisa Graves, *Costs of War: Detention*, WATSON INST. FOR INT’L & PUB. AFF., <http://watson.brown.edu/costsofwar/costs/social/rights/detention> [<http://perma.cc/UCD9-E7TS>].

issues at the heart of the detention debate extend to the conflict as a whole—a constitutional ambiguity concerning the power to combat terrorism and the due process protections afforded to detainees.⁵ From a more macro-level perspective, the fight against terrorism is positioned right at the nexus between the congressional war powers and the President’s power, as Chief Executive, to respond against threats to domestic security. Perhaps an even more fundamental question is whether the “War on Terror” should be treated as a “war” under the Constitution at all. Although these questions are ever prevalent in the background, the central constitutional question surrounds the scope of the rights of detained “enemy combatants” under the Due Process Clause.⁶

The “War on Terror” has an elaborate constitutional history with respect to the due process rights of terror suspects. The Supreme Court and lower federal courts have ruled on countless petitions and cases from terrorist detainees, which has created a new area of jurisprudence governing this issue.⁷ The end of “combat operations” in Afghanistan has added a significant wrinkle to the debate surrounding detainee due process rights,⁸ and the Supreme Court will likely be called on to decide this issue.

This Note explores how the U.S. Supreme Court should approach this constitutional question. Part I discusses the legal basis for the “War on Terror.” It further explores some of the key cases in the Supreme Court’s terror detention jurisprudence. The focus will then shift to recent cases addressing the issues of whether detainees can be held following the end of “combat operations” in Afghanistan. Part II argues that the Supreme Court, in ruling on habeas petitions from detainees, should uphold the executive branch’s constitutional authority to detain terror suspects indefinitely, even if active combat has ended in Afghanistan. It then explores various legal theories that the Court may use to justify its decision, including the argument that the end of combat operations does not preclude the executive branch’s constitutional detention power. Part III explores possible policy decisions that the elected branches may pursue in order to provide some clarity on the constitutionality of the detention issue.

When Osama Bin Laden was killed in 2011, some expressed the sentiment that the “War on Terror” was ending, and President Obama later declared the core of al Qaeda “decimated.”⁹ Since that time, however, al Qaeda has attacked the U.S. Embassy in Benghazi, Libya.¹⁰ The world has witnessed the barbaric rise of ISIS in

⁵ See, e.g., David G. Savage, *Constitution Applies to Detainees, Justices Say. It’s Third Supreme Court Rebuke of Bush’s Policy*, L.A. TIMES (June 13, 2008), <http://articles.latimes.com/print/2008/jun/13/nation/na-scotus13> [<http://perma.cc/X2YW-8Z4F>].

⁶ See U.S. CONST. amend. V; see also *id.* amend. XIV, § 1.

⁷ See *infra* Part I (discussing the major cases that relate to issues in this Note).

⁸ See U.S., *NATO Ceremonially End Afghan Combat Mission After 13 Years*, NBC NEWS, <http://www.nbcnews.com/news/world/u-s-nato-ceremonially-end-afghan-combat-mission-after-13-n263671> [<http://perma.cc/87WW-KKT2>] (last updated Dec. 8, 2014, 5:53 AM).

⁹ See Susan Crabtree, *WH Insists Al Qaeda Core Is ‘Decimated,’* WASH. EXAMINER (Sept. 26, 2014, 4:50 PM), <http://www.washingtonexaminer.com/wh-insists-al-qaeda-core-is-decimated/article/2554038> [<http://perma.cc/2WC5-F7YB>].

¹⁰ See, e.g., Oren Dorell, *Senate Says No Doubt Al-Qaeda in on Benghazi*, USA TODAY

Iraq and Syria,¹¹ the violent assassination of *Charlie Hebdo* staff members in Paris,¹² and the recent mass shootings in Paris and San Bernardino.¹³ This chaos reflects the reality of the world that we live in today. As one threat subsides, another emerges and poses a real danger to national security interests. Although the U.S. Constitution may not fathom an unending war, as the “War on Terror” seems to be, the three branches can chart a course for further action against terrorist threats that better fits within a sensible constitutional framework.

I. THE LEGAL AND HISTORICAL BACKGROUND OF THE “WAR ON TERROR”

After the 9/11 attacks, the United States entered into a truly unprecedented conflict by commencing a full military campaign against a non-state terrorist organization.¹⁴ The actors involved were therefore operating in a largely unpopulated legal arena.¹⁵ For better or worse, the tools and rhetoric employed by the elected branches would come to define how the “War on Terror” would be fought. As the conflict extended over the course of years, many clashes developed over the proper constitutional roles of all three branches of government, but the focus centered on the power of the President to propagate the “war.”¹⁶

A. Basis for Detentions—Authorization for Use of Military Force (AUMF)

On September 11, 2001, the United States witnessed the worst terrorist attack on American soil in the nation’s history as al Qaeda hijackers took the lives of roughly

(Jan. 16, 2014, 10:03 PM), <http://www.usatoday.com/story/news/world/2014/01/16/al-qaeda-benghazi-role-known-early/4520871/> [<http://perma.cc/N6YS-C4RW>].

¹¹ See, e.g., Nick Thompson, Richard Greene & Sarah-Grace Mankarious, *ISIS: Everything You Need to Know About the Rise of the Militant Group*, CNN, <http://www.cnn.com/2015/01/14/world/isis-everything-you-need-to-know/> [<http://perma.cc/249A-SRUE>] (last updated Feb. 10, 2015, 11:59 AM).

¹² See, e.g., Maria Abi-Habib, Margaret Coker & Hakim Almasmari, *Al Qaeda in Yemen Claims Responsibility for Charlie Hebdo Attack*, WALL ST. J., <http://www.wsj.com/articles/yemens-al-qaeda-branch-claims-responsibility-for-charlie-hebdo-attack-1421231389> (last updated Jan. 14, 2015, 8:12 PM).

¹³ Michael S. Schmidt & Richard Pérez-Peña, *F.B.I. Treating San Bernardino Attack as Terrorism Case*, N.Y. TIMES (Dec. 4, 2015), <http://www.nytimes.com/2015/12/05/us/tashfeen-malik-islamic-state.html>; *Paris Attacks: What Happened on the Night*, BBC NEWS (Dec. 9, 2015), <http://www.bbc.com/news/world-europe-34818994> [<http://perma.cc/4RS8-C8Q4>].

¹⁴ See Heinz Klug, *The Rule of Law, War, or Terror*, 2003 WIS. L. REV. 365, 372–73 (2003) (explaining the United States’ “generalized” War on Terror).

¹⁵ *Id.* at 366.

¹⁶ Alison Parker & Jamie Fellner, *Above the Law: Executive Power After September 11 in the United States*, in HUMAN RIGHTS WATCH WORLD REPORT 2004: HUMAN RIGHTS AND ARMED CONFLICT 140, 140–55 (2004), <https://www.hrw.org/legacy/wr2k4/download/wr2k4.pdf> [<http://perma.cc/Q8QZ-EUGT>] (outlining the tension between President Bush and the judiciary in regard to the War on Terror).

3,000 Americans in New York City and Washington, D.C.¹⁷ In the immediate aftermath of the attacks, President George W. Bush, and many Americans, were ready to strike back at the responsible parties.¹⁸ One week after the attacks, on September 18, 2001, Congress adopted a joint resolution, known as the AUMF, in order “[t]o authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.”¹⁹ Despite the vote by Congress, this was not a “declaration” of war under Article I of the Constitution.²⁰ This resolution would essentially become the legal basis for the so-called “War on Terror.”²¹ Given all the action it has been used to justify, the brevity of the AUMF is surprising. The real substance of the resolution is in Section 2, subsection (a), which reads as follows:

That the President is authorized 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.²²

In addition to this language, the justifications listed by Congress provide unique insight into the thought process behind the drafting of the AUMF. First, Congress

¹⁷ See *September 11th Fast Facts*, CNN, <http://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/> [<http://perma.cc/SQ34-BSTL>] (last updated Sept. 7, 2015, 12:41 PM).

¹⁸ President George W. Bush, Address to the Nation on the September 11 Attacks (Sept. 11, 2001) (transcript available at SELECTED SPEECHES OF PRESIDENT GEORGE W. BUSH, 2001–2008, at 57, http://www.georgewbush-whitehouse.archives.gov/infocus/bush-record/documents/Selected_Speeches_George_W_Bush.pdf [<http://perma.cc/VD5P-FYZG>]) (“The search is underway for those who are behind these evil acts. I’ve directed the full resources of our intelligence and law enforcement communities to find those responsible and to bring them to justice. We will make no distinction between the terrorists who committed these acts and those who harbor them. . . . America and our friends and allies join with all those who want peace and security in the world, and we stand together to win the war against terrorism.”).

¹⁹ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

²⁰ Compare U.S. CONST. art. I, § 8, cl. 11 (granting Congress the power to declare war), with 115 Stat. 224 (authorizing the President to use “necessary and appropriate” force). It is ultimately this distinction that creates the constitutional dilemma. Where the doctrine on the law of war and war powers is a little more robust, constitutional law does not provide as much guidance when it comes to dealing with a global fight against terrorism and the mechanisms deployed to deal with the threats.

²¹ See, e.g., Andrew Cohen, *The Case for Congress Ending Its Authorization of the War on Terror*, ATLANTIC (June 10, 2013), <http://www.theatlantic.com/politics/archive/2013/06/the-case-for-congress-ending-its-authorization-of-the-war-on-terror/276699/> [<http://perma.cc/AN5E-SF8Y>] (calling the 2001 AUMF a “blank check” to wage the War on Terror).

²² § 2(a), 115 Stat. at 224.

seemed keen on protecting the United States' right to self-defense and ensuring the safety of American citizens at home and abroad.²³ Furthermore, it acknowledges that national security and foreign policy are threatened by terrorist acts, and these acts pose "unusual and extraordinary" threats.²⁴ Perhaps most importantly, Congress recognized that the President has constitutional authority to "deter and prevent acts of international terrorism against the United States."²⁵ Through these suppositions, Congress seems to endorse a zone of constitutional presidential power where the President can act to combat terrorism to exercise the nation's right to self-defense and protect national security interests. An extension of this theory can be used to support the detention of terror suspects without such authorization from Congress, such as the AUMF.

Periodically, Congress has reaffirmed its commitment to the President's power to detain terror suspects under the AUMF, with the most recent express affirmation in the National Defense Authorization Act for Fiscal Year 2012 (the Act).²⁶ The Act restated the President's authority to use "all necessary and appropriate force pursuant to the [AUMF]," which included the authority "to detain covered persons."²⁷ In addition to any person connected to the 9/11 attacks, as covered by the AUMF, the Act also covered

[a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.²⁸

Any such covered person could be detained pending the "disposition of a person under the law of war," which the Act defined to include detention without trial "until the end of the hostilities authorized by the [AUMF]."²⁹ Most importantly for detentions, the Act codified "legislative support for law-of-war detention of members of

²³ *Id.* ("Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad . . .").

²⁴ *Id.*

²⁵ *Id.*

²⁶ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011).

²⁷ *Id.* § 1021(a), 125 Stat. at 1562.

²⁸ *Id.* § 1021(b)(2), 125 Stat. at 1562.

²⁹ *Id.* § 1021(c)(1), 125 Stat. at 1562. It is this "end of hostilities" question that is at the heart of the issue that this Note explores. Detainees will argue that the cessation of "combat operations" in Afghanistan qualifies as such an end, but, with a continued U.S. military presence in Afghanistan and threat of further attacks, an interpretation that hostilities continue beyond the end of "combat operations" is entirely reasonable.

associated forces that, although not directly involved in the September 11 attacks, may pose threats to the United States currently or in the future.”³⁰

Even though the drafters expressly limited the scope of the Act, journalists and activists challenged the expansion of detention power allegedly authorized under Section 1021(b)(2).³¹ The plaintiffs feared that the government would construe their work as “having substantially supported al-Qaeda, the Taliban, or associated forces.”³² They claimed that this section gave the President the authority to detain American citizens on American soil.³³ Although the district court agreed with the plaintiffs and entered a permanent injunction preventing any detentions pursuant to Section 1021(b)(2),³⁴ the Second Circuit reversed that decision, holding that the journalists and activists lacked standing because the section says nothing about the President’s authority to detain American citizens.³⁵ As a result, the court failed to evaluate the plaintiffs’ constitutional claims.³⁶

This suit reflects the sensitive nature of the United States’ approach to its detention program, but it also highlights the key distinction between “enemy combatants” and lawful American citizens.³⁷ The AUMF and subsequent affirmations like the National Defense Authorization Act reflect the commitment of the United States to defend itself from the threat of foreign terrorists. As a result, it may be necessary to detain certain “enemy combatants” for indefinite amounts of time. The question of whether terror suspects can truly be detained indefinitely following the cessation of hostilities is what this Note attempts to answer, and eventually what the federal courts will have to answer.

³⁰ Oona Hathaway et. al, *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT’L L. 123, 126 (2013). Seeing as the AUMF was not a constitutional declaration of war, this can be viewed as an express congressional expansion of the scope of the AUMF, which could give it scope beyond the plain language of the AUMF. However, this language is contradictory to the construction clause in subsection (d), which says that the scope of the President’s power under the AUMF is not expanded or limited. § 1021(d), 125 Stat. at 1562.

³¹ *Hedges v. Obama*, 890 F. Supp. 2d 424, 427 (S.D.N.Y. 2012), *vacated and remanded*, 724 F.3d 170 (2d Cir. 2013).

³² *Hedges v. Obama*, 724 F.3d 170, 173 (2d Cir. 2013).

³³ *Id.*

³⁴ *Hedges*, 890 F. Supp. 2d at 472.

³⁵ *Hedges*, 724 F.3d at 173–74.

³⁶ *Id.* at 174. (reversing with no ruling on the merits).

³⁷ This distinction is important to reinforce. In the line of detention cases since the outset of the war in Afghanistan, both American citizens and foreign nationals have challenged their detentions. This Note limits its analysis to cases of foreign nationals that fall under the definition of “enemy combatants.” Terror suspects considered as “enemy combatants” can be detained indefinitely pending “[t]he disposition of a person under the law of war.” National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(a)–(c)(1), 125 Stat. 1298, 1562 (2011). Therefore, this Note explores perhaps the final “out” for these certain suspects—the “end of hostilities” in Afghanistan which no longer makes their detention legal under the AUMF.

B. Allowing Detention of Enemy Combatants—Hamdi v. Rumsfeld

In 2004, the Supreme Court decided the influential detention case of *Hamdi v. Rumsfeld*.³⁸ Hamdi was a U.S. citizen born in Louisiana who moved with his family to Saudi Arabia as a child.³⁹ By 2001, he was living in Afghanistan, and, in January 2002, he was captured, turned over to U.S. forces, and taken to Guantanamo Bay, Cuba.⁴⁰ When the U.S. government learned that Hamdi was a U.S. citizen, he was transferred to a naval brig in Norfolk, Virginia, and later to another brig in Charleston, South Carolina.⁴¹ The government asserted its right to detain Hamdi indefinitely because he was an “enemy combatant.”⁴² Hamdi’s father filed a petition for a writ of habeas corpus, naming his son and himself, as next friend, as petitioners.⁴³ Essentially, Hamdi’s father argued that his son was entitled to the full protections of the Constitution as an American citizen, and, therefore, he could not be detained without charges, barred from access to counsel, or subjected to further fundamental rights violations.⁴⁴ The district court provided Hamdi with counsel and ordered that the attorney have access to him.⁴⁵ On appeal, the Fourth Circuit reversed the lower court’s decision.⁴⁶ The case bounced around the lower courts until it found its way to the Supreme Court for review and disposition of the detention issue.⁴⁷

A plurality of the Justices vacated the Fourth Circuit.⁴⁸ They held that the AUMF authorized the detention of individuals classified as enemy combatants, including those in Hamdi’s position as a citizen-detainee.⁴⁹ Writing for the plurality, Justice O’Connor understood enemy combatant to include “an individual who . . . was ‘part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in an armed conflict against the United States’ there.”⁵⁰ She went on to say that detentions were considered “necessary and appropriate force” authorized by

³⁸ 542 U.S. 507 (2004).

³⁹ *Id.* at 510.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 511.

⁴⁴ *Id.*

⁴⁵ *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 529 (E.D. Va. 2002) (“On June 11, 2002, this Court found that Hamdi’s father had properly filed his habeas petition as next friend, appointed the Federal Public Defender as counsel for Petitioners, and ordered the Respondents to allow counsel access to Hamdi.”).

⁴⁶ *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002).

⁴⁷ *Hamdi*, 542 U.S. at 509.

⁴⁸ *Id.* at 539.

⁴⁹ *Id.* at 518 (“We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”).

⁵⁰ *Id.* at 516.

the AUMF.⁵¹ In an attempt to limit the scope of the decision, O'Connor referred to the "detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured."⁵² This language would seem to limit presidential detention authority, but she went on to clarify further by saying that the President's power to detain under the AUMF may be different when "the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war."⁵³ Recognizing the sensitivity surrounding the issue of detention and the uncertain nature of the "War on Terror," the Court employed this language to leave an open door for changing circumstances.

Although they did not sign on to the plurality opinion, Justices Souter and Ginsburg concurred in the judgment of the Court, but they did not believe that the AUMF gave the executive branch the authority to detain in the manner expressed here.⁵⁴ Souter drew attention to another statute, the Non-Detention Act, which says that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."⁵⁵ In essence, Justice Souter did not interpret the AUMF as an exception to the non-detention rule, and he found that Hamdi could not be detained further given the mandate of the Non-Detention Act.⁵⁶ Thus, he did not reach the merits of many of the constitutional issues that the plurality considered with regard to due process protections.⁵⁷

Justice Scalia authored a dissent, joined by Justice Stevens, that did not approve of the detention of an American citizen without cause.⁵⁸ He believed that a U.S. citizen accused of engaging in war against the United States was to be charged with "treason or some other crime" under the Constitution.⁵⁹ Justice Scalia believed that this must be the proper course of action unless the writ of habeas corpus was properly suspended under the Suspension Clause.⁶⁰ He admitted that he was not sure whether prosecution for treason or other crimes is sufficient to meet the national security necessities, but he asserted that the proper avenue is for Congress to expressly suspend the writ of habeas corpus under its express constitutional authority.⁶¹

⁵¹ *Id.* at 519 ("In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.").

⁵² *Id.* at 518.

⁵³ *Id.* at 521.

⁵⁴ *Id.* at 541 (Souter, J., concurring in part and dissenting in part).

⁵⁵ *Id.*; see also 18 U.S.C. § 4001(a) (2012).

⁵⁶ *Hamdi*, 542 U.S. at 553 (Souter, J., concurring in part and dissenting in part).

⁵⁷ *Id.*

⁵⁸ *Id.* at 555 (Scalia, J., dissenting).

⁵⁹ *Id.* at 554.

⁶⁰ *Id.*

⁶¹ *Id.* at 578.

Lastly, Justice Thomas penned his own dissent, which is discussed at length later in this Note.⁶² Overall, the *Hamdi* case both represents a landmark decision in the terror detention jurisprudence and influenced many of the later cases decided on the subject.

C. *Allowing Access to Federal Courts*—*Boumediene v. Bush*

In *Boumediene v. Bush*⁶³ in 2008, the Supreme Court ruled in a 5–4 decision that detainees were entitled to use the writ of habeas corpus to challenge their detentions.⁶⁴ In response to the Court’s ruling in *Hamdan v. Rumsfeld*⁶⁵ a few years earlier, Congress enacted the Military Commissions Act of 2006 to authorize military commissions for the prosecution of enemy combatants after the Supreme Court rejected the previously established military tribunals as unconstitutional.⁶⁶ Section 2241(e) of the statute removed jurisdiction over habeas petitions of detainees from the federal courts.⁶⁷ The majority held that any denial of habeas rights of the detainees must be in accordance with the Suspension Clause of the Constitution.⁶⁸ Furthermore, the Court ruled that the Detainee Treatment Act did not provide an effective substitute for habeas corpus.⁶⁹

Two dissents were authored by Chief Justice Roberts and by Justice Scalia. The Chief Justice objected to the majority providing aliens, who were determined to be enemy combatants, habeas corpus rights under the Constitution.⁷⁰ He viewed the majority’s decision as an inappropriate negation of a procedural system set up by the elected branches after “careful investigation and thorough debate.”⁷¹ Roberts saw no victory for detainees, as they were now only guaranteed more litigation to determine the content of their habeas rights as enemy combatants.⁷² He was further frustrated by the majority’s decision to upset the findings and law-making of Congress, which “attempt[ed] to ‘determine—through democratic means—how best’ to balance the security of the American people with the detainees’ liberty interests.”⁷³

Justice Scalia objected on a broader level than Roberts. He felt strongly that the writ of habeas corpus has never been viewed to benefit aliens abroad, and he felt that the Suspension Clause had no application to this case.⁷⁴ Calling the majority’s decision

⁶² See *infra* Part II.A.

⁶³ 553 U.S. 723 (2008).

⁶⁴ *Id.* at 798.

⁶⁵ 548 U.S. 557 (2006).

⁶⁶ See *id.* at 576–77; see also 28 U.S.C. § 2241 (2012).

⁶⁷ See 28 U.S.C. § 2241(e).

⁶⁸ *Boumediene*, 553 U.S. at 771 (“This Court may not impose a *de facto* suspension by abstaining from these controversies.”); see also U.S. CONST. art. I, § 9, cl. 2.

⁶⁹ *Boumediene*, 553 U.S. at 795.

⁷⁰ *Id.* at 803 (Roberts, C.J., dissenting).

⁷¹ *Id.* at 801.

⁷² *Id.* at 826.

⁷³ *Id.* (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring)).

⁷⁴ *Id.* at 827 (Scalia, J., dissenting).

“devastating,” Scalia seemed troubled by the stripping of military authority and thus cited instances where thirty detainees, who had been released from Guantanamo Bay, returned to the battlefield, with one resuming his post as a senior Taliban commander.⁷⁵ From a practical standpoint, he expressed worry about how the military is given “the impossible task of proving to a civilian court . . . that evidence supports the confinement of each and every enemy prisoner.”⁷⁶ In a hyperbolic conclusion, Justice Scalia warned that “[t]he Nation will live to regret what the Court has done today.”⁷⁷ Regardless of whether this is true, many of the same concerns addressed in *Boumediene* are still at issue today.

As a result of the five-Justice majority ruling, enemy combatants detained in places like Guantanamo Bay could now challenge their detentions in federal court.⁷⁸ In recent years, a new argument has emerged to support detainee habeas petitions. After President Obama announced plans to end combat operations in Afghanistan by the end of 2014,⁷⁹ detainees began preparing to argue that the AUMF, which authorizes their detentions, has lapsed with the end of active combat.⁸⁰ In fact, the Supreme Court has hinted at this type of argument already.

D. Supreme Court Begs the Question—Hussain v. Obama

In April 2014, the Supreme Court rejected Abdul Al Qader Ahmed Hussain’s petition for a writ of certiorari.⁸¹ Hussain was a citizen of Yemen who was captured in Pakistan in March 2002.⁸² He had been living in both Pakistan and Afghanistan

⁷⁵ *Id.* at 828–29. This Note argues that the Supreme Court should take these still-prevalent concerns into account when deciding whether to continue to allow detentions following the end of “combat operations” in Afghanistan.

⁷⁶ *Id.* at 850.

⁷⁷ *Id.*

⁷⁸ *See id.* at 732–33 (majority opinion).

⁷⁹ The United States and Afghanistan have recently signed a security agreement that will allow U.S. troops to remain in the country. If the deal were not signed, U.S. troops were slated to leave the country by the end of 2014. Despite the continuing presence of U.S. troops, overall involvement will be winding down. According to President Obama, about 5,500 U.S. troops will stay in Afghanistan into 2017. Greg Jaffe & Missy Ryan, *Obama Outlines Plan to Keep 5,500 Troops in Afghanistan*, WASH. POST (Oct. 15, 2015), https://www.washingtonpost.com/world/national-security/obama-expected-to-announce-new-plan-to-keep-5500-troops-in-afghanistan/2015/10/14/d98f06fa-71d3-11e5-8d93-0af317ed58c9_story.html [http://perma.cc/T425-UJZV].

⁸⁰ Charlie Savage, *Decaying Guantánamo Defies Closing Plans*, N.Y. TIMES, <http://www.nytimes.com/2014/09/01/us/politics/decaying-guantanamo-defies-closing-plans.html> (last updated Sept. 4, 2014) (“[T]he government is bracing for a wave of new habeas corpus lawsuits after combat operations in Afghanistan come to an end in December, raising the question of whether the legal basis for wartime detentions—the 2001 authorization to use military force against the perpetrators of the Sept. 11 attacks—has expired.”).

⁸¹ *Hussain v. Obama*, 134 S. Ct. 1621 (2014) (denying petition for writ of certiorari).

⁸² *Hussain v. Obama*, 718 F.3d 964, 966 (D.C. Cir. 2013), *cert denied*, 134 S. Ct. 1621 (2014).

since 1999.⁸³ In November 2000, Hussain was living near the front lines of the war between the Taliban and the Northern Alliance.⁸⁴ He lived with Taliban members who gave him an AK-47 and “trained him in its use.”⁸⁵ After the 9/11 attacks, Hussain fled Afghanistan into Pakistan where he was captured and transferred to Guantanamo Bay.⁸⁶

Hussain sought a petition of habeas corpus from the district court, but the case was stayed when the court was uncertain of its jurisdiction to hear petitions from Guantanamo detainees.⁸⁷ After the Supreme Court issued its opinion in *Boumediene*, the district court heard Hussain’s habeas petition, but it was denied.⁸⁸ The district court ruled that Hussain was either a member of al Qaeda or the Taliban when he was captured.⁸⁹ It relied on the circumstances of what he was doing and with whom he was staying while he was in Pakistan and Afghanistan, and the court did not find his explanations for these actions plausible.⁹⁰

Hussain appealed his case to the D.C. Circuit where the decision to deny the habeas petition was affirmed.⁹¹ He then sought review from the Supreme Court, but his petition for certiorari was denied.⁹² An opinion by Justice Breyer was issued respecting the denial of certiorari.⁹³ Justice Breyer drew attention to the possibility that, even if Hussain was a member of al Qaeda or the Taliban, he was not an “individual who . . . was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.”⁹⁴ He further observed:

The Court has not directly addressed whether the AUMF authorizes, and the Constitution permits, detention on the basis that an individual was part of al Qaeda, or part of the Taliban, but was not “engaged in an armed conflict against the United States” in Afghanistan prior to his capture. Nor have we considered whether, assuming detention on these bases is permissible, either the AUMF or the Constitution limits the duration of detention.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 966–67.

⁸⁹ *Id.* at 967.

⁹⁰ *Hussain v. Obama*, 821 F. Supp. 2d 67, 79 (D.D.C. 2011) (describing Hussain’s non-sensical justifications).

⁹¹ *Hussain*, 718 F.3d at 966.

⁹² *See Hussain v. Obama*, 134 S. Ct. 1621 (2014).

⁹³ *Id.* at 1622.

⁹⁴ *Id.* (alteration in original) (emphasis omitted) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004)).

The circumstances of Hussain's detention may involve these unanswered questions, but his petition does not ask us to answer them.⁹⁵

As the global fight against terrorist threats continues, the Court will likely be faced with these exact questions. Administrations, current and future, may seek to detain indefinitely individuals who have engaged in open hostility against our country, but these individuals may not be actively engaged in a "war" or "conflict" against the United States. Put another way, the question surrounds whether an individual can be detained solely on the basis of Taliban or al Qaeda membership.⁹⁶

In fact, the government has been advancing this argument in recent habeas cases.⁹⁷ The Supreme Court, however, has not decided whether membership in a terrorist group alone is sufficient to justify detention.⁹⁸ The implication in *Hussain* is that the government may need to prove the suspect was "engaged in an armed conflict."⁹⁹ This argument has been advanced in one case and rejected by the D.C. Circuit in *Khairkhwa v. Obama*.¹⁰⁰ *Khairkhwa* argued that the government needed to prove that he "fought or engaged in armed conflict or hostilities against the United States or its allies."¹⁰¹

The court concluded that proof that the individual actively engaged in combat was "unnecessary."¹⁰² It relied on the D.C. Circuit's earlier decision of *Al-Bihani v. Obama*.¹⁰³ Al-Bihani was a cook for the Taliban who carried a firearm but never used it in "hostilities."¹⁰⁴ Therefore, he argued that he could be detained only if he engaged in a direct hostile act like firing his weapon.¹⁰⁵ The court rejected this argument and held that his role as part of active Taliban forces was sufficient to warrant detention.¹⁰⁶ If the Supreme Court were to take up a habeas case with similar arguments, it is unclear whether the Court would accept them. First, the National Defense Authorization Act confirms the proposition that the President can detain individuals as long as they are a member of a group that is hostile to the United

⁹⁵ *Id.*

⁹⁶ Marty Lederman, *Justice Breyer's Intriguing Suggestions in Hussain: A Sign of Habeas Challenges to Come?*, JUST SECURITY (Apr. 23, 2014, 10:30 AM), <https://www.justsecurity.org/9674/justice-breyers-intriguing-suggestion-hussain-sign-habeas-challenges-come/> [http://perma.cc/6VW7-JDKG].

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* (emphasis omitted).

¹⁰⁰ 703 F.3d 547 (D.C. Cir. 2012).

¹⁰¹ *Id.* at 550 (quoting Petitioners Brief at 9, *Khairkhwa*, 703 F.3d 547 (No. 13-638)). He actually extended his argument further, claiming that the government had to prove that he would pose a danger to the United States in the future if he were to be released. *Id.*

¹⁰² *Id.*

¹⁰³ 590 F.3d 866 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 929 (2011).

¹⁰⁴ *Id.* at 869–70.

¹⁰⁵ *Id.* at 871.

¹⁰⁶ *Id.* at 871–73.

States.¹⁰⁷ Second, in *Hamdi*, Justice O'Connor based her reading of the AUMF on "longstanding law-of-war principles."¹⁰⁸ The historical function of detention has been to get enemy combatants off the battlefield and prevent them from returning to the enemy and active combat.¹⁰⁹ This would seem to apply to soldiers who have not necessarily engaged in an open fight or have been ordered into battle.

Justice Breyer's dissent from denial of certiorari sheds light on the essential question this Note seeks to answer.¹¹⁰ United States combat presence in Afghanistan has ceased, and detainees will bring habeas petitions citing the very questions the Supreme Court acknowledged in *Hussain*—whether detentions are constitutionally permissible outside of "active hostilities."¹¹¹

E. Ripeness of the Issue—Al Odah v. United States

In August 2014, the United States District Court for the District of Columbia ruled on the habeas petition of Fawzi Khalid Abdullah Fahad al Odah.¹¹² Al Odah was a Kuwaiti citizen who had traveled to Afghanistan.¹¹³ He was captured by "Pakistani border guards in Tora Bora, Afghanistan in December 2001, and [then] turned over to U.S. military forces."¹¹⁴ Early the next year, al Odah was transferred to Guantanamo Bay and has been detained there for more than twelve years.¹¹⁵

In May 2002, al Odah first sought a writ of habeas corpus and argued that he was not an enemy combatant and thus could not be detained.¹¹⁶ It was not until August 2009 that the district court held that *more likely than not* al Odah had been a part of the Taliban and al Qaeda forces in Afghanistan.¹¹⁷ Therefore, he could be classified as an enemy combatant under the AUMF.¹¹⁸ Like detainee Hussain, the court did not find al Odah's explanations for his activities credible.¹¹⁹ The ruling was

¹⁰⁷ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(a)–(c), 125 Stat. 1298, 1562 (2011).

¹⁰⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) ("Further, we understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on long-standing law-of-war principles.").

¹⁰⁹ See *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.").

¹¹⁰ See *Hussain v. Obama*, 134 S. Ct. 1621, 1622 (2014).

¹¹¹ *Id.*

¹¹² *Al Odah v. United States*, 62 F. Supp. 3d 101, 103 (D.D.C. 2014).

¹¹³ *Id.*

¹¹⁴ *Id.* at 104.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* (emphasis added).

¹¹⁸ *Id.* This application of a "more likely than not" standard reflects the court's willingness to defer to the judgment of the executive branch.

¹¹⁹ *Id.*

upheld by the D.C. Circuit in 2010, where they found the evidence against al Odah was “so strong” to sustain the district court’s finding, regardless of the standard of review.¹²⁰ His petition for certiorari was denied by the Supreme Court in 2011.¹²¹

Al Odah renewed his challenge to his detention following the purported plans by the United States to end active combat in Afghanistan.¹²² He contended that the cessation of hostilities in Afghanistan made his detention illegal under the AUMF.¹²³ Al Odah specifically cited President Obama’s 2013 State of the Union address where he declared that the war in Afghanistan would be over by the end of 2014.¹²⁴ He also noted that the government took concrete steps to implement the withdrawal, including transferring control of U.S. detention facilities to the Afghan government and turning over Afghan districts to Afghan security control.¹²⁵ However, the district court once again denied al Odah’s petition for writ of habeas corpus.¹²⁶ The court concluded that the claim was “not ripe because it [was] dependent on future events that may not occur as anticipated, or may not occur at all.”¹²⁷ In essence, according to the court, al Odah could not challenge the legality of his detention when his detention was not yet illegal. The district court summarized:

Petitioner does not allege that he is currently unlawfully detained, but rather that he will be unlawfully detained once the United States’ war in Afghanistan has come to an end. Such future unlawful detention, however, is speculative, as Petitioner’s claim relies upon the assumption that the government will not release him once it no longer has the authority to detain him under the AUMF. Accordingly, Petitioner’s first claim is not ripe and this Court lacks jurisdiction to rule on it.¹²⁸

Although the courts have not addressed detention claims like al Odah’s or Hussain’s on the merits presently, the recent end of “combat operations” in Afghanistan will likely lead to renewed challenges by detainees claiming that the end of “combat operations” equates to an end of hostilities.¹²⁹ The Supreme Court will be

¹²⁰ *Al Odah v. United States*, 611 F.3d 8, 16 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1812 (2011).

¹²¹ *Al Odah v. United States*, 131 S. Ct. 1812 (2011).

¹²² *Al Odah*, 62 F. Supp. 3d at 106.

¹²³ *Id.*

¹²⁴ *Id.* at 104.

¹²⁵ *Id.* (referencing concrete steps that petitioner cited as evidence of implementing the withdrawal of U.S. troops from Afghanistan).

¹²⁶ *Id.* at 114.

¹²⁷ *Id.* at 106.

¹²⁸ *Id.*

¹²⁹ This Note assumes that some terror suspects will be detained following an alleged cessation of hostilities in Afghanistan. Although it is possible that the U.S. government could

left to evaluate the constitutionality of detaining terrorist “enemy combatants” indefinitely, and it will have to evaluate whether “hostilities” can persist without active “combat” in Afghanistan. Mainly, the Justices will need to determine whether the AUMF, or the Constitution more broadly, allows the detention of terrorist enemy combatants without an active deployment of U.S. troops in combat. It is a question that has not been addressed in any of the major detention cases heard by the Court. As the nation moves farther away from the war in Afghanistan, and with growing threats from other groups like ISIS, it may be time to further evaluate the definition and treatment of “enemy combatants” and the rules regarding their detention.

II. CONSTITUTIONALITY OF TERROR DETENTIONS AFTER CESSATION OF “COMBAT OPERATIONS” IN AFGHANISTAN

The United States continues to detain individuals it deems serious threats to national security.¹³⁰ After the end of active combat operations in Afghanistan, it would be impractical to release the most dangerous of the detainees. In the “war” that the United States faces today, the enemy often consists of religious radicals who will use any tactics necessary to inflict suffering on Americans domestically and overseas.¹³¹ A report conducted six years ago concluded that one in seven of the 534 prisoners transferred from Guantanamo Bay had re-engaged in terrorist or militant activity.¹³² With continued threats today from terror groups like ISIS, any released detainees could easily join the organization to continue to combat U.S. interests in the Middle East.¹³³ This reality and the continuing global threat will likely influence the merits of any constitutional decision-making process on detentions.

Furthermore, it may be impractical to bring these detainees to trial in either a military or civilian setting. The government may lack sufficient evidence to charge, or convict, detainees of specific crimes, or the evidence may be classified or come from protected sources that the government would not be willing to disclose.¹³⁴

either transfer all detainees or hand them back over to enemy forces, this Note operates under the condition that some suspects will remain detained for purposes of national security.

¹³⁰ *The Guantánamo Docket: A History of the Detainee Population*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo> (last updated Apr. 4, 2016) (highlighting that 89 detainees remain at Guantanamo Bay in 2016).

¹³¹ See, e.g., Elisabeth Bumiller, *Later Terror Link Cited for 1 in 7 Freed Detainees*, N.Y. TIMES (May 20, 2009), <http://www.nytimes.com/2009/05/21/us/politics/21gitmo.html> (highlighting the potential that if detainees are moved to the United States’ prisons, there is a risk of attack).

¹³² *Id.*

¹³³ See Justin Fishel & Jennifer Griffin, *Sources: Former Guantanamo Detainees Suspected of Joining ISIS, Other Groups in Syria*, FOXNEWS.COM (Oct. 30, 2014), <http://www.foxnews.com/politics/2014/10/30/sources-former-guantanamo-detainees-suspected-joining-isis-other-groups-in.html> [<http://perma.cc/DKL5-U7J3>] (reporting that as many as 30 former detainees are suspected to have joined overseas terror groups).

¹³⁴ Alan M. Dershowitz, *Opinion, Detentions of War: How Can US Keep Terror Suspects with No Hope of Trial, but Espouse Due Process?*, BOS. GLOBE (Sept. 16, 2014), <http://www>

Given these circumstances, continued and indefinite detention is the most practical and appropriate solution to protect national security and the lives of American citizens at home and abroad. Although such detentions may result in infringements on the due process rights of terror suspects, sufficient due process protection must be balanced with the executive branch's duty to protect the national security of the United States.

The problem then arises of how to strike the appropriate constitutional balance that weighs all of the competing interests. In *Hamdi*, the plurality opinion hinted that detentions can only last for the duration of the conflict.¹³⁵ Inevitably, federal courts will face habeas petitions where the petitioner will argue that he was not "engaged in an armed conflict against the United States," and the courts will need to determine "whether . . . either the AUMF or the Constitution limits the duration of detention."¹³⁶ In ruling on this matter, the Supreme Court can uphold indefinite detentions after the cessation of hostilities while respecting the due process boundaries imposed by the Constitution and relevant jurisprudence.

A. Supporting Detentions in Reliance on Justice Thomas's Dissent in Hamdi

In a post-cessation world, it will be the prerogative of the district courts to adjudicate the habeas claims of continued detainees. Judges can issue rulings that allow for deference to the national security interests of the nation while still fulfilling their role within the constitutional framework. One such method would be to utilize the judicial deference argument advanced by Justice Thomas in his dissent in *Hamdi v. Rumsfeld*.¹³⁷

In supporting the detention of Hamdi, Justice Thomas believed that the power to detain was squarely within the war powers of the President, as granted by Congress, and the courts should not constrain the express constitutional authority of the elected branches.¹³⁸ Furthermore, in circumstances where the public safety of the United States or its people are in danger, certain concessions must be made in the area of due process.¹³⁹ Justice Holmes once said that "[p]ublic danger warrants the substitution of executive process for judicial process."¹⁴⁰ He went on to say that "what is due process of law depends on circumstances. It varies with the subject-matter [sic] and the necessities of the situation."¹⁴¹

[.bostonglobe.com/opinion/2014/09/15/should-suspected-terrorists-like-those-held-guantanamo-detained-without-trial/9N2ERaZn75mSSZX67F6rFK/story.html](http://www.bostonglobe.com/opinion/2014/09/15/should-suspected-terrorists-like-those-held-guantanamo-detained-without-trial/9N2ERaZn75mSSZX67F6rFK/story.html).

¹³⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004).

¹³⁶ *Hussain v. Obama*, 134 S. Ct. 1621, 1622 (2014).

¹³⁷ *Hamdi*, 542 U.S. at 579 (Thomas, J., dissenting).

¹³⁸ *Id.* at 579–80.

¹³⁹ *Id.* at 590.

¹⁴⁰ *Moyer v. Peabody*, 212 U.S. 78, 85 (1909) (per curiam) (citing *Keely v. Sanders*, 99 U.S. 441, 446 (1878)).

¹⁴¹ *Id.* at 84.

For high-value detainees who pose threats of returning to terrorist activity against the United States, the exigencies may require continued detention and a different level of due process protection. While detainees will argue that they can no longer be detained following the end of combat operations in Afghanistan, the government may encourage the district court to deny such habeas petitions because of their general threat to national security. Especially with the rise of terrorist organizations like ISIS and continued attacks on U.S. citizens and interests, the government may maintain that the legislative purpose behind the AUMF was to allow the President to combat terrorist threats against the nation. Furthermore, it may look to provisions that seem to broaden the scope of “covered person” under the AUMF.¹⁴² It would be within the executive branch’s authority to continue detaining terror suspects to prevent them from joining further jihadist-led threats against the United States and its interests.¹⁴³

Justice Thomas also believed that the power to detain did not end with the cessation of formal hostilities, but that this detention authority seems based in the ability to punish those guilty of offenses under the laws of war.¹⁴⁴ Therefore, it may be possible to detain terror suspects indefinitely if they are being held for violations of the laws of war. However, as discussed further in the next Section, the “War on Terror” does not fit neatly into a traditional “war” landscape.¹⁴⁵ Although the authority to detain nationals of a belligerent country may continue after the formal cessation of hostilities,¹⁴⁶ the case of al Qaeda members participating in a worldwide effort to commit violence on U.S. interests does not look all that similar.¹⁴⁷ The current state

¹⁴² National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011) (allowing detention of an individual who was “a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces” (emphasis added)).

¹⁴³ See Fishel & Griffin, *supra* note 133.

¹⁴⁴ See *Madsen v. Kinsella*, 343 U.S. 341, 360 (1952) (“It is suggested that, because the occupation statute took effect September 21, 1949, whereas the crime charged occurred October 20, 1949, the constitutional authority for petitioner’s trial by military commission expired before the crime took place. Such is not the case. The authority for such commissions does not necessarily expire upon cessation of hostilities or even, for all purposes, with a treaty of peace. It may continue long enough to permit the occupying power to discharge its responsibilities fully.”); see also *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950) (“The jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war is long-established.”).

¹⁴⁵ See *infra* Part II.B.1.

¹⁴⁶ At issue in *Johnson v. Eisentrager* were the habeas petitions of twenty-one German nationals who were convicted of violations of the laws of war for engaging in, permitting, or ordering continued military activity against the United States after the surrender of Germany and before the surrender of Japan during World War II. *Eisentrager*, 339 U.S. at 766.

¹⁴⁷ See, e.g., *Abi-Habib, Coker & Almasari*, *supra* note 12 (explaining terrorist group attacks on civilian locations).

of affairs may simply require a development of new standards of detention from that of the conflicts based in traditional war.

The current reality is that terror threats against the United States are fluid and dynamic. At the time of the *Hamdi* decision, the conflict looked more like a traditional war with U.S. forces fighting Taliban and al Qaeda forces in Afghanistan.¹⁴⁸ Although these official operations came to a close in December 2014, American interests are still under constant threat from terrorist groups worldwide.¹⁴⁹ In this world, Justice Thomas's argument becomes stronger. It is best for the judiciary to defer to the elected branches in determining whether to detain enemy combatants, because those branches possess the latest intelligence and national security information to evaluate threats and dangers.¹⁵⁰ Here, the courts could balance the national security interests of the country by allowing the President and Congress to make detention determinations within their constitutional war-making authority.

Given the nature of their violent acts, attempted violent acts, or threatened violent acts against the United States, the terror suspects will have to forgo some due process protections. Once again, as Justice Holmes stated, due process depends on the circumstances, and the continuing terror threats against U.S. interests would permit the continuing incarceration of terror suspects with the goal of maintaining the safety of the United States and its citizens.¹⁵¹ Lastly, the position of Justice Thomas comports with the spirit of the stated congressional justifications for the AUMF mentioned earlier.¹⁵² Viewed holistically, these declarations support the President's constitutional authority under Article II to ensure the self-defense of the nation. Even after the end of hostilities in Afghanistan, deference to this constitutional delegation of power to the executive branch could be a prudent strategy to justify the continued detention of dangerous terror suspects, and it can be supported using Justice Thomas's theories articulated in his *Hamdi* opinion.

B. Shifting the Focus to Justice O'Connor's Hamdi Opinion—the "Practical Circumstances" Exception

In authoring the plurality opinion in *Hamdi*, Justice O'Connor believed that the AUMF's authority to detain suspected terrorists was derived from the President's

¹⁴⁸ See, e.g., Joel Roberts, *U.S. Troops in Karbala Clash*, CBS NEWS (May 13, 2004, 8:03 AM), <http://www.cbsnews.com/news/us-troops-in-karbala-clash/> [<http://perma.cc/TW8G-ZQXP>] (describing a battle in Karbala in 2004).

¹⁴⁹ See Thompson, Greene & Mankarious, *supra* note 11.

¹⁵⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507, 582–83 (2004) (Thomas, J., dissenting) (stating that whether *Hamdi* is an enemy combatant is a determination which is “of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry” (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948))).

¹⁵¹ See *Moyer v. Peabody*, 212 U.S. 78, 84 (1909).

¹⁵² See *supra* Part I.A (discussing listed justifications for the AUMF).

use of “necessary and appropriate force.”¹⁵³ However, she qualified this authority as the power to detain under the “law of war,” which would require enemy combatants to be repatriated after the end of the conflict.¹⁵⁴ At the time, this may have been the appropriate analysis because U.S. ground troops were engaged in open conflict with al Qaeda and Taliban forces in Afghanistan.¹⁵⁵ Justice O’Connor’s goal, perhaps rightfully so, seems to have been to limit the scope of the Court’s ruling to “the limited category we are considering, for the duration of the particular conflict in which [the detainees] were captured.”¹⁵⁶ This language could very well be used by the detainees challenging their detentions because it seems to strongly support the notion that it would be unconstitutional to continue holding them. However, it may not be that simple.

Interestingly, Justice O’Connor wrote an exception into her opinion. She indicates that the President’s power to detain could be different if “the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war.”¹⁵⁷ Almost ten years later, Justice Breyer pointed to this exact language in his certiorari statement in *Hussain v. Obama*.¹⁵⁸ This suggests that the Justices tend to be cognizant of the changing circumstances and possible exigencies affecting the current landscape. In relying on this “practical circumstances” exception, the courts will need to look at the current nature of the conflict and see if it is “entirely unlike” the conflicts that gave rise to the law of war.¹⁵⁹ Essentially, the argument shifts to whether combatting terrorism is a “war.” This analysis is important to understand whether it is correct to equivocate the end of “combat operations” in Afghanistan to the end of “hostilities” against al Qaeda, the Taliban, and other terror groups.

1. “War on Terror”—Misnomer?

With just sixty words, Congress created a legal basis for a slew of controversial executive programs to fight terrorism. As one observer noted, the AUMF “has taken on a life of its own, and the Executive Branch has used it in ways that no one who voted for it envisioned in 2001.”¹⁶⁰ However, Congress clearly used broad language,

¹⁵³ *Hamdi*, 542 U.S. at 521.

¹⁵⁴ *See id.* at 520–21.

¹⁵⁵ *Id.* at 510 (“Soon thereafter, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.”).

¹⁵⁶ *Id.* at 518.

¹⁵⁷ *Id.* at 521.

¹⁵⁸ *Hussain v. Obama*, 134 S. Ct. 1621, 1622 (2014).

¹⁵⁹ *See Hamdi*, 542 U.S. at 521.

¹⁶⁰ SHOON MURRAY, THE TERROR AUTHORIZATION: THE HISTORY AND POLITICS OF THE 2001 AUMF 2 (2014) (quoting Jane Harman, Former Representative (D-Cal.), Address at

specifically the phrase “all necessary and appropriate force,” to allow the President to take action against those responsible for the 9/11 attacks.¹⁶¹ As we know, the attacking party was not a foreign sovereign but a terrorist organization, and this is where the story took an interesting turn. The United States had never engaged in a major conflict such as the “War on Terror,” and it created “uncharted legal and political territory.”¹⁶² However, the Nation was recovering from a devastating attack, and the Bush administration decided on a quick, strong retaliation to bring the attackers to justice.¹⁶³

The manner in which the fight was conducted became a polarizing issue. Strong critics slammed the Bush administration’s legal policies and believed that the expansion of executive power amounted to tyranny.¹⁶⁴ Given the fragility of the national morale after 9/11 and the continued threat of attacks, this view seems harsh. It may be that President Bush and his associates were keen on preventing future attacks to American personnel and seeking justice for the deaths of thousands of innocent Americans. Perhaps, the government was acting out of “fear of accountability from a failure to protect the country.”¹⁶⁵ President Bush went so far to tell Attorney General John Ashcroft, “Don’t ever let this happen again.”¹⁶⁶

The Bush administration made the tactical decision to advance the rhetoric of a “War on Terror.” After the AUMF was authorized, it was interpreted as a war against al Qaeda.¹⁶⁷ However,

“[t]hroughout history, wars have typically been declared and fought between states and against clearly identifiable combatants,

the Woodrow Wilson International Center for Scholars Event, “AUMF: Reassessing the Role of Congress,” July 11, 2013).

¹⁶¹ *See id.* at 2–3 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)).

¹⁶² *Id.* at 3.

¹⁶³ DONNA G. STARR-DEELEN, *PRESIDENTIAL POLICIES ON TERRORISM: FROM RONALD REAGAN TO BARACK OBAMA* 124 (2014).

¹⁶⁴ HOWARD BALL, *BUSH, THE DETAINEES, & THE CONSTITUTION: THE BATTLE OVER PRESIDENTIAL POWER IN THE WAR ON TERROR* 4 (2007) (“The post-2001 military and national security strategy developed and boldly implemented by President Bush and his lieutenants is a startling tale of . . . the presidency . . . trying to assume all powers: executive, legislative, and judicial, as well as that of commander in chief of the nation’s armed forces. Whether justified in the name of national security or in the cause of maintaining order, this uniting of all power in the hands of the president is tyranny.”).

¹⁶⁵ STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 210 (2013) (“Regardless of how the Bush administration’s actions prior to 9/11 are assessed, everyone in the executive branch was acutely aware that they would be blamed for another attack. This well illustrates the logic of the post-1945 constitutional order, in which presidents since Truman have been handed what seemed to them sole responsibility for protecting the country from danger. Thus, administration officials could have reasonably believed there was a national consensus that all measures necessary must be taken.” (footnotes omitted)).

¹⁶⁶ *Id.* (referring to another 9/11-like attack on American soil).

¹⁶⁷ *See* MURRAY, *supra* note 160, at 2–3.

but this new enemy is neither organized by state affiliation nor located in a specific geographic area.” Because the resolution is aimed at a terrorist network, rather than a state, it has no geographic limitation and no clear temporal stopping point. The authorization gave the executive branch the latitude to conduct armed conflicts in many unspecified locations around the globe¹⁶⁸

This is indeed a unique conflict. Perhaps, one that fits in a potential “zone of twilight”¹⁶⁹ between Congress’s power to declare war and the President’s power to repel sudden attacks against the United States.¹⁷⁰

Looking at the true nature of the conflict against international terrorism, it may be difficult to continue speaking in “war” rhetoric. Thankfully, since 9/11, the United States has experienced infrequent attacks against its assets, which then begs the question of whether the nation is engaged in a “war” at all.¹⁷¹ However, with the continual growth of new terrorist groups and the continual threats to American well-being from groups like ISIS, there seems to be a pervasive sense of danger.¹⁷² From a legal standpoint, it is true that “the Constitution has never been understood to allow for an unending war, one that has no definite end-point.”¹⁷³ This issue becomes especially significant in the case of detentions, which the Supreme Court acknowledges are allowed under the AUMF due to “longstanding law-of-war principles.”¹⁷⁴

¹⁶⁸ *Id.* at 3 (footnotes omitted).

¹⁶⁹ *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (“When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”).

¹⁷⁰ *See* STARR-DEELEN, *supra* note 163, at 124–25. In fact, Bush administration officials did not feel that the AUMF was necessary to orchestrate a military response following 9/11. *Id.* They believed the President possessed the constitutional authority to act unilaterally against terrorist threats. *Id.* The Obama administration has also advanced this argument in support of its actions against terror threats. Charlie Savage, *White House Invites Congress to Approve ISIS Strikes, but Says It Isn’t Necessary*, N.Y. TIMES (Sept. 10, 2014), <http://www.nytimes.com/2014/09/11/world/middleeast/white-house-invites-congress-to-approve-isis-strikes-but-says-it-isnt-necessary.html>.

¹⁷¹ *See* MURRAY, *supra* note 160, at 6 (“The ‘war’ narrative as it relates to groups and countries areas [sic] outside of Afghanistan also has increasingly lost facial credibility as time passes. The infrequency of terrorist attacks against the U.S. homeland, or even against U.S. assets, has challenged the characterization that the United States is in a conflict of enough intensity to justify the legal framework that comes with ‘war.’”).

¹⁷² *See, e.g., id.* at 97 (highlighting efforts to expand the AUMF to combat new threats).

¹⁷³ Lyle Denniston, *Constitution Check: Is the President’s Power to Detain Terrorism Suspects About to Lapse?*, NAT’L CONST. CTR.: CONST. DAILY (Sept. 4, 2014), <http://blog.constitutioncenter.org/2014/09/constitution-check-is-the-presidents-powers-to-detain-terrorism-suspects-about-to-lapse/> [<http://perma.cc/J4HQ-JURT>].

¹⁷⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

Therefore, in assessing whether the “practical circumstances” have changed following the end of “combat operations” in Afghanistan, the Supreme Court must decide whether the “War on Terror” fits under the umbrella of “war” jurisprudence and analysis.

2. Terrorism—Criminal Act or Act of War?

The theoretical war over the categorization of terrorism is just as hard-fought as the conflict on the battlefield. The Bush administration chose the “war” side of the debate because “only the military has the capability to do what must be done.”¹⁷⁵ Known as the armed-conflict model, this view treats terrorism as “war” due to the “signature violence and indiscriminate killing” involved, and it recognizes the fact that terrorists routinely violate international laws of war and tend to target civilians while fighting.¹⁷⁶ Proponents feel that terrorism is “a national security threat that imperils the very existence of the state.”¹⁷⁷

The National Constitution Center has described the situation appropriately:

America has been involved in many wars, some conducted in ways that fully complied with limits set by the Constitution, and some that were not. But the Constitution has never been understood to allow for an unending war, one that has no definite end-point. As the U.S. military combat effort in Afghanistan approaches its planned conclusion . . . , federal courts are certain to be drawn into a new controversy over what that will mean, constitutionally.¹⁷⁸

Given the unending nature of the “War on Terror,” it begs the question whether it can be treated as a traditional “war” at all—a conflict that led to the development of the law of war.¹⁷⁹ The modern conflict is not a congressionally declared war against a foreign state, probably what could be defined as a true “war.”¹⁸⁰ Although the express power to “declare” such a war rests with Congress,¹⁸¹ the Supreme Court has recognized the President’s power to protect U.S. interests abroad.¹⁸²

Just before the outbreak of the Civil War, Supreme Court Justice Nelson, on circuit, decided the case of *Durand v. Hollins*.¹⁸³ In rejecting a suit against the executive

¹⁷⁵ See STARR-DEELEN, *supra* note 163, at 124 (quoting JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 10 (2006)).

¹⁷⁶ *Id.* at 9.

¹⁷⁷ *Id.*

¹⁷⁸ See Denniston, *supra* note 173.

¹⁷⁹ See *Hamdi*, 542 U.S. at 520–21.

¹⁸⁰ *Id.*

¹⁸¹ U.S. CONST. art. I, § 8, cl. 11.

¹⁸² See, e.g., *Durand v. Hollins*, 8 Fed. Cas. 111, 111 (C.C.S.D.N.Y. 1860).

¹⁸³ *Id.*

branch, Justice Nelson expressed the President's authority to protect U.S. citizens and property overseas.¹⁸⁴ When there is danger to American interests abroad,

for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action.¹⁸⁵

This type of language is what creates instances of constitutional confusion, especially in the case of terrorism. On its face, actual or threatened terrorist attacks on U.S. citizens or property abroad would allow the President to take action against those responsible under cases like *Durand*. Therefore, from a hypothetical standpoint, even when the congressional legislation such as the AUMF, which strengthens Presidential war-making authority, lapses, the President can still take action to protect U.S. citizens abroad. With evidence of recidivism amongst released Guantanamo detainees,¹⁸⁶ the government can make a strong argument to the courts that continued detention is within the President's constitutional authority to protect U.S. citizens in danger overseas.

After the tragedy of 9/11, advancing the rhetoric of a "War on Terror" may have been politically beneficial for the Bush administration. All of these years later, it perhaps became clearer that the United States is not fighting a "war" against groups like al Qaeda. The "War on Terror" plays out more like the "War on Drugs." It represents the attitude that the U.S. government is taking against perceived threats to its interests. The reality is that defining this conflict as a "war" has grown to be unpopular on an international scale. For example, the Obama administration's escalated use of drone strikes to kill targets abroad, which some view as a move away from indefinite detentions,¹⁸⁷ has been met with disfavor in many foreign nations.¹⁸⁸

Perhaps much of this disfavor stems from, in the early years, trying to fit the "War on Terror" into a traditional law-of-war framework. In a case like *Hamdi*, it may have been best to recognize the "practical circumstances" exception from the start and craft a clearer constitutional landscape around acts of terrorism, which are sure to be a continuing threat for the foreseeable future.¹⁸⁹ It may not be too late to take such action. As the nation has now ended combat operations in Afghanistan and moves toward the withdrawal of all troops from Afghanistan in the coming years,¹⁹⁰

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 112.

¹⁸⁶ See Fishel & Griffin, *supra* note 133.

¹⁸⁷ See MURRAY, *supra* note 160, at 75.

¹⁸⁸ *Id.* at 84–85.

¹⁸⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

¹⁹⁰ See David Jackson, *Obama Hails End of Combat Operations in Afghanistan*, USA TODAY: THE OVAL (Dec. 28, 2014, 2:37 PM), <http://www.usatoday.com/story/theoval/2014>

it would behoove all three branches of government to work together to chart a clearer constitutional course for the future.

After almost fourteen years of fighting al Qaeda across the globe, it is clear that the conflict does not look like a “war” in the traditional sense. The United States’ approach to combating the terror threat has often been responsive, with an almost ad hoc approach to thwarting jihadist assailants and detaining them in the interests of national security.¹⁹¹ Given the dynamic nature of the current landscape, the “practical circumstances” argument allows the Supreme Court to pivot and chart a new course for the future of “War on Terror” constitutional jurisprudence. It could invoke this “practical circumstances” exception in its evaluation of whether detentions can continue under the AUMF and Due Process Clause now that “combat operations” have ended in Afghanistan.

C. *Effect of the End of “Combat Operations”*

Given the already lengthy debate regarding the classification of terrorism and its related conflicts, the questions grow more complex after the cessation of “combat operations” in Afghanistan. Although President Obama has “hailed” the end of the “war,” it is not clear if the “war” is actually at an end.¹⁹² Although active military operations have ceased, a contingency of American troops will remain in Afghanistan for other defensive and training purposes.¹⁹³ More recently, President Obama has further halted troop withdrawal by keeping 9,800 troops in Afghanistan through the end of 2016.¹⁹⁴ Furthermore, although the United States military will not be engaged in organized combat in Afghanistan, there is still a continued international threat from

/12/28/obama-afghanistan-combat-operations-end-statement/20969021 [http://perma.cc/A6AB-F3DZ].

¹⁹¹ Michaela Dodge, Lisa Curtis & Jessica Zuckerman, *Eleven Years Later: U.S. Should Not Lose Momentum in the War on Terrorism*, HERITAGE FOUND. (Sept. 10, 2012), <http://www.heritage.org/research/reports/2012/09/counterterrorism-strategy-us-should-not-lose-momentum-in-war-on-terrorism> [http://perma.cc/F9NA-LKRR].

¹⁹² See Jackson, *supra* note 190. But see Philip Ewing, *U.S. Military Role in Afghanistan Will Still Be Combat*, POLITICO, <http://www.politico.com/story/2014/11/barack-obama-military-afghanistan-113110.html> [http://perma.cc/6BU7-H2GY] (last updated Nov. 22, 2014, 3:40 PM) (explaining the Obama administration’s plans to continue airstrikes against Taliban forces following the end of “combat operations” in December 2014); Jaffe & Ryan, *supra* note 79 (explaining that 5,500 troops will stay in Afghanistan until 2017).

¹⁹³ See Masoud Popalzai & Jason Hanna, *Afghanistan Signs Deal Keeping U.S. Troops Beyond 2014*, CNN, <http://www.cnn.com/2014/09/30/world/asia/afghanistan-us-security-agreement/> [http://perma.cc/Z9YM-3D3M] (last updated Oct. 1, 2014, 5:33 AM).

¹⁹⁴ Jim Acosta & Jeremy Diamond, *Obama Again Delays Afghanistan Troop Drawdown*, CNN POLITICS, <http://www.cnn.com/2015/10/15/politics/afghanistan-troops-obama/> [http://perma.cc/QE83-ZTYV] (last updated Oct. 15, 2015, 4:20 PM). In the announcement, however, President Obama “stressed that the formal combat mission [in Afghanistan] has ended.” *Id.*

groups like al Qaeda.¹⁹⁵ All of these realities create a troublesome legal puzzle for the Supreme Court in deciding an *Al Odah*-esque case that could now be considered ripe following the official end of “combat operations.”

Detainees will likely contend that their incarceration is no longer justified under the AUMF and the Due Process Clause. As this Note has discussed, the political realities make releasing the most dangerous suspects incredibly risky.¹⁹⁶ Therefore, the Supreme Court will need to chart a course that best fits within the desired national policy. The Justices can choose to rule that the end of “combat operations” has caused a lapse in AUMF’s authority to detain, and the Due Process Clause requires the detainees to be released or charged with crimes. Another option would be to decide the case from a more technical standpoint and say that the continued presence of American troops in Afghanistan, even in an advisory role, results in a determination of active hostilities. Because such “hostilities” continue, the detentions remain permissible under the Due Process Clause.

Perhaps the best option would be for the Court to interpret the AUMF as allowing the detention authority to extend beyond the mere cessation of the “combat mission.”¹⁹⁷ In doing so, it could draw on the legal arguments touched on in this Section and highlight the continuing danger and “hostility” that international terrorism poses for the foreseeable future. The Court may endorse the flexible form of due process that Justice Thomas recognized in his *Hamdi* dissent.¹⁹⁸ In this way, it does not shy away from the due process cloud that hangs over the national security reasons for upholding indefinite detentions. The Justices could recognize the necessity of due process protection while balancing it against the security needs of the nation.

The Court can further utilize Justice O’Connor’s “practical circumstances” exception from her *Hamdi* opinion to highlight the new approach that needs to be taken towards terrorism jurisprudence now that the conflict has strayed farther from the traditional “war” definition.¹⁹⁹ In doing so, more deference can be afforded to the President’s constitutional authority to protect the United States from attack and insurrection and exercise the nation’s right to self-defense. Indeed, the Court should be concerned with ceding too much control over detainees’ due process rights to the

¹⁹⁵ See, e.g., Thomas Joscelyn, *High-Ranking US Intelligence Official: Al Qaeda Will Make Gains in Syria and Afghanistan in 2015*, BUS. INSIDER (Feb. 4, 2015, 11:25 AM), <http://www.businessinsider.com/high-ranking-us-intelligence-official-al-qaeda-will-make-gains-in-syria-and-afghanistan-in-2015-2015-2> [<http://perma.cc/34C5-P5AJ>] (highlighting a growing threat to the West from an official branch of al Qaeda).

¹⁹⁶ See Fishel & Griffin, *supra* note 133; see also Bumiller, *supra* note 131 (referencing dangers of terrorist recidivism).

¹⁹⁷ See Jackson, *supra* note 190 (quoting President Obama’s remarks that the United States is safe after the War on Terror).

¹⁹⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 590–92 (2004) (Thomas, J., dissenting) (discussing cases where the Court took a more context-based approach in its Due Process Clause analysis).

¹⁹⁹ *Id.* at 521 (plurality opinion).

executive branch. Although the Court should preserve the right to detain individuals after the end of “combat operations,” the Justices should urge Congress to use the legislative process to more effectively deal with the issue of terrorist detention moving forward.

III. CHARTING THE FUTURE OF DETENTIONS—POLICY SOLUTIONS TO A CONSTITUTIONAL PROBLEM

Although the Supreme Court can justify indefinite detentions through judicial deference to executive decisions or the *Hamdi* “practical circumstances” exception, the political branches can best espouse due process through the policy-making process. Ideally, the government could devise a system where terror suspects remain detained or face a type of judicial proceeding where they are afforded due process protections that conform to the circumstances. The best policy solutions will address the problem that causes the indefinite detentions—when the government cannot or chooses not to prosecute the suspects because of evidentiary or security shortcomings.

The issue boils down to the United States choosing between the lesser of two evils. It can release the detainees, but these detainees may be highly dangerous individuals who will likely return to terrorist organizations and continue to perpetuate violence against the United States.²⁰⁰ The other option is to continue to detain them indefinitely. Even if the President has the power to authorize detentions in the interest of national security, they remain politically unpopular²⁰¹ and, possibly, inconsistent with average notions of due process under the law that are synonymous with the American legal system. Although some will see indefinite detention as an infringement on detainee rights in any circumstances, action by Congress or the President would indicate that the United States is sympathetic to these issues while still looking to preserve the national security. Even though it can be interpreted as maneuvering to help the United States rationalize its suspension of due process, it would be a step in the right direction toward a more wholesome, constitutional approach.

One such solution is for Congress to pass a detention law that would regulate the indefinite detention process.²⁰² The law could allow detainees to have certain due process protections and a quasi-judicial proceeding. As Professor Alan Dershowitz recently suggested, Congress could establish a tribunal that will base continued detention on evidence of continued dangerousness or probability of recidivism.²⁰³ Detainees could be provided access to counsel, notice of the charges and proceedings against them, and a heightened burden of proof.²⁰⁴ Lawmakers could also enact provisions to ensure fair and comfortable treatment for detainees, and, perhaps, they

²⁰⁰ See Bumiller, *supra* note 131.

²⁰¹ See *id.*

²⁰² See Dershowitz, *supra* note 134.

²⁰³ *Id.*

²⁰⁴ *Id.*

could establish special detention centers in which to house and monitor terror suspects. In many ways this process could provide much-needed transparency in the area of detentions. It would also provide suspects more due process protections than the current system, even if those can be justified under the Constitution and related jurisprudence.

In fact, this system would be similar to that employed by Israel. Under the Emergency Powers (Detentions) Law of 1979 (EPDL), Israel updated its past detention statute to allow for more detainee protections.²⁰⁵ They were granted prompt presentment before the president of the district within forty-eight hours of arrest for judicial review of the detention, allowed appeals to the supreme court, and mandated the president of the district court to conduct reviews of the detention every three months.²⁰⁶ Further, under this law, both Israeli citizens and non-citizens within Israel may be detained if reasons of “state security or public security” require it, and, on reviewing appeals from detention orders, the supreme court applies the standard that the danger must be “so grave as to leave no choice but to hold the suspect in administrative detention’ or that the [suspect] ‘would *almost certainly* pose a danger to public or State security.’”²⁰⁷ In addition, any authorized detention orders lapse after six months, but they can be renewed indefinitely.²⁰⁸

Israel’s processes should be very meaningful to the United States because Israel is the United States’ biggest ally in the region and they both face consistent and dangerous threats from terror organizations.²⁰⁹ Due to Israel’s more expansive history of terror threats and need to protect themselves from such danger, the United States can learn from their preventive detention process and use it as a guide to chart the future of its own program. This is especially true when similar rationales underlie the Israeli system.

Specifically, Israel aims “to protect sources and methods and allow otherwise inadmissible evidence such as hearsay into evidence.”²¹⁰ Crafting similar judicial

²⁰⁵ Stephanie Cooper Blum, *Preventive Detention in the War on Terror: A Comparison of How the United States, Britain, and Israel Detain and Incapacitate Terrorist Suspects*, 4 HOMELAND SECURITY AFF. 6 (2008).

²⁰⁶ *Id.*

²⁰⁷ *Id.* (quoting Emanuel Gross, *Human Rights, Terrorism, and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 AM. J. INT’L & COMP. L. 721, 763 (2001)).

²⁰⁸ *Id.* (emphasis omitted). Again, although this is not ideal, it is a more judicially protected process than our current process for ensuring detainee rights. Even though indefinite detentions are still possible (and perhaps likely in certain circumstances), a system of this kind ensures, at a minimum, that the detainee and his counsel have a right to be heard periodically. It also requires the government to continue to put forth evidence of a continued threat to U.S. security.

²⁰⁹ See, e.g., Greg Botelho, Ralph Ellis & Ben Wedeman, *4 Worshipers Killed in Jerusalem Synagogue; Netanyahu Calls for Unity*, CNN, <http://www.cnn.com/2014/11/18/world/meast/jerusalem-violence/> [<http://perma.cc/UGQ5-M7SV>] (last updated Nov. 18, 2014, 4:48 PM) (discussing a terror attack at an Israeli synagogue).

²¹⁰ See Blum, *supra* note 205, at 6–7.

processes will allow the United States to better espouse due process, while still maintaining the secrecy of sensitive information²¹¹ and alleviating concerns over insufficiency of evidence that may pose a problem in a traditional criminal trial.

Overall, adopting a detention law on the model of Israel's EPDL seems to be a significant improvement to the current ad hoc, executive-driven system the United States currently employs. The legislative process would allow the elected representatives of the people to debate the issues and work out a system that appropriately achieves the foreign policy and domestic security goals of the nation. Another option open to U.S. leaders is to modify the AUMF or repeal it and draft a new statute to better reflect the current realities of the conflict.²¹² Others are simply looking to expand the AUMF to include new groups, while some wish to grant the President the power to use force to combat any terrorist threats facing the United States.²¹³

The nature of any grant of power to the President by Congress is the balance between flexibility to combat the threat and the fear of broad powers run amok. Regardless of the means employed, if lawmakers wish to modify or craft a new AUMF, they would be prudent to include provisions on detentions. Given the history of the current AUMF, it is clear that detaining terror suspects who have committed violent acts, or have planned or attempted to commit such acts, floats in a turbulent area of constitutional law and theory. Any future action must pay attention to the lessons—often harsh—learned in the thirteen years under the AUMF.

CONCLUSION

Now that “combat operations” in Afghanistan have come to a formal close,²¹⁴ the United States will face a big legal question regarding the constitutionality of its continued detention of terror suspects. Detainees will likely seek habeas petitions in federal courts arguing that their detentions are no longer justified due to the inapplicability of the AUMF outside of active hostilities against al Qaeda and the

²¹¹ Israel allows its district judges to review all evidence against a detainee whether it is classified or not. *Id.* at 6. The judge then makes an ex parte decision on what information can be disclosed to the suspect and his counsel. *Id.* Although decried by some human rights groups, this process at least allows a neutral party to review the government's evidence to determine whether the detainee represents a sufficient national security threat to warrant administrative detention. *Id.*

²¹² Democratic Representative Adam Schiff of California has already introduced such a bill. See John Bresnahan & Lauren French, *Democrat Renews Call for Congress to Authorize War vs. Islamic State*, POLITICO (Dec. 10, 2015, 3:35 PM), <http://www.politico.com/story/2015/12/adam-schiff-military-war-islamic-state-216649> [<http://perma.cc/2762-6BPN>]. It would primarily act as an AUMF against ISIS, but it would also repeal the 2001 AUMF and the 2002 AUMF against Iraq, both of which have been cited as legal sources of authority to fight ISIS. See *id.*

²¹³ See MURRAY, *supra* note 160, at 96–97.

²¹⁴ See Jackson, *supra* note 190.

Taliban in Afghanistan.²¹⁵ The government will have to advance, and the courts will then have to evaluate, legal theories justifying the continued detention of high-level terror threats.

Although some would argue indefinite detention without formal charges expressly violates due process protections, the courts could adopt constitutionally acceptable rationales for such action. First, district courts, and later the Supreme Court, could employ a judicial deference standard in evaluating habeas petitions. The government can point to the purpose behind the AUMF in granting the President the necessary authority to ensure the right to self-defense and protect the nation from terrorist threats. It can also cite judicial precedents that recognize the executive branch's authority to protect U.S. citizens and property overseas and employ measures to prevent harm to U.S. interests.

Justice O'Connor's "practical circumstances" carve-out in her *Hamdi* plurality opinion can also be a strong source of support for continued detentions.²¹⁶ The United States can shift the rhetoric away from fighting a "War on Terror" to reflect the truer nature of the modern conflict against terrorist organizations. By showing that the "practical circumstances" now differ from traditional law-of-war detention schemes, the government can justify preventive detentions as a necessary means to maintain national security. This argument is strengthened by evidence of recidivism amongst released detainees.²¹⁷

From a more technical standpoint, the courts can simply rule that the end of "combat operations" in Afghanistan does not equate to an end to active hostilities against al Qaeda and similar groups. This can be supported by the continued presence of U.S. troops on the ground in Afghanistan, even if they are not engaged in formal combat operations.²¹⁸ Given the turbulent nature of the Middle East and recent outbursts of violence, this would not be a far-fetched conclusion.

In order to strengthen the constitutional argument of indefinite, preventive detentions, the United States would benefit from offering detainees some due process protections. As Justice Holmes has said, "[D]ue process of law depends on circumstances."²¹⁹ Legitimacy of the practice can be enhanced by ensuring comfortable conditions and treatment of detainees, as well as offering them the assistance of legal counsel. In addition, the best course of action going forward is to adopt a new policy to provide clarity to an already murky constitutional landscape. Lawmakers can draft a preventive detention statute that can provide a detention process that ensures more protection for detainee rights, as well as sufficient judicial oversight. As such, the United States makes a more concerted effort to espouse due process in constitutionally protected executive detentions.

²¹⁵ See Denniston, *supra* note 173.

²¹⁶ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

²¹⁷ See Bumiller, *supra* note 131.

²¹⁸ See Jackson, *supra* note 190; Jaffe & Ryan, *supra* note 79.

²¹⁹ *Moyer v. Peabody*, 212 U.S. 78, 84 (1909).

In the end, no solution will be perfect, and there will always be dissenters who criticize the process. However, the current global landscape indicates that real threats still exist to the United States and its interests. Preserving national security has always been a paramount interest of the nation. The United States can move forward in combatting terrorist threats by updating its detention scheme to more truly reflect its commitment to due process under the law. Therefore, the country can move forward in its efforts to defeat terrorism and protect the national welfare with a detention system that operates on strong constitutional footing.