

# THE STATE OF WAR & THE LIMITS OF DETENTION

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## I. PROLOGUE

*Xmas Day [1914]*

*Darling dear – as I cannot be with you all, the next best thing is to write to you for so I get closer.*

*We have had a “seasonable weather” day – which means sharp frost & fog & never a smich [smidge?] of sun. I went to church with 2 of my battalions in an enormous factory room & after lunch took down to the N. Staffords in my old trenches at Rue du Bois Mother’s gifts of toffee, sweets, cigarettes, pencils, handkerchiefs & writing paper.*

*There I found an extraordinary state of affairs – this a.m. a German shouted out that they wanted a day’s truce & would one come out if he did; so very cautiously one of our men lifted himself above the parapet & saw a German doing the same. Both got out then more & finally all day long in that particular place they have been walking about together all day giving each other cigars & singing songs. Officers as well as men were out & the German Colonel himself was talking to one of our Captains.*

*My informant, one of the men, said he had had a fine day / of it & had “smoked a cigar with the best shot in the German army, then not more than 18. They say he’s killed more of our men than any other 12 together but I know now where he shoots from & I hope we down him tomorrow”.*

*I hope devoutly they will – next door the 2 battalions opposite each other were shooting away all day & so I hear it was further north, 1st R.B. playing football with the Germans opposite them - next Regiments shooting each other.*

*I was invited to go & see the Germans myself but refrained as I thought they might not be able to resist a General.*

*Frank Lyon came over this p.m. & brought me a note book from John & the enclosed letter from Henry Wilson to whom you can write your thanks. Tom Holland, looking very tall & gaunt, came to lunch with me yesterday. He also is at General Hd. Qtrs. He was just like his pleasant self...<sup>1</sup>*

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## II. INTRODUCTION

More than eight years after President Barack Obama issued an Executive Order for the review and disposition of individuals detained at the Guantanamo Bay Naval Base and the closure of its detention facilities,<sup>2</sup> forty-one foreign nationals remain at the enclave in southeastern Cuba.<sup>3</sup> This stubborn reality has resisted the passage of time, judicial scrutiny, and the application of executive power, leaving few indications of any forthcoming resolution.<sup>4</sup>

For observers, the rather opaque nature of the judicial processes occurring at Guantanamo poses some obstacles to further examination.<sup>5</sup> Nevertheless, a mutually reinforcing body of existing international treaty obligations and evolving national jurisprudence exists and can provide a suitable legal framework for discussion.

By necessity, determining the proper disposition for these detained individuals requires consideration of the underlying grounds for their detention and the full range of existing alternatives.<sup>6</sup> Such options must include release, repatriation, and continued detention at an alternate location.<sup>7</sup> The ensuing difficulty lies in establishing which of the proceeding courses of action is legally appropriate.

Since arbitrary detention offends the rule of law, there is a strong presumption in favor of release and repatriation unless legal authority for detention can be established.<sup>8</sup> Thus, from the outset, the state's power to detain foreign belligerents at Guantanamo has been open to challenge.<sup>9</sup>

In the time that has elapsed since the first detainees arrived at Guantanamo in January 2002, the initial grounds for their confinement

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<sup>1</sup> Keith Perry, *The Real Story Behind The 1914 Christmas Truce*, THE TELEGRAPH (Dec. 4, 2014, 12:02 PM), <http://www.telegraph.co.uk/history/world-war-one/11271839/The-real-story-behind-the-1914-Christmas-truce.html>. In this letter to his wife, written on Christmas Day, General Walter Congreve VC explains the extraordinary circumstances around the Christmas Truce of 1914.

<sup>2</sup> Exec. Order No. 13492, 74 Fed. Reg. 16 (Jan. 27, 2009).

<sup>3</sup> Exact numbers are not available from official sources but The New York Times reported that forty-one foreign nationals were detained at Guantanamo Bay as of March 23, 2017. *The Guantanamo Docket*, N.Y. TIMES (Mar. 23, 2017), <https://www.nytimes.com/interactive/projects/guantanamo/detainees>.

<sup>4</sup> See Priscilla Alvarez, *Will Guantanamo Bay's Prison Ever Close?*, THE ATLANTIC (Dec. 21, 2016), <https://www.theatlantic.com/politics/archive/2016/12/obama-guantanamo-bay/511349/>.

<sup>5</sup> See Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After Boumediene and the Relationship Between Habeas Corpus and Due Process*, 14 J. CONST. L. 719 (2012).

<sup>6</sup> See Garcia et al., *Closing the Guantanamo Detention Center: Legal Issues*, CONG. RESEARCH SERV. (May 20, 2013), <https://fas.org/sgp/crs/natsec/R40139.pdf>.

<sup>7</sup> See *id.*

<sup>8</sup> The antecedents of this well established principle of fundamental justice include the Habeas Corpus Act 1679 and Magna Carta 1215, which prevent the British sovereign from arbitrarily detaining any individual without an articulable legal basis. It is recognized in international law at Article 9 of the 1948 Declaration of Universal Human Rights. Universal Declaration of Human Rights art. 9, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

<sup>9</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

have received judicial consideration.<sup>10</sup> The Supreme Court's ruling in *Hamdi v. Rumsfeld*<sup>11</sup> validated the Executive's power to detain enemy combatants at Guantanamo but the conditions under which the *Hamdi* Court upheld the lawfulness of detention at Guantanamo—namely, the active hostilities against the Taliban and al Qaeda—have changed drastically.<sup>12</sup> An updated analysis is therefore needed—one that asks whether the factual predicates for detaining some, if not all, of the Guantanamo detainees have disappeared altogether.

Broadly, the detention is justified by the Supreme Court's own interpretation of the Authorization for Use of Military Force ("AUMF")<sup>13</sup> against those who played a role in the September 11 terror attacks. This position is supported by the law of armed conflict ("LOAC").<sup>14</sup> Both the LOAC and the AUMF stand for the principle that, in times of war, enemy soldiers can be detained to prevent them from returning to the battlefield.<sup>15</sup> This is inherently logical since detainees are military targets that might alternatively have been killed in battle.

Crucially, this authority to detain belligerents of the Taliban, Al-Qaeda, and associated forces, is limited by the duration of the war against them. The legal grounds for detention expire when the war ends. In the context of the current Global War on Terror ("GWOT"),<sup>16</sup> this formulation poses conceptual and practical difficulties. In numerous and fundamental ways, the GWOT does not resemble previous military conflicts; it resists easy application of the LOAC and challenges traditional notions of war. Must there be American troops on the ground, for example, or do American Predator drones in the skies create a battlefield? When facing inchoate enemies in an ill-defined theater, what criteria should be used? And who is the final arbiter: the courts or the President?

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10 *Id.*

11 *Id.*

12 See Zachary Laub, *CFR Backgrounders: The Islamic State*, COUNCIL ON FOREIGN RELATIONS (Aug. 10, 2016), <http://www.cfr.org/iraq/islamic-state/p14811>

13 Authorization for Use of Military Force, 50 U.S.C.S. § 1541 (2016).

14 The Law of Armed Conflict, which includes customary norms of international law and treaty obligations, has evolved over centuries. Most notably it has been memorialized in the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1864, 1906, 1929, and 1949. Subsequent protocols have expanded the Geneva Conventions and additional conventions, such as the Ottawa Treaty which prohibits anti-personnel mines, have further expanded the body of international treaty obligations and contributed to the evolution of customary norms. See Rod Powers, *Law of Armed Conflict (LOAC)*, THE BALANCE (Sept. 15, 2016), <https://www.thebalance.com/law-of-armed-conflict-loac-3332966>.

15 *See id.*

16 *War on Terrorism*, GLOBAL POLICY FORUM, <https://www.globalpolicy.org/war-on-terrorism.html> (last visited Feb. 14, 2017).

### III. RELEASE AND REPATRIATION

#### A. INTERNATIONAL LAW

The body of international law that regulates conduct during armed conflict, or *jus in bello*, developed over centuries of warfare.<sup>17</sup> At its core, the LOAC seeks to balance military necessity against human suffering.<sup>18</sup> To mitigate the inescapable violence of war, it distinguishes between legitimate military actions and prohibited conduct. Some of these standards have been reduced to writing in the form of international treaties, beginning with the Geneva Convention 1864 (“First Geneva Convention”), while others are anchored in customary norms.<sup>19</sup>

Customary norms derive from individual and collective notions of acceptable practices. When British and German soldiers engaged in a friendly football match during the Christmas Day Truce of 1914,<sup>20</sup> both sides had entered battle with a similar understanding of proper conduct during times of war. And if, as it has been said, the battle of Waterloo was won on the playing fields of Eton, then their notions of the proper conduct of war was culturally instilled. The Christmas Day Truce of 1914, however extraordinary, was possible in the context of a conventional war between two uniformed European armies. In the context of the current GWOT, such an event is unimaginable.

Nevertheless, the mass atrocities of World War II and the subsequent Nuremberg trials exposed the susceptibility of customary norms and the limits of existing treaties.<sup>21</sup> Genocide and the advent of the nuclear age, in particular, called for new legal mechanisms and provided a catalyst for further codification through international treaties.<sup>22</sup> Arguably, the GWOT now calls for a similar response.

Treaties, unlike custom, are easily accessed and can provide concrete guidance. The limits on detention are explicitly addressed within the Geneva Convention (III) Relative to the Treatment of Prisoners of War (“Third Geneva Convention”).<sup>23</sup> On this point, Article 118 the Third Geneva Convention is definitive: “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”<sup>24</sup>

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<sup>17</sup> See Powers, *supra* note 13.

<sup>18</sup> See *id.*

<sup>19</sup> *Treaties, State Parties and Commentaries*, INT’L COMMITTEE OF THE RED CROSS, <https://ihl-databases.icrc.org/ihl/INTRO/120?OpenDocument> (last visited Feb. 15, 2017).

<sup>20</sup> *Christmas Truce of 1914*, HISTORY, <http://www.history.com/topics/world-war-i/christmas-truce-of-1914> (last visited Feb. 15, 2017).

<sup>21</sup> *The Influence of the Nuremberg Trial on International Criminal Law*, ROBERT H. JACKSON CTR., <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/> (last visited Feb. 15, 2017).

<sup>22</sup> See *id.*

<sup>23</sup> Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316. [“Geneva III”].

<sup>24</sup> *Id.*

## B. DOMESTIC LAW

In domestic law, the legal force of international treaties is established at Article VI of the United States Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>25</sup>

Thus, binding international treaties share equal status with the United States Constitution — albeit while remaining subject to judicial review.

Here, judicial review as provided under the Constitution has had no impact. The Court in *Hamdi* endorsed the rules of detention contained in the Third Geneva Convention.<sup>26</sup> Although the limits of detention under the Third Geneva Convention were not at the core of the controversy in *Hamdi*, the Supreme Court recognized their overarching control: “It is a clearly established principle of the law of war that detention may last no longer than active hostilities.”<sup>27</sup>

In *Hamdi*, the Court focused primarily on the Government’s legal authority to detain enemy combatants pursuant to the AUMF.<sup>28</sup> To a large extent, the analysis under the AUMF mirrors the application of international law with respect to questions of release and repatriation. The provisions of the AUMF, like the Third Geneva Convention, contemplate a limited timeframe for detention.<sup>29</sup> The AUMF, as interpreted by the Supreme Court, authorizes the Executive to detain certain individuals “engaged in an armed conflict against the United States,” only “for the duration of these hostilities.”<sup>30</sup>

This rule has been consistently applied in American courts.<sup>31</sup> In *Al-Bihani v. Obama*, for instance, the petitioner submitted that he was eligible for release because the “conflict with the Taliban has allegedly ended.”<sup>32</sup> The Court held that this argument “fail[ed] on both factual and practical grounds” owing to the fissiparous nature of the armed groups fighting within Afghanistan and the continued presence of American troops in Afghan territory.<sup>33</sup> In a decision that exhibits a degree of contempt for both “vague treaty provisions and amorphous customary principles”<sup>34</sup> and defines its own holding as “common sense,”<sup>35</sup> the court provides that “[t]he

25 U.S. CONST. art. VI.

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

27 *Id.* If this statement is *dicta*, then it is *dicta* of the highest order.

28 *Id.*

29 *See id.*

30 *Id.* at 520.

31 *See e.g.*, *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010); *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014).

32 *Al-Bihani*, 590 F.3d at 874.

33 *Id.*

34 *Id.* at 875.

35 *Id.* at 876.

Conventions, in short, codify what common sense tells us must be true: release is only required when the fighting stops.”<sup>36</sup>

Similarly, in *Aamer v. Obama*, the Court found that the Executive’s legitimate authority to detain prisoners under the AUMF was internally limited to the duration of hostilities: “[T]his court has repeatedly held that under the [AUMF], individuals may be detained at Guantanamo so long as they are determined to have been part of Al Qaeda, the Taliban, or associated forces, and so long as hostilities are ongoing.”<sup>37</sup>

Thus, in summary and at the risk of extreme redundancy, American law provides that enemy combatants can be detained for the duration of hostilities.

## VI. THE “STATE OF WAR”

### A. HOSTILITIES

In both international and domestic law, the continuation of hostilities is a necessary precondition for detention. This apparent consistency, however, is complicated by the difficulty of determining when—or, indeed, whether—hostilities have ceased. At times, this determination becomes complicated by language and the many possible meanings of the terms deployed. Is it necessary, for example, to distinguish between “the end of the war” and “the cessation of hostilities?” Or, is there a difference between a “military operation” and an “act of war”? And, if so, are such distinctions helpful or even sustainable?

In pursuit of the answers to these questions, the Court in *Al-Bihani* provides an entirely rational response. It proposes a plain language solution that is both sensible and elegant in its simplicity: “release is only required when the fighting stops.”<sup>38</sup> Yet, this axiom cannot be conclusive because our system of government cannot allow it to be. The separation of powers carries the inherent possibility that the separate branches of government may differ on the question of whether hostilities have ceased and reach incompatible conclusions. Thus, the question of paramount importance becomes: Who determines when the fighting stops?

Under these circumstances, the Guantanamo detainees become hostages to the system of government itself. Their ultimate disposition cannot be determined without first establishing which branch of government holds the power to authoritatively declare that the war has ended. Thus, their fate becomes subsumed within larger questions about the proper exercise of judicial review and the nature of executive power. And,

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<sup>36</sup> *Id.*

<sup>37</sup> *Aamer*, 742 F.3d at 1041. Congress later endorsed this understanding of respondents’ detention power in the National Defense Authorization Act for Fiscal Year 2012 (“NDAA”), Pub. L. No. 112-81, 125 Stat. 1298 (2011), codified at 10 U.S.C.S. § 801, which authorized “[d]etention under the law of war without trial until the end of hostilities authorized by the [AUMF].” NDAA § 1021(c)(1).

<sup>38</sup> See Powers, *supra* note 13.

to answer this question the judiciary must embark on an investigative process that is, by necessity, self-regarding.

A return to first principles is only partially illuminating because the scope of judicial review, itself notoriously absent from the Constitution, precludes adjudication of matters that are fundamentally political in nature.<sup>39</sup> The answer, if it already exists, can only be found in the common law. On this point, the Supreme Court's decision in *Boumediene v. Bush*<sup>40</sup> holds a position of prominence. In that case, and in a process that was necessarily circular, the Supreme Court considered its own power to review the Executive's justifications for detaining people at Guantanamo.<sup>41</sup>

In both *Hamdi* and *Boumediene*, the Supreme Court has asserted that the separation of powers requires that the courts play an active role in reviewing the Guantanamo detention cases. Writing for the plurality in *Hamdi*, Justice O'Connor describes the Supreme Court's function in the following terms:

In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.<sup>42</sup>

Thus, by implication, the Supreme Court has asserted its own ability to review the Executive's determination of whether a state of war exists. If the Supreme Court is competent to examine individual detention cases and each detention is limited to the duration of hostilities, it logically flows that the Supreme Court must have the power to review any determination of whether or not hostilities have ceased.

## B. THE POLITICAL QUESTION DOCTRINE

Quite predictably, this pronouncement could not settle the controversy. The Supreme Court itself, as seen in *Boumediene*, remains bitterly split.<sup>43</sup> The competing values at stake in *Hamdi* and *Boumediene* revealed deep disagreements among the justices. Broadly, these differences relate to

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<sup>39</sup> *Marbury v. Madison*, 5 U.S. 137 (1803), famously limited the power of judicial review to justiciable issues and established the political question doctrine whereby matters of a fundamentally political nature fall outside the jurisdiction of the Supreme Court.

<sup>40</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>41</sup> The matter of the Supreme Court's ability to define its own scope of power was a source of internal controversy, particularly in *Boumediene v. Bush*, 553 U.S. 723 (2008), where the Supreme Court split 5-4. In dissent, both Chief Justice Roberts and Justice Scalia denounced the majority's holding as judicial overreach.

<sup>42</sup> *Hamdi*, 542 U.S. at 525.

<sup>43</sup> *Boumediene*, 553 U.S. at 723-98.

incompatible views about the separation of powers and the scope of judicial review. In both instances, the dissenters decried an apparent judicial incursion into the Executive's exclusive sphere.<sup>44</sup> To this point, Justice Scalia writing in dissent in *Boumediene*, denounces the Court's insistence on its own ability to rule on individual detention cases as part of a scheme of judicial overreach that seeks to subvert the separation of powers by expanding its own remit:

The gap between rationale and rule leads me to conclude that the Court's ultimate, unexpressed goal is to preserve the power to review the confinement of enemy prisoners held by the Executive anywhere in the world. The "functional" test usefully evades the precedential landmine of *Eisenrager* but is so inherently subjective that it clears a wide path for the Court to traverse in the years to come.<sup>45</sup>

These objections have a pedigree. Under the political question doctrine, which is as old as judicial review itself, certain questions of law are not justiciable because they are fundamentally political in nature.<sup>46</sup> The Supreme Court, in *Baker v. Carr*,<sup>47</sup> articulated the six factors that guide the identification of a non-justiciable political question:

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>48</sup>

The political question doctrine "arises from two constitutional principles: the separation of powers among the three coordinate branches of government and the inherent limits on judicial capabilities."<sup>49</sup> Questions of a fundamentally political nature are therefore reserved to the Executive.

### *1. Past Application of the Political Question Doctrine*

Application of the political question doctrine shelters Executive decisions from judicial review. To do so, in the context of determining the existence of a state of war, one must make a series of assumptions: (1) that

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44 *Hamdi*, 542 U.S. at 539–99; *Boumediene*, 553 U.S. at 800–50.

45 *Boumediene*, 553 U.S. at 728.

46 *Marbury*, 5 U.S. at 137 (1803).

47 *Baker v. Carr*, 369 U.S. 186, 217 (1962).

48 *Id.*

49 *Banner v. U.S.*, 303 F. Supp. 2d 1, 9 (D.D.C. 2004).

the decision to go to war must be entrusted to the political branches; (2) that the judiciary lacks the expertise to decide whether we are at war; or (3) that there are no judicially manageable standards to determine whether we are at war.

The Supreme Court has already applied the political question doctrine to this very issue. In the World War II-era case of *Ludecke v. Watkins*, 335 U.S. 160 (1948),<sup>50</sup> the Supreme Court held that the existence of armed conflict is a political question, beyond the jurisdiction of the judiciary to answer.<sup>51</sup> As Justice Frankfurter writes in *Ludecke*:

The power with which Congress vested the President had to be executed by him through others. He provided for the removal of such enemy aliens as were “deemed by the Attorney General” to be dangerous. But such a finding at the President’s behest was likewise not to be subjected to the scrutiny of courts. For one thing, removal was contingent not upon a finding that in fact an alien was “dangerous.” The President was careful to call for the removal of aliens “deemed by the Attorney General to be dangerous.” But the short answer is that the Attorney General was the President’s voice and conscience. A war power of the President not subject to judicial review is not transmuted into a judicially reviewable action because the President chooses to have that power exercised within narrower limits than Congress authorized.

And so we reach the claim that, while the President had summary power under the Act, it did not survive cessation of actual hostilities. This claim in effect nullifies the power to deport alien enemies, for such deportations are hardly practicable during the pendency of what is colloquially known as the shooting war. Nor does law lag behind common sense. *War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops. “The state of war” may be terminated by treaty or legislation or Presidential proclamation. Whatever the modes, its termination is a political act.*<sup>52</sup>

To this point, *Ludecke* remains the “last authoritative precedent on the subject—the ‘war’ does not end when the fighting stops.”<sup>53</sup>

<sup>50</sup> *Ludecke v. Watkins*, 335 U.S. 160, 168–69 (1948).

<sup>51</sup> *Ludecke* was not the first case to consider this question. *The Prize Cases*, 67 U.S. 635, 670 (1863), reached a similar conclusion, exhibiting a very high degree of judicial deference: “Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.” *The Prize Cases* are not included in the main discussion on the grounds that they deal with internal conflict and, broadly, reach the same conclusion as *Ludecke*. The distinctions between a domestic ‘rebellion’ or ‘insurrection’ and an ‘international war’ risks creating unnecessary confusion and falls beyond the scope.

<sup>52</sup> *Ludecke*, 335 U.S. at 165–69 (internal citations omitted) (emphasis added).

<sup>53</sup> Stephen I. Vladeck, *Ludecke’s Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT’L SECURITY L. & POL’Y 53, 86 (2006).

This phrase undoubtedly contains much truth because war is often a political state of affairs. Absent military combat, a state of war can still exist *de jure*—one notorious example being the state of war between the Allies and Germany after the defeat of the Third Reich. With Germany divided, the U.S. and the Soviet Union could not agree on the matter of which successor government had the legal capacity to sign a multilateral peace treaty.<sup>54</sup> This formal state of war was not cured until German unification and the Treaty on the Final Settlement with Respect to Germany.<sup>55</sup>

Furthermore, even in the absence of fighting, a state may have any number of political reasons to refrain from declaring the end of hostilities. In some instances, a state may want to delay such a declaration while it pursues political goals during the negotiations of a peace treaty. The relations, or lack thereof, between the states of Israel and Iraq provide an interesting example. During the Arab-Israeli War of 1948, Iraq contributed forces to the invading Arab armies. However, at the conclusion of the conflict, Iraq was not a party to the 1949 Armistice Agreements.<sup>56</sup> The reasons for this apparent oversight are entirely political. An armistice agreement requires a level of recognition<sup>57</sup> of one's former adversary that Iraq was not willing to accept.

Despite its apparent perspicacity, the application of this statement from *Ludecke* also contains the potential for absurd results. If determining the end of a war is a political rather than factual decision, then the political branches retain the power to maintain a state of war regardless of whether fighting has actually ceased. By necessity, the corollary is also true — the political branches could declare that a war had ended despite the fact that fighting is ongoing. Thus, under the political question doctrine, the state of war and the state of peace can both exist as legal fictions.

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<sup>54</sup> *German Unification Case Study*, FOOTHILL COLLEGE, <http://www.foothill.fhda.edu/divisions/unification/historical.html> (last visited Feb. 28, 2017).

<sup>55</sup> Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, *reprinted in* 29 I.L.M. 1186. History provides several amusing examples of *de jure* wars. Some relate to the legal inability of a successor to act following a loss of sovereign independence or other political transformation. In other cases, countries have been accidentally omitted from peace treaties. An example of the former would be the Principality of Montenegro which, in solidarity with Russia, declared war on Japan in 1904. By 1919, Montenegro united with Serbia before becoming integrated within the Kingdom of Yugoslavia in 1922. A newly independent Montenegro signed a peace treaty with Japan in 2006. An example of the former would be the formal state of war that existed for more than 300 years between the Netherlands and the Isles of Scilly. Before the outset of the First Anglo-Dutch War, the Dutch had declared war on the Isles of Scilly but this state of war was not addressed in the Treaty of Westminster (1654).

<sup>56</sup> *Armistice Lines (1949-1967)*, ISR. MINISTRY OF FOREIGN AFFAIRS, <http://www.mfa.gov.il/mfa/aboutisrael/maps/pages/1949-1967%20armistice%20lines.aspx> (last visited Feb. 14, 2017).

<sup>57</sup> At a minimum, joining the 1949 Armistice Agreement would have recognized Israel's capacity to enter into international agreements and conduct foreign relations. Iraq was not prepared to do so. See PM David Ben-Gurion, Statement from First Knesset, Sitting 20 (Apr. 4, 1949), <http://www.jcpa.org/art/knesset2.htm>.

## 2. Current Application of the Political Question Doctrine

As recently as 2013, the D.C. Circuit applied the same reasoning from *Ludecke* to the question of whether an armed conflict had ended. In *Al Maqaleh v. Hagel*, the Court deferred to the Executive and exercised the political question doctrine:

The Government represents that the United States remains at war in Afghanistan. Appellants do not dispute the Government's claim, nor can they. *Whether an armed conflict has ended is a question left exclusively to the political branches. Not only have the political branches yet to announce an end to the war in Afghanistan, but the President has repeatedly declared that it is ongoing.*<sup>58</sup>

One curious feature of the decision in *Al Maqaleh* is the suggestion that the contents of the President's weekly address weigh on the legal determination of the existence (or, by extension, the absence) of a state of war. If this is accurate, what should be made of President Obama's following statements during the 2013 State of the Union Address, in which he stated:

Tonight, we stand united in saluting the troops and civilians who sacrifice every day to protect us. Because of them, we can say with confidence that America will complete its mission in Afghanistan and achieve our objective of defeating the core of al Qaeda.

Already, we have brought home 33,000 of our brave servicemen and women. This spring, our forces will move into a support role, while Afghan security forces take the lead. Tonight, I can announce that over the next year, another 34,000 American troops will come home from Afghanistan. *This drawdown will continue and by the end of next year, our war in Afghanistan will be over.*<sup>59</sup>

A literal application of the approach from *Al Maqaleh* would suggest, based on these remarks alone, that the legal basis for any detentions arising from the war in Afghanistan exhausted itself with the foretold end of the war in late 2014.

Nearly three months later, in an address at the National Defense University, President Obama repeated that the "combat mission" would "come to an end" by 2014 and spoke directly about the Government's plan to transfer the Guantanamo detainees to facilities on the US mainland:

Now, even after we take these steps one issue will remain – just how to deal with those GTMO detainees who we know have participated in dangerous plots or attacks but who cannot be prosecuted, for example, because the

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<sup>58</sup> *Al Maqaleh v. Hagel*, 738 F.3d 312, 330 (D.C. 2013) (internal citations omitted) (emphasis added).

<sup>59</sup> President Barack Obama, *Remarks by the President in the State of the Union Address*, THE WHITE HOUSE (Jan. 24, 2012), <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address>. (emphasis added).

evidence against them has been compromised or is inadmissible in a court of law. But once we commit to a process of closing GTMO, I am confident that this legacy problem can be resolved, consistent with our commitment to the rule of law.

I know the politics are hard. But history will cast a harsh judgment on this aspect of our fight against terrorism and those of us who fail to end it. Imagine a future – 10 years from now or 20 years from now – when the United States of America is still holding people who have been charged with no crime on a piece of land that is not part of our country.<sup>60</sup>

With the benefit of hindsight, even if perhaps unfairly,<sup>61</sup> President Obama's declarations that the war would conclude by the end of 2014 can be tested against actual events. Although NATO officially suspended combat operations in Afghanistan on December 28, 2014,<sup>62</sup> American soldiers remain in Afghan territory.<sup>63</sup> Their remit involves the training and advising of their Afghan successors, but these American troops continued to carry out airstrikes and raids long after the war was declared over.<sup>64</sup> These distinctions seem particularly hollow considering that on August 2015<sup>65</sup> two US soldiers were killed in the Helmand province where American forces continue to carry out airstrikes against the Taliban.

In part, these incongruities arise from the impossibility of utilizing a forward-looking policy statement as the basis for a determination of present facts. Invariably, the exercise must fail because it is impossible to foresee when or even if hostilities will cease, and political statements cannot create facts. In suggesting that the President's weekly address might have any dispositive value, the Court in *Maqaleh* extends the political question doctrine to its most extreme and absurd conclusion. Common sense requires a distinction between law and political speech.

### C. HABEAS CORPUS PETITIONS

Despite the constraints that the political question doctrine appears to impose, the courts have shown a willingness to consider whether hostilities

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<sup>60</sup> President Barack Obama, *Remarks by the President at the National Defense University*, THE WHITE HOUSE (May 23, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

<sup>61</sup> Similarly, on May 1, 2003, President George W. Bush gave a televised speech onboard the aircraft carrier *USS Abraham Lincoln* and declared the end of major combat operations in Iraq. A banner in the background read "Mission Accomplished."

<sup>62</sup> *Press Release, NATO Secretary General's Statement on a New Chapter in Afghanistan*, NATO (Dec. 28, 2014), [http://www.nato.int/cps/en/natohq/news\\_116341.htm?selectedLocale=en](http://www.nato.int/cps/en/natohq/news_116341.htm?selectedLocale=en).

<sup>63</sup> Matthew Cox, *Commander: More US Troops in Afghanistan Sent 'Stong Message'*, MILITARY.COM (Dec. 1, 2016), <http://www.military.com/daily-news/2016/12/01/commander-more-us-troops-in-afghanistan-sent-strong-message.html>.

<sup>64</sup> Azam Ahmed & Joseph Goldstein, *More Aggressive Role by US Military Is Seen in Afghanistan Taliban Gains Pull U.S. Units Bank Into Fight In Afghanistan*, N.Y. TIMES (April 30, 2015), [http://www.nytimes.com/2015/04/30/world/asia/more-aggressive-role-by-us-military-is-seen-in-afghanistan.html?\\_r=0](http://www.nytimes.com/2015/04/30/world/asia/more-aggressive-role-by-us-military-is-seen-in-afghanistan.html?_r=0).

<sup>65</sup> Mohammad Stanekzai, *U.S. Soldiers Killed in Afghanistan, Taliban Grab District*, REUTERS (Aug. 26, 2015), <http://www.reuters.com/article/us-afghanistan-attack-idUSKCN0QV13E20150826>

have ended in the context of habeas corpus. In *Hamdi*, the Court confronts the issue directly:

The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who engaged in an armed conflict against the United States. If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of necessary and appropriate force and therefore are authorized by the AUMF.<sup>66</sup>

This is hardly surprising given that a petition for habeas corpus, by its very nature, challenges state power and requires judicial review of executive conduct. Judicial independence and a degree of scrutiny are required.<sup>67</sup>

Inevitably, once *Hamdi* cleared the threshold and could be heard on its merits, the Court was obliged to address the question of whether hostilities had ceased because the AUMF's detention authorization turns partly on whether "United States troops are still involved in active combat in Afghanistan."<sup>68</sup>

In *Boumediene*, the Court was confronted with a threshold question of whether the territorial status of Guantanamo precluded the adjudication of a detainee's habeas petition.<sup>69</sup> After acknowledging that, "in other contexts the Court has held that questions of sovereignty are for the political branches to decide," the Court switched course and rejected the government's argument that *de jure* sovereignty over Guantanamo was a missing prerequisite for habeas corpus jurisdiction.<sup>70</sup> Justice Kennedy, writing for the majority, emphasizes the high degree of control that the US military maintains over Guantanamo:

Third, if the Government's reading of *Eisentrager* were correct, the opinion would have marked not only a change in, but a complete repudiation of, the *Insular Cases*' (and later *Reid*'s) functional approach to questions of extraterritoriality. We cannot accept the Government's view. *Nothing in Eisentrager says that de jure sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus.* Were that the case, there would be considerable tension between *Eisentrager*, on the one hand, and the *Insular Cases* and *Reid*, on the other. Our cases need not be read to conflict in this manner. A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the *Insular Cases*, *Eisentrager*, and *Reid*: the idea

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<sup>66</sup> *Hamdi*, 542 U.S. at 521.

<sup>67</sup> *Id.* at 537 ("Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.")

<sup>68</sup> *Id.* at 521.

<sup>69</sup> *Boumediene*, 553 U.S. at 732.

<sup>70</sup> *Id.*

that questions of extraterritoriality turn on objective factors and practical concerns, not formalism.<sup>71</sup>

Additionally, as in *Hamdi*, the Court suggests that challenging the Executive is integral to its function when examining on a petition of habeas corpus: “The test for determining the scope of [a habeas] must not be subject to manipulation by those whose power it is designed to restrain.”<sup>72</sup> To the dissent, this maneuver is a disingenuous attempt to extend the power of the judiciary and usurp the Executive’s authority.

#### D. LIMITATIONS OF THE POLITICAL QUESTION DOCTRINE

Although habeas corpus petitions have presented compelling reasons for the Supreme Court to accept the challenge of determining whether a state of war exists, there is no need to consider that they are unique in this regard. A determination that war has ended, like a declaration of war itself, may be a “political act” but it is not necessarily a “political question.”<sup>73</sup> This distinction is reflected in the earlier examples of the President’s 2013 State of the Union Address<sup>74</sup> and his remarks at the National Defense University.<sup>75</sup> The political process and the exercise of the Executive functions invite the President to make statements on the status of hostilities to further political goals. In a free and democratic society, the citizenry reasonably expects to receive statements on government policy. The quality, accuracy, or sincerity of the statements is an entirely different sort of political question.

The courts have also been willing to rule on the existence of a state of war where the former is a statutory precondition for a legal claim that cannot otherwise be decided. In *Koohi v. United States*, the Ninth Circuit considered the meaning of “time of war” within the Federal Tort Claims Act exemption.<sup>76</sup> The Court held that the phrase “time of war” does not require an express declaration of war, but applies when, as a result of deliberate decision by the executive branch, US armed forces engage in an organized series of hostile encounters on a significant scale with the military forces of another nation.<sup>77</sup> These same words were judicially considered in *United States v. Sobell* in the context of determining the applicable statutory sentence.<sup>78</sup> Other examples include *New York Life Ins. Co. v. Durham*, where the Court engaged the same issue when adjudicating a payment contingent to a life insurance contract that provided for a lower

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71 *Id.* at 734 (emphasis added).

72 *Id.* at 765–66.

73 See *Judicial Determination of the End of War*, 47 COLUM. L. REV. 255 (1947).

74 President Obama, *supra* note 55.

75 President Obama, *Supra* note 56.

76 *Koohi v. United States*, 976 F.2d 1328, 1333 (9th Cir. 1992). The appellants in *Koohi* were the heirs of deceased passengers and crew who were onboard an Iranian civilian aircraft that was mistakenly destroyed by U.S. military operating in the Persian Gulf during the Iran-Iraq War (1980-1988).

77 *Id.* at 1337.

78 *United States v. Sobell*, 314 F.2d 314, 325–32 (2d Cir. 1963).

rate of payout if death occurred during “war,”<sup>79</sup> and *United States v. Proserpi*,<sup>80</sup> where the Court interpreted the meaning of the phrase “termination of hostilities” for purpose of tolling of statute of limitations under the Wartime Suspension of Limitations Act.<sup>81</sup>

All of these issues combine rather nicely in the very recent case of *Al Warafi v. Obama*.<sup>82</sup> In earlier and separate proceedings, the petitioner in *Al Warafi* unsuccessfully challenged his detention at Guantanamo under the AUMF and was refused habeas corpus.<sup>83</sup> In support of his contention that the war in Afghanistan had ended, Al Warafi provided pronouncements from President Obama’s own speeches. On December 15, 2014, the President stated that “[t]his month, after more than 13 years, our combat mission in Afghanistan will be over,” and that “[t]his month America’s war in Afghanistan will come to a responsible end.”<sup>84</sup> In his State of the Union Address on January 20, 2015, the President stated that “our combat mission in Afghanistan is over.”<sup>85</sup> On January 28, 2015, the President again said that “our combat mission in Afghanistan is over and America’s longest war has come to a responsible and honorable end.”<sup>86</sup> On May 23, 2015, the President stated that the upcoming Memorial Day would be the first “since our war ended in Afghanistan,” and that “[i]n Afghanistan, our troops now have a new mission—training and advising Afghan forces.”<sup>87</sup> On May 25, 2015, the President delivered a speech at the Arlington National Cemetery in which he described that day as the first Memorial Day “since our war in Afghanistan came to an end.”<sup>88</sup> He also said that the “fewer than 10,000 troops” remaining in Afghanistan are pursuing “a mission to train and assist Afghan forces.”<sup>89</sup> After stating that “Afghanistan remains a very dangerous place,” the President described a recent American casualty as “the first American servicemember to give his life to this new mission to train Afghan forces.”<sup>90</sup>

79 *New York Life Ins. Co. v. Durham*, 166 F.2d 874 (10th Cir. 1948).

80 *United States v. Proserpi*, 573 F. Supp. 2d 436, 454–55 (D. Mass. 2008).

81 Wartime Suspension of Limitations Act, 18 U.S.C.A. § 3287 (2006).

82 *Al Warafi v. Obama*, 2015 U.S. Dist. LEXIS 99781 (D.D.C. 2015).

83 *Al Warafi v. Obama*, 704 F. Supp. 2d at 35 (D.D.C. 2010). The procedural history of the case is lengthy. *Al Warafi* filed for a writ of habeas corpus challenging his detention in 2004. In 2010, the D.C. Circuit denied that petition on the grounds that Al Warafi “was more likely than not part of the Taliban” but remanded to determine whether he qualified as protected medical personnel under the First Geneva Convention and Army Regulation 190-8. *Al Warafi v. Obama*, 409 Fed. App’x 361, 362 (D.C. Cir. 2011). On remand, the D.C. Circuit held that Al Warafi failed to prove that he qualified as protected medical personnel. *Al Warafi v. Obama*, 821 F. Supp. 2d 47, 54–56 (D.D.C. 2011). The D.C. Circuit affirmed that ruling and Al Warafi’s petition for rehearing en banc was denied. 716 F.3d 627 (2013), and, *Al Warafi v. Obama*, No. 11-5276 (D.C. Cir. 2013). The Supreme Court denied Al Warafi’s petition for a writ of certiorari. *Al Warafi v. Obama*, 134 S. Ct. 2134 (2014), affirmed at *Al Warafi v. Obama*, 409 Fed. App’x. 361, 362 (D.D.C. 2011)”

84 *Al Warafi*, 2015 U.S. Dist. LEXIS 99781, \*3

85 *Id.*

86 *Id.* at \*4.

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

Relying on the principle from the political question doctrine, Al Warafi submitted that the war was over because “a conflict is over when the President says it is over.”<sup>91</sup> This claim, both facially truthful and factually incorrect, provided an ostensibly valid and articulable reason to release Al Warafi from an otherwise helpless legal position. It also placed the executive branch in the awkward position of having to either impeach itself or argue against the very prerogative that it sought to assert. After all, turnabout is fair play.

Despite its rather clever appeal, this argument must be rejected. The suggestion that President Obama should be, to borrow the Shakespearean phrase, “[h]oist with his owne petar”<sup>92</sup> because of ill-considered language cannot be sustained. To do so would ignore the nature of political speech, a long tradition of presidential gaffes, and divorce his statements from their original context. And, as the court rightly points out, Al Warafi’s argument is essentially about semantics and interpretation: “So the question of who decides when hostilities have ended for the purposes of AUMF detention is not one the litigants dispute in this case—they merely differ on what, exactly, the President has decided.”<sup>93</sup>

As this statement foreshadows, the court later concludes that presidential speeches are not dispositive as to the existence of active hostilities.<sup>94</sup> This conclusion is hardly surprising because the differences between political speech and promulgated law are self-evident.<sup>95</sup>

As the discussion progresses, the court offers a solution to the apparent contradictions between *Ludecke* and *Hamdi*. The two cases are presented as complementary, to be read in harmony:

Though *Hamdi* may appear to contradict *Ludecke*, it does no more than address a question that *Ludecke* expressly reserved: “Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.”<sup>96</sup>

The *Hamdi* plurality, at last compelled to answer this grave question, held that a court can and must examine such issues, including the issue of whether active hostilities continue, itself.<sup>97</sup> Thus, in the court’s estimation, *Hamdi* did not contradict *Ludecke*. Rather, the Court in *Hamdi* simply ventured into an area fraught with difficulty that *Ludecke* had been able to avoid.

With similar equanimity, the *Al Warafi* court reconciles *Hamdi* to *Boumediene* by stressing their shared willingness to review executive

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91 *Id.*

92 William Shakespeare, *Hamlet*, act 3, sc. 4.

93 *Al Warafi*, 2015 U.S. Dist. LEXIS 99781 at \*6.

94 *Id.* at \*21–23.

95 In support of this proposition, the Court in *Al Warafi* cites *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919).

96 *Ludecke*, 335 U.S. at 169.

97 *Al Warafi*, 2015 U.S. Dist. LEXIS 99781 at \*9.

conduct. In both *Hamdi* and *Boumediene*, the Court was not inhibited by the executive branch's assertions. In fact, the review of executive conduct is characterized as central to the Court's constitutionally mandated function. *Boumediene*, like *Hamdi*, reasoned that habeas rights that lived and died by the unexamined word of the political branches would be fatally flawed.<sup>98</sup>

And, further, the Court finds no support in any of the aforementioned cases to reject the principle cited in *Baker* itself, and embodied in *Hamdi* and *Boumediene*, that "even the war power does not remove constitutional limitations safeguarding essential liberties."<sup>99</sup>

The court in *Al Warafi* rejects the proposition that the political question doctrine controls the determination of whether hostilities have ceased, holding that "what [the] respondents portray[ed] as iron law is in fact a principle that sometimes yields to other constitutional values, practical concerns notwithstanding."<sup>100</sup> In conclusion, it determines that the existence of war is justiciable. This approach might appear to sacrifice principle for practicality but, in essence, it primarily recognizes the fact that the answer to whether war exists depends centrally on the statutory reason or legal context for posing the question.

## V. THE JUDICIARY AND THE EXECUTIVE AT WAR

### A. SEPARATION OF POWERS

The decision in *Al Warafi*, which finds harmony where other courts have found conflict, is appealingly pragmatic but it also contains an element of danger. The possibility that the judiciary can intrude in areas that properly fall within the Executive's sphere of power is precisely what offended the dissenters in *Boumediene*. To this point, Chief Justice Roberts denounced a transparent power grab: "One cannot help but think, after surveying the modest practical results of the majority's ambitious opinion, that this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants."<sup>101</sup>

But his objections, in their own way, are also pragmatic because they rest on the belief that the majority has overreached by destroying an adequate system of due process without proposing any concrete alternative:

This whole approach is misguided . . . . It is also fruitless. How the detainees' claims will be decided now that the DTA is gone is anybody's guess. But the habeas process the Court mandates will most likely end up

<sup>98</sup> Compare *Boumediene*, 553 U.S. at 765–66 ("[t]he test for determining the scope of [habeas] must not be subject to manipulation by those whose power it is designed to restrain") with *Hamdi*, 542 U.S. at 537 ("[a]ny process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.").

<sup>99</sup> *Id.* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934)

<sup>100</sup> *Al Warafi*, 2015 U.S. Dist. LEXIS 99781 at \*11.

<sup>101</sup> *Boumediene*, 553 U.S. at 801.

looking a lot like the DTA system it replaces, as the district court judges shaping it will have to reconcile review of the prisoners' detention with the undoubted need to protect the American people from the terrorist threat—precisely the challenge Congress undertook in drafting the DTA. All that today's opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary.<sup>102</sup>

Justice Scalia approaches the issue of separation of powers more directly. In a scathing dissent, he eviscerates the majority's inclination to interpret the Constitution in ways that serve only to augment the Court's own powers:

How, then, does the Court weave a clear constitutional prohibition out of pure interpretive equipoise? The Court resorts to 'fundamental separation-of-powers principles' to interpret the Suspension Clause. According to the Court, because 'the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers,' the test of its extraterritorial reach 'must not be subject to manipulation by those whose power it is designed to restrain.' That approach distorts the nature of the separation of powers and its role in the constitutional structure. *The 'fundamental separation-of-powers principles' that the Constitution embodies are to be derived not from some judicially imagined matrix, but from the sum total of the individual separation-of-powers provisions that the Constitution sets forth.* Only by considering them one-by-one does the full shape of the Constitution's separation-of-powers principles emerge. It is nonsensical to interpret those provisions themselves in light of some general 'separation-of-powers principles' dreamed up by the Court. Rather, they must be interpreted to mean what they were understood to mean when the people ratified them. *And if the understood scope of the writ of habeas corpus was 'designed to restrain' (as the Court says) the actions of the Executive, the understood limits upon that scope were (as the Court seems not to grasp) just as much 'designed to restrain' the incursions of the Third Branch.* 'Manipulation' of the territorial reach of the writ by the Judiciary poses just as much a threat to the proper separation of powers as 'manipulation' by the Executive. As I will show below, manipulation is what is afoot here. The understood limits upon the writ deny our jurisdiction over the habeas petitions brought by these enemy aliens, and entrust the President with the crucial wartime determinations about their status and continued confinement.<sup>103</sup>

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102 *Id.* at 809.

103 *Id.* at 833 (internal citations omitted).

Quite rightly, the separation of the branches must prevent judicial tyranny. Each branch must check the other. For Justice Scalia the majority has gone too far.

#### B. DEFERENCE IS NOT ACQUIESCENCE

Ultimately, the divided decision in *Boumediene* offers two equally unpalatable options: craven functionalism and judicial impotence. The first would allow the judiciary to overstep its role and interfere with the political process; the second would prevent the judiciary from engaging with the issues in any meaningful way. One renders the court despotic; the other neuters it. Nevertheless, there is no need to accept that the only possible choice is between a judicial leviathan and an unfettered executive. The proper compromise is not to dismiss the question under the political question doctrine. Instead, separation of powers concerns can be addressed through judicial deference.

This distinction is subtle but profound. Dismissing a case under the political question doctrine declares the court itself entirely unfit to hear the action. As a result, it creates an insurmountable threshold that precludes the court from making any further inquiries into the existence of hostilities. The weakness in this approach can be revealed by employing absurd examples. If the Executive said, preposterously, that the United States was in a state of war with Canada or Narnia, the political question doctrine would require the court to accept that view without question.

Alternatively, an inflexible and overly broad application of the political question doctrine would prevent the courts from reaching any legal conclusions. This could create an intolerable level of uncertainty. Common sense demands that, in a state ruled by law, disputes can be settled through the courts. Here, judicial deference can provide a possible solution and preserve a role for the courts.

In practice, judicial deference could permit the Courts to demand from the Executive some proof of war without usurping the Executive's prerogative to declare when hostilities cease.

In deference, the burden of proof required to persuade the Court can be significantly lower. For example, consider the context of the Freedom of Information Act ("FOIA").<sup>104</sup> Under FOIA, the government can refuse to disclose a requested document under Exemption 1 so long as it can show that the document was "properly classified."<sup>105</sup> The standard for classifying a document is that release is "reasonably likely to cause harm to national security."<sup>106</sup> On its face, this would seem to fall squarely within the political question doctrine: whether the release of information is going to cause harm to national security requires predictive judgments and a body of expertise that few courts possess. This determination properly belongs to

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<sup>104</sup> Freedom of Information Act of 1966, Pub. L. No. 89-554, 80 Stat. 383 (codified at 5 U.S.C. § 552 (2012)).

<sup>105</sup> *Military Audit Project v. Casey*, 656 F.2d 724, 737 (D.C. Cir. 1981).

<sup>106</sup> *Id.*

the Executive. Nonetheless, no court has refused to review an Exemption 1 assertion on the basis of the political question doctrine. Instead, courts have opted to defer to the Executive's classification decisions. Importantly, courts have been equally clear that "deference is not acquiescence."

## VI. CONCLUSION

Much of the initial controversy surrounding the detention of foreign combatants at Guantanamo centered on issues of territorial sovereignty and the legal status of detainees. With the passage of time, and as these detentions became a feature of the legal landscape, the authority for these ongoing detentions has come under greater scrutiny. Changes in government policy have since determined that these detentions should not be sustained indefinitely. During the tenure of President Obama, the closure of Guantanamo became a political imperative, and the discussion has shifted towards disposition of the detainees.

Despite the considerable political will exerted in efforts to close the detention facility at Guantanamo, little has changed. Even detainees who have been deemed suitable for release remain in custody at Guantanamo.<sup>107</sup> In large part, their continued detention is sustained by the legal framework that governs release and repatriation. According to international law and the Supreme Court's own interpretation of the AUMF, detention is legally sanctioned during times of war. Release can only be triggered by the cessation of hostilities. Thus, the definition of war lies at the core of this discussion.

Judicially determining the existence of war presents a particular set of challenges; it requires a balancing of different constitutional principles that has the potential to bring the branches of government into conflict. The proposition that the existence of war is a justiciable issue is, in and of itself, a source of some controversy; hence, the bitter divisions that separated the Supreme Court in *Hamdi* and *Boumediene*.

Historically, the courts have been reluctant to determine whether a state of war exists because of the political question doctrine. Nonetheless, the courts have shown an ability to engage with this issue when the definition of "war" related to a discrete legal issue, such as habeas petitions. In the age of the GWOT, complete with belligerent non-state actors, self-proclaimed Islamic states, cross-border militias, fighters without uniforms, and cyber warfare, the courts may well come to regret their willingness to do so.

Significantly, the Guantanamo detention cases have become subsumed within these larger questions about the proper exercise of judicial review and the nature of executive power. The Supreme Court's decision in

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<sup>107</sup> Charlie Savage, *U.S. Studies Moving Guantánamo Detainees to Colorado Prison*, N.Y. TIMES (Oct. 2, 2015), [www.nytimes.com/2015/10/03/us/us-studies-moving-guantanamo-detainees-to-colorado-prison.html?\\_r=0](http://www.nytimes.com/2015/10/03/us/us-studies-moving-guantanamo-detainees-to-colorado-prison.html?_r=0).

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*Boumediene*, with its slim majority and scathing dissents, suggests that these questions remain susceptible to future challenge. As for the Guantanamo detainees, despite superficially sympathetic treatment in *Boumediene*, they continue to be the perennial losers. Out of its many mixed messages, one clear winner emerges from *Boumediene*: the Supreme Court itself. The Court may still lack the ability to say "what war is" but it maintains the power to say "what the law is." In a state ruled by law, this must be the ultimate power.

