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Avoiding Judicial Second-Guessing in a Nontraditional Theatre of War

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NOTE

AVOIDING JUDICIAL SECOND-GUESSING IN A NONTRADITIONAL THEATRE OF WAR

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ABSTRACT

Every American generation has fought battles with foreign adversaries in the name of securing freedom for future generations. On September 11, 2001, Generation Y was in elementary school when they saw the news of the largest terrorist attack on U.S. soil. Yet, the ideology that spawned these attacks continues to pose a threat to national security. This Note focuses on the tension between establishing an effective detainment strategy and complying with Supreme Court precedent. While the precedent clearly proscribes certain strategies, it provides no guidance on the proper detainment procedures. In response, this Note suggests that there should be less judicial interference into the military's detainment strategies regarding the practice of classifying individuals as enemy combatants; the process where those individuals are detained; the detainee's recourse to Article III courts; and the role of the Constitution and statutory regulations in vital military operations.

Inherent in these components of detainment are three issues currently plaguing the executive, legislative, and judicial branches: (1) the standard for determining whether an enemy combatant is part of enemy forces; (2) the legal process that best addresses the tension between liberty and security; and (3) the length of detainment. This Note will discuss whether the Authorization for the Use of Military Force ("AUMF") authorizes, and whether the Constitution permits, the detention of an individual on the basis of membership in a radical terrorist organization—such as the Taliban—not currently engaged in an armed conflict against the United States. It will also address whether the AUMF or the Constitution limits the duration of the detention when such an individual is detained, since the Court did not have an opportunity to answer the detention question in *Hussain v. Obama*, and thus left the military without any guidance on the Constitutional or statutory standards for resolving the durational question.

I. INTRODUCTION

In the United States, the tension between security and liberty is ongoing and becoming more strained as threats to national security increase. This tension is shared among the executive, the legislature, and the judicial branches, all of which are attempting to maintain national security while determining the treatment of individuals who have committed crimes against the United States. All the while, these enemies do not fit within the traditional definitions of what constitutes a state actor, a non-state, or an international armed conflict. They do not fit within these traditional definitions because of the increasing unification of their operations separate from any state actor.

To reduce judicial second guessing, this Note proposes that (1) detainees should be detained based solely on a military tribunal's finding that they are unlawful enemy combatants; (2) trials for war crimes by a military commission, with certain procedural safeguards, are adequate to meet due process; and (3) the length of detainment should rest on evidence of continued dangerousness or likelihood of recidivism.

II. BACKGROUND

A. The Authorization for Use of Military Force ("AUMF")

Congress passed the AUMF in the wake of the attacks on September 11, 2001. The resolution's purpose is to "authorize the use" of the military against "those responsible for the recent attacks launched against the United States."[1] The AUMF grants the President of the United States the "authority under the Constitution to take actions to deter and prevent acts of international terrorism against the United States."[2] Section 2(a) provides the justification for actions taken overseas and at home in the name of preventing terrorism against the United States. It states:

> [T]he 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

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

> future acts of international terrorism against the United States by such nations, organizations or persons.[3]

Section 2(b) states that all of the powers vested therein are consistent with the War Powers Resolution.[4]

B. The War Powers Resolution

The purpose of the War Powers Resolution is to "fulfill the intent of the framers of the Constitution" by limiting the President's power in sending the United States Armed Forces into hostilities.[5] It invokes the "Necessary and Proper" Clause found in Article I, Section 8, of the U.S. Constitution in determining that the President's Commander in Chief responsibilities could only be exercised pursuant to "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."[6]

By passing the AUMF, Congress, in effect, released the President from the restraints imposed by the War Powers Resolution. The War Powers Resolution was an attempt to limit the Executive's Commander in Chief powers; the AUMF is an attempt to expand them. The President already had the power to authorize the use of military force against those responsible for the attacks on 9/11 under the War Powers Resolution, because 9/11 was a "national emergency created by attack upon the United States."[7] While the AUMF stipulates that it does not supersede the War Powers Resolution, the AUMF serves as the justification for the continued detention of combatants in Afghanistan and Iraq.[8] Consequently, throughout these hostilities, there have been persons captured and deemed lawful or unlawful enemy combatants. Due process dictates that those who are detained must have an opportunity to contest the status of their detainment.[9] However, determining the classification of detainees and their accompanying right to contest their classification is extremely controversial. Such controversy led the Supreme Court to decide *Rasul v. Bush* and *Hamdi*

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3. *Id.*
4. *Id.*
5. War Powers Resolution, 50 U.S.C.A. § 1541 (West 1973).
6. *Id.*
7. *Id.*
8. Al-Bihani v. Obama, 590 F.3d 866, 873 (D.C. Cir. 2010).
9. Hamdi v. Rumsfield, 542 U.S. 507, 509 (2004).

v. Rumsfield in 2004, which then led to the establishment of the Combatant Status Review Tribunals ("CSRT").[10]

C. Combatant Status Review Tribunals

The Combatant Status Review Tribunal ("CSRT") is an administrative process used to determine whether each detainee under the control of the Department of Defense at Guantanamo Bay meets the criteria of an enemy combatant.[11] Punishment is not the purpose of the CSRT.[12] Instead, the purpose is to prevent enemy combatants from returning to the battlefield and engaging in further attacks against both civilians and U.S. Forces.[13]

The CSRT operates under the supervision of three "neutral commissioned officers" who determine, under a preponderance of the evidence standard, whether the "evidence supports an enemy combatant determination."[14] In the CSRT, each individual has the right to representation, the right to receive a summary of evidence against him, the right to have exculpatory evidence provided to the tribunal, and the right to have any new information relating to the individual's status heard in a newly convened tribunal.[15]

Consistent with Article 5 of the Geneva Convention, those detained under unlawful enemy combatant status are not entitled to the benefit of Prisoner of War ("POW") status.[16] However, after *Hamdi v. Rumsfield*, the United States Supreme Court provided a path for unlawful enemy combatants to contest their status and the "basis for their detention."[17] The Court further held that a detainee has a right of habeas corpus,[18] even after review of the combatant's status by a military tribunal.

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10. *Combatant Status Review Tribunals: Purpose,* DEP'T OF DEF., http://archive.defense.gov/news/Oct2006/ d20061017CSRT.pdf. (last visited October 14, 2016) [hereinafter DEP'T OF DEF.].

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. DEP'T OF DEF., *supra* note 10.

17. *Id.*

18. Habeas corpus is a "writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal." Writ of habeas corpus mandates that a detainee must be produced before the issuing court to determine whether his detention is lawful. *Habeas Corpus,* BLACK'S LAW DICTIONARY, (10th ed. 2014).

D. Hamdi v. Rumsfeld*: Procedural Protections for Citizen-Detainees*

Hamdi is the principal case that extended habeas corpus procedural protections to every citizen-detainee within the United States, including unlawful enemy combatants.[19] Petitioner Hamdi was seized for allegedly taking up arms with the Taliban.[20] The U.S. government claimed that Hamdi's status as an enemy combatant justified holding him indefinitely, without formal charges or proceedings.[21] The government also argued that since it was "'undisputed' that Hamdi's seizure took place in a combat zone, the habeas determination can be made purely as a matter of law, with no further hearing or fact finding necessary."[22] The *Hamdi* Court reaffirmed that detentions cannot last longer than active hostilities. The *Hamdi* decision was consistent with the provisions of the Geneva Conventions,[23] which state that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities."[24] In *Hamdi,* the Court also determined that, counter to Hamdi's argument, the government can detain individuals for the entire duration of hostilities as part of the lawful exercise of "necessary and appropriate force."[25] However, it must be sufficiently clear that the individual is an enemy combatant in order to do so.[26]

The U.S. government also made a separation of powers argument, which has been a significant source of tension and ongoing debate.[27] The government argued that "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict" requires very limited, individual, independent inquiry into the executive branch's detention scheme.[28] This argument was struck down by the Court, which reasoned that "the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully

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19. Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004).

20. *Id.* at 510.

21. *Id.*

22. *Id.* at 526.

23. *Id.* at 520.

24. Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364 (Feb. 2, 1956).

25. *Hamdi*, 542 U.S. at 521.

26. *Id.* at 523.

27. *Id.* at 527.

28. *Id.*

the Government's case and to be heard by an impartial adjudicator."[29] The Court weighed the competing interests of liberty and security, and ultimately concluded that the threat to liberty outweighed the risks to security.[30] Weighing liberty against security is the heart of the ongoing debate. The CSRTs were created to comply with *Hamdi*'s requirements.[31] However, the "due process versus security" debate did not end here, but appeared again in *Boumediene v. Bush*.

E. Boumediene v. Bush*: Noncitizen Enemy Combatants*

In *Boumediene*, the government contended that *noncitizen* enemy combatants detained in territories located outside our Nation's borders have "no constitutional rights and no privilege of habeas corpus."[32] The reach of the Suspension Clause became a key issue in determining whether noncitizen or foreign national enemy combatants are entitled to constitutional protections. The Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[33] The Court established three factors in determining the Suspension Clause's reach: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[34]

The *Boumediene* Court also entertained a separation of powers argument and acknowledged the risk that applying the Suspension Clause to military detentions abroad may divert the military's attention from vital tasks.[35] Nonetheless, the Supreme Court, once again, valued liberty over security and extended habeas corpus protections to noncitizen detainees held abroad, despite the separation of powers concern.[36]

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29. *Id.* at 535.

30. *Id.* at 532. ("It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.").

31. DEP'T OF DEF., *supra* note 10.

32. Boumediene v. Bush, 553 U.S. 723, 739 (2008).

33. U.S. CONST. art. I, § 9, cl. 2.

34. *Boumediene*, 553 U.S. at 766.

35. *Id.* at 769.

36. *Id.* at 771.

F. Hussain v. Obama*: Walks like a Duck, Talks like a Duck, Must be a Duck*

Since 2008, when *Boumediene* was decided, questions of constitutional detainment and classification of enemy combatants have become more complicated. The complications stem from the supposed end of armed conflict against the United States in Afghanistan and the withdrawal of U.S. military members from Afghanistan.[37] Detainees with ties to the Taliban or al Qaeda are still currently held in the custody of the United States Armed Forces. These complications concerning Taliban and al Qaeda detainees were addressed by the court in *Hussain v. Obama*.

The D.C. Circuit adopted the common sense "walks like a duck" test in *Hussain v. Obama* to determine that the facts and circumstances (such as where that detainee has lived) of each case dictates whether a detainee is "part of" an enemy group. As the common saying goes, if the thing looks like a duck, walks like a duck, and quacks like a duck, then it is a duck.[38] In this case, Appellant Abdul al Qadar Ahmed Hussain moved from Yemen to Pakistan, and eventually departed for Afghanistan where he resided with three Taliban guards.[39] While there, Hussain was provided with an AK-47 rifle and trained in its use.[40] After 9/11, Hussain fled Afghanistan and returned to Pakistan where he lived at a Jama'at al-Tablighi mosque.[41] He was captured in 2002 and transferred to Guantanamo Bay.[42]

Hussain argued that in order to justify his status as an enemy combatant, the government must show that Hussain "personally picked up arms and engaged in active hostilities against the United States."[43] The D.C. Circuit admitted that there are no "categorical rules to determine whether a detainee is 'part of' an enemy group.'"[44] Because there are no categorical rules, the court engaged in a fact-specific inquiry to determine whether Hussain's ten-month stay with the Taliban and his carrying of an AK-47 pointed to his membership of the Taliban.[45] The court concluded that the

37. President Barack Obama, Statement by the President on the End of the Combat Mission in Afghanistan (Dec. 28, 2014).

38. *Hussain v. Obama*, 718 F.3d 964, 968 (D.C. Cir. 2013).

39. *Id.* at 966.

40. *Id.*

41. *Id.* at 969.

42. *Id.* at 966.

43. *Id.* at 967.

44. *Hussain*, 718 F.3d at 968.

45. *Id.*

evidence did point to his membership.[46] Hussain's final argument was that the district court did not determine whether he was "affiliated with al Qaeda, the Taliban, or both."[47] The court swiftly struck down this argument by stating, "[b]oth are enemy forces, and affiliation with either justifies detention."[48]

In this case, Hussain was captured near the front lines of the battle, lived with Taliban warriors for ten months, and learned how to use and carry an AK-47.[49] He demonstrated all the signs and characteristics of being an unlawful enemy combatant, and, thus, must have been an unlawful enemy combatant who was affiliated with the Taliban.[50] However, in Justice Edward's concurring opinion, he eviscerated the majority's "walks like a duck test" and concluded that the President and Congress must begin strongly considering a different approach to determining Guantanamo Bay detainee cases.[51]

Subsequently, Hussain appealed the D.C. Circuit's decision to the Supreme Court.[52] Hussain's petition for writ of certiorari to the Supreme Court did not specifically ask the Court to address whether Hussain was engaged in active hostilities.[53] By denying certiorari, the Supreme Court declined to determine whether the D.C. Circuit was correct in its decision that the evidence supported a finding that Hussain was "part of" either the Taliban or al Qaeda.[54] Although certiorari was ultimately denied, Justice Breyer stated,

> 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

46. *Id.* at 970.
47. *Id.*
48. *Id.*
49. *Hussain*, 718 F.3d at 969.
50. *Id.* at 971.
51. *Id.* at 972-73.
52. Hussain v. Obama, 132 S. Ct. 1621 (2014).
53. *Id.* at 1622.
54. *Id.*

> permissible, either the AUMF or the Constitution limits the duration of detention.[55]

This Note addresses Breyer's unanswered question. The Supreme Court has not yet decided whether the government must prove that unlawful enemy combatants were engaged in armed conflict in order to detain them, or simply that they were a member in an associated force. These questions cannot remain unanswered as "[a] solid U.S. law-of-war detainee program is a key component of the U.S. national defense and strategy now and in the future."[56]

III. PERSONS SUBJECT TO DETENTION

A. In Ex parte Quirin*: Offenders Against the Law of War*

During World War II, German saboteurs landed near Jacksonville, Florida, buried their uniforms, and disguised themselves in civilian clothes.[57] After landing, they were arrested by the FBI, tried before a military tribunal, and subsequently executed.[58] The Supreme Court upheld the process whereby the saboteurs were executed.[59] The Court recognized the traditional distinction between lawful and unlawful combatants by stating:

> By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly

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55. *Id.*

56. Sandra L. Hodgkinson, *Detention Operations: A Strategic Overview*, U.S. MILITARY OPERATIONS 275, 305 (Geoffrey S. Corn et al. eds., 2016).

57. Ex parte Quirin, 317 U.S. 1, 21 (1942).

58. CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 400 (5th ed. 2016).

59. *Quirin*, 317 U.S. at 48.

> through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.[60]

Because the Germans did not identify themselves, but instead secretly operated with the intention of destructing life and property, they were not entitled to the protections of POW status. Accordingly, military tribunals were sufficient to determine their status and the consequences of their secretive, untraditional actions. In the years since World War II, America's enemies have changed, but their untraditional form of warfare has not.

B. Classification, Classification, Classification

Modern conflicts in Iraq and Afghanistan have seen "the emergence of a third category of detainees: unprivileged enemy belligerents."[61] Combatant status originated from the 1907 Hague Convention, which resulted in the Regulations Respecting the Law and Customs of War on Land.[62] These regulations applied the laws, rights, and duties of war not only to armies, but also to militia and volunteer corps meeting the following criteria: "[t]o be commanded by a person responsible for his subordinates; [t]o have a fixed distinctive emblem recognizable at a distance; [t]o carry arms openly; and [t]o conduct their operations in accordance with the laws and customs of war."[63] After World War II, the Third Geneva Convention clearly delineated that POWs are captured combatants who fulfill the above-mentioned criteria.[64] POWs "enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."[65]

Many of America's modern enemies do not fit the traditional mold of a lawful enemy combatant. Unlawful enemy combatants do not fit into the

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60. *Id.* at 30–31.

61. Jeffrey Bovarnick & Jack Vrett, *Detention Operations at the Tactical and Operational Levels*, U.S. MILITARY OPERATIONS 307, 337 (Geoffrey S. Corn et al. eds., 2016).

62. LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR 98 (2016).

63. *Id.*

64. *Id.* at 102 (citing Geneva Convention (III) Relative to the Treatment of Prisoners of War, *supra* note 24).

65. *Id.*

Geneva Convention's Article 4 description of POWs.[66] An unlawful enemy combatant is not part of an identifiable command structure, has no distinguishing insignia, does not carry arms openly, and does not conduct operations in accordance with the law and customs of war.[67] Unlawful enemy combatants are also referred to as "persons who fight without the right to engage in hostilities; that is, persons who are not part of any regular army or militia and would never qualify as combatants or prisoners of war."[68]

However, the military conflict between al Qaeda, ISIS, and associated forces blurs the line between an unlawful enemy combatant and a POW.[69] Al Qaeda, in particular, operates using a hierarchical structure and performs military-style operations with a "clear rank structure."[70] Also, terrorist organizations do not report to a state and, therefore, are non-state actors,[71] unlike the enemies that the U.S. faced in World War II. Although most terrorist organizations arguably have an identifiable command structure, their members do not "wear uniforms, carry . . . arms openly or mass [their] troops at the borders of the nations [they] attack . . . ."[72] They also do not carry on their "operations" in accordance with the laws of war, as demonstrated through attacks such as the World Trade bombing in 1992, the 1998 East African bombings in Kenya and Tanzania, and the 9/11 attacks.[73] Because America's modern enemies demonstrate factors from both unlawful enemy combatant status and POW status, the traditional definition of both classifications has been strained. However, determining the status of a person is of utmost importance in determining whether the protections of the Geneva Convention attach to the individual.

C. Hamdan v. Rumsfield*: Character of the Conflict? International v. Non-International*

In *Hamdan*, the Supreme Court determined the conflicts with al Qaeda and the Taliban were not international armed conflicts.[74] The Court decided

66. Geneva Convention (III) Relative to the Treatment of Prisoners of War, *supra* note 24, at art. 4.

67. Blank & Noone, *supra* note 62, at 93-94.

68. *Id.* at 104.

69. *Id.*

70. Hodgkinson, *supra* note 56, at 276.

71. *Id.* at 277.

72. Blank & Noone, *supra* note 62, at 94.

73. Hodgkinson, *supra* note 56, at 277.

74. Hamdan v. Rumsfeld, 548 U.S. 557, 630-32 (2006).

that these conflicts were non-international armed conflicts because these organizations were non-state actors.[75] A non-international conflict, as understood in Common Article 3 of the Geneva Conventions, includes an armed conflict that involves one or more non-governmental armed groups.[76] On the other hand, an international armed conflict involves one or more States involved in armed force against another State.[77] Thus, international armed conflicts are those that oppose a High Contracting Party, meaning a State.[78] Because an international armed conflict does not require a formal declaration of war,[79] determining whether an international armed conflict exists depends on a fact specific inquiry into what occurs on the ground.[80] Once an international armed conflict is established, international humanitarian law applies and the protections of the Geneva Convention attach to those captured.[81] Contrarily, Article 3 protections require that those captured in non-international armed conflict appear before a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[82]

In determining whether the conflicts with al Qaeda and the Taliban were of an international or non-international character, the Court adopted a type of original intent line of reasoning.[83] The Court stated that the Convention did consider "limiting language that would have rendered Common Article 3 applicable 'especially [to] cases of civil war, colonial conflicts, or wars of religion,' [which] was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations."[84] Without addressing whether the facts of *Hamdan* fit within the proposed definition, the Court concluded that the conflicts with the Taliban and al Qaeda were non-international conflicts.[85]

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75. *Id.*

76. INT'L COMM'N. OF THE RED CROSS (ICRC), HOW IS THE TERM "ARMED CONFLICT" DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 1 (2008), https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Geneva Convention (III) Relative to the Treatment of Prisoners of War, *supra* note 24.

83. *See* Hamdan v. Rumsfield, 548 U.S. 557 (2006).

84. *Hamdan*, 548 U.S. at 631.

85. *Id.* at 630-31.

The distinction the *Hamdan* Court provided between non-international and international armed conflict was taken from the Commentary on the Additional Protocols to the Geneva Conventions of August 12, 1989, which provides that the difference between a non-international and international armed conflict is the legal status of the opposing entities.[86] Al Qaeda and the Taliban do not report to a state and, therefore, they do not have the legal status of a nation state.[87] The classification of a "non-state actor" would be the differentiating "legal status" that classifies conflicts with terrorist organizations as non-international armed conflicts. This classification comports with the Court's interpretation of a non-international conflict as one that "does not involve a clash between nations."[88]

D. From Capture to Detainment

At the point of capture, regardless of the prisoners' classification, all personnel have six steps to ensure legal and safety protocols are satisfied: "(1) Search, (2) Silence, (3) Safeguard, (4) Segregate, (5) Speed to the Rear, and (6) Tag."[89] This strict process "transforms legal obligations related to the protection and respect of all detainees into a battle drill for the personnel most likely to capture them."[90] After an Article 5 tribunal determines whether the captured is a POW or an unlawful enemy combatant, the captured person is transferred to a Theater Internment Facility ("TIF") where other persons of the same classification are kept.[91] The largest TIF in Iraq, Camp Bucca, once housed twenty-five thousand detainees.[92] However, that number was drawn down near the end of the war as the detainees were either released or turned over to the Iraqi government for prosecution or another form of disposition.[93] There is also a similar plan in Afghanistan to draw down the detention facility in Parwan and hand the detainees over to the Afghan government for prosecution of crimes.[94] However, an immense problem remains because Afghanistan has not developed an effective criminal justice system with the ability to handle the large amount of detainees that would be suddenly thrust upon it.

86. *Id.*
87. Hodgkinson, *supra* note 56, at 277.
88. *Hamdan*, 548 U.S. at 630.
89. Bovarnick & Vrett, *supra* note 61, at 317.
90. *Id.*
91. Hodgkinson, *supra* note 56, at 294.
92. *Id.*
93. *Id.*
94. *Id.*

Nevertheless, Afghanistan and similar countries have just cause to prosecute those who have committed atrocities against their own people, just as our armed forces have just cause to prosecute atrocities committed against the U.S.

E. Defining "Part Of" Enemy Forces—Mattan v Obama

In *Mattan v. Obama*, the appellants, Mattan, along with seven other detainees, brought a habeas proceeding to challenge the legality of their detention.[95] The issue before the court was whether the petitioners' detainment was within the scope of the government's authority and consistent with domestic law and laws of war.[96] The United States government claimed that it had the authority under the AUMF to detain persons who were "part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners."[97] The D.C. district court struck down two definitions proposed by the federal government as falling "outside the bounds" of the AUMF.[98] First, the government did not have the "authority to detain those who 'substantially supported' enemy forces."[99] Second, those who have "directly supported hostilities" by aiding enemy forces are not considered "part of" those enemy forces and do not fall under the authorization of the AUMF.[100] Nevertheless, the D.C. court upheld the one aspect of the government's definition, which included a provision that those who are "part of" such forces are properly subject to detainment.[101] Furthermore, "support of" enemy forces can still be used as a factor in determining whether a detainee is "part of" enemy forces, but it is not sufficient as a stand-alone test for determining lawful detainment.[102] "Part of" means those who are members of enemy forces "at the time of their capture."[103]

The *Mattan* court denied that it was drafting its own definitions, reasoning instead that the court must determine whether the proposed

95. Mattan v. Obama, 618 F. Supp. 2d 24 (D.D.C. 2009).
96. *Id.* at 25.
97. *Id.* at 25-26.
98. *Id.* at 26.
99. *Id.*
100. *Id.*
101. *Mattan*, 618 F. Supp. 2d at 26.
102. *Id.*
103. *Id.* at n.3.

definition fits the within the President's authority under the AUMF.[104] Although the D.C. court accepted the government's provision that those who are "part of" enemy forces fall under the AUMF, the court seemingly did create its own definition of "part of" by excluding those who substantially or directly support enemy forces.

Although Judge Lamberth's clarification in his majority opinion in *Mattan* is important in understanding who can be lawfully detained, it is not within the judiciary's "province" to "draft definitions."[105] As the drafter of the AUMF, only Congress has the proper authority to draft or amend the definitions to clarify its statutory intent. Most of our traditional definitions were designed for a traditional enemy; such definitions do not account for the fact that our modern-day conflicts blur the distinction between the law of war and traditional law enforcement.[106]

The purpose of law of war detentions is to remove enemies from the battlefield and to prevent them from returning.[107] Members in organizations such as al Qaeda and the Taliban can be captured and prevented from returning to the battlefield, but they also can be tried under the criminal law for crimes they have committed.[108] However, the *Mattan* court did not extend the definition of "part of" to include "substantial" support because of its possible implication of domestic criminal law.[109] The problem is that modern law of war overlaps with criminal law, and a refusal to recognize this dilemma destabilizes a solid detainee strategy.[110] The judiciary is not tasked with drafting definitions; the legislature has the authority to redraft provisions that will adequately adjust traditional definitions to include the overlap of law of war and criminal law detentions. Establishing a captured person's classification will determine the legal process that attaches to that classification and how to proceed with the

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104. *Id.* at 26. In addition, consider also Judge Leon's statement:

> I do not believe . . . that it is the province of the judiciary to draft definitions. It is our limited role to determine whether definitions crafted by either the Executive or the Legislative branch, or both, are consistent with the President's authority under the [AUMF] and his war powers under Article II of the Constitution.

Boumediene v. Bush, 583 F. Supp. 2d 133, 134 (D.D.C. 2008).

105. *Boumediene*, 583 F. Supp. 2d at 134.

106. Hodgkinson, *supra* note 56, at 276.

107. *Id.* at 275.

108. *Id.* at 277. Zacarias Moussaoui was a 9/11 co-conspirator tried in Article III courts and sentenced to life in prison. *Id.* at n.8.

109. *Mattan*, 618 F. Supp. 2d at 26 n.3.

110. Hodgkinson, *supra* note 56, at 276.

prosecution of that individual, thus contributing to less Article III intervention into detainment procedures. The solution is for the Court to defer to the Executive in exercising war-making power and to Congress in exercising its law-making power.

IV. WHAT LEGAL PROCESS ATTACHES TO THOSE DETAINED?

A. *What About Harm to Defendant's Liberty?*

"Internment without trial is so antithetical to the rule of law as understood in a democratic society that recourse to it requires to be carefully scrutinized by the courts of that society."[111] In a sense, this is an argument of the lesser of the two evils: either we secure liberty at the possible risk of security, or we maintain security at the cost of fundamental liberties. Due process dictates that individuals must be protected from arbitrary deprivations of liberty through certain procedural safeguards.[112] It requires that "a person in jeopardy of serious loss (be given) notice of the case against him and opportunity to meet it."[113]

Ultimately, the enemy combatants argue that nonintervention will impede their liberty.[114] The alternative is to allow intervention based on "irreparable psychological harm" or the risk that the litigant's defense will be divulged before trial in a federal court.[115] The sum of the argument is that the litigant will suffer "great and immediate" injury and the federal court must not abstain.[116] Irreparable harm is the first requirement for a litigant to fit within the exception of no abstention.[117] The second requirement is that the defendant must also show that the alternative tribunal is "incapable of fairly and fully adjudicating the federal issues before it."[118] In the case of *In re Al-Nashiri*, the court concluded that the possibility of a psychological injury did not jeopardize his opportunity of a fair hearing in the military commission and, thus, intervention was not warranted.[119]

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111. Bovarnick & Vrett, *supra* note 61, at 321 (quoting Al-Jedda v. United Kingdom, 2011 Eur. Ct. H.R. 1092).

112. *Id.* at 331.

113. Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

114. In re Al-Nashiri, 835 F.3d 110, 133 (2016).

115. *Id.* at 128.

116. *Id.* (citations omitted).

117. *Id.*

118. *Id.* (quoting Kugler v. Helfant, 421 U.S. 117, 123–24 (1975)).

119. *Id.* at 129.

Essentially, the basis of a detainment strategy should be kept at the lowest level possible. First, the sensitive nature of these cases requires that certain considerations relevant to national security allow them to be treated differently. The detainment strategy requires the protection of individual and public safety by handling sensitive intelligence. Second, the military is better equipped to handle detention decisions due to the necessity of using evidence that is obtained in the course of standard military operations. The military commissions currently established are the result of extensive Congressional debate. Thus, deference to Congress implicitly suggests that the military system established for determining status is adequate to provide Constitutional protections. Therefore, decisions on whom to detain and whom to release should not be removed to Article III courts, but left in the "theater of war" and "normalize[d] . . . into routine military operations."[120]

B. Noncitizen Detainee

The federal habeas corpus statute allows prisoners *within the jurisdiction* of federal courts to challenge the validity of their imprisonment.[121] In *Rasul v. Bush*, the petitioner challenged his imprisonment in Guantanamo Bay under the federal habeas statute.[122] In that case, the issue was "whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"[123] The Court concluded that aliens held at Guantanamo Bay fell within the scope of 28 U.S.C. § 2241 because the United States exercises complete control and jurisdiction over that base.[124] However, the Court failed to address where aliens were to bring petitions for relief. Since the base does not technically fall under any federal court's jurisdiction, the Court fashioned a different standard. Unfortunately, the Court-created remedy brings more complications than answers.

The *Rasul* decision effectively overturned *Johnson v. Eisentrager,* which held that aliens detained outside the United States are not entitled to invoke a petition for habeas corpus.[125] The dissent in *Rasul* argued that the

120. Hodgkinson, *supra* note 56, at 302.

121. 28 U.S.C. § 2241, *declared unconstitutional by* Boumediene v. Bush, 553 U.S. 723 (2008).

122. Rasul v. Bush, 542 U.S. 466, 468 (2004).

123. *Id.* at 475.

124. *Id.* at 468.

125. Johnson v. Eisentrager, 339 U.S. 763, 790-91 (1950).

majority's decision was a "wrenching departure from precedent."[126] The majority's decision in *Rasul* extended, for the first time, the federal court's jurisdiction beyond the territorial jurisdiction of the courts.[127] The dissent also correctly stated that the extension of the habeas statute over noncitizen detainees is properly left to Congress.[128] It further argued that if Congress had wanted to change federal jurisdiction, it could have easily done so.[129] The departure of the Court into matters properly left to the legislature was appropriately recognized by the *Rasul* dissent as a creation of a "monstrous scheme in time of war" and created a "frustration of our military commanders' reliance upon clearly stated prior law."[130] Such a sudden departure from precedent was, indeed, "judicial adventurism of the worst sort."[131]

1. *Hamdan v. Rumsfield*

In *Hamdan v. Rumsfield*, the Court erred once more by deeming the military commissions established by the executive branch as not regularly constituted courts adequate to meet due process.[132] The dissent in *Hamdan* correctly stressed that the Judiciary does not have the "aptitude, facilities nor responsibility" to make military and foreign policy decisions.[133] Too much judicial interference at home negatively affects the Commander in Chief's and Congress's ability to conduct foreign affairs abroad.[134] The Court's decision in *Hamdan* to strike down trial by military commissions was judicial interference into a political decision, which should have been entitled to a "heavy measure of deference."[135] In his dissent, Justice Alito argued that military commissions fit squarely within the definition of a regularly constituted court.[136] Indeed, a military commission is typically made up of military officers who try both "fact and law."[137] The military

126. *Rasul*, 542 U.S. at 505 (Scalia, J., dissenting).

127. *Id.* at 485 (Stevens, J.).

128. *Id.* at 497 (Scalia, J., dissenting.).

129. *Id.* at 506.

130. *Id.*

131. *Id.*

132. Hamdan v. Rumsfeld, 548 U.S. 557, 564 (2006).

133. *Id.* at 688 (Thomas, J., dissenting).

134. Hodgkinson, *supra* note 56, at 301.

135. *Hamdan,* 548 U.S. at 680 (Thomas, J., dissenting).

136. *Id.* at 725 (Alito, J., dissenting).

137. Amanda Schaffer, *Life, Liberty, and the Pursuit of Terrorists: An In-Depth Analysis of the Government's Right to Classify United States Citizens Suspected of Terrorism as Enemy*

commissions do not use the Federal Rules of Evidence in their proceedings.[138] Instead, the Presiding Officer determines whether "evidence would have probative value to a reasonable person."[139] In order to convict the detainee for crimes he has committed, two-thirds of the military panel must agree.[140] The detainee is also entitled to counsel.[141] Thus, there are certain procedural safeguards that have been established to ensure that the detainee can present a defense.

2. Deference to the Executive in War-Making Power and to Congress in Law-Making Power

The *Boumediene* Court's decision rejected the notion that habeas corpus could be withheld from a detainee and further concluded that the tribunals were inadequate to satisfy due process.[142] Key to its rationale was that the detainee has a limited means to rebut the government's factual assertion that he is an enemy combatant.[143] Consistent with the Court's tradition of rejecting detainment strategies established by Congress and the Executive, despite failing to provide more concrete procedures of its own, the *Boumediene* decision knocked down the "most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants."[144] Justice Roberts even went so far as to suggest that the Court's decision was not about detainment at all, but rather the Court's attempt to control federal policy over enemy combatants.[145] Although the majority paid lip service to the "proper deference . . . to the political branches,"[146] the Court ignored precedent as set out in *Eisentrager*, declined to say how the statute failed to address petitioner's due process rights, and failed to establish a standard that would provide "adequate" procedural safeguards that Congress has not already addressed.[147] Indeed, "[s]ecurity

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Combatants and Try Those Enemy Combatants by Military Commission, 30 FORDHAM URB. L.J. 1465, 1470 (2003).

138. *Id.*

139. *Id.* at 1470-71.

140. *Id.* at 1471.

141. *Id.*

142. Boumediene v. Bush, 553 U.S. 723, 729 (2008).

143. *Id.*

144. *Id.* at 801 (Roberts, J., dissenting).

145. *Id.*

146. *Boumediene*, 553 U.S. at 796 (Kennedy, J.).

147. *Id.* at 801 (Roberts, J., dissenting).

subsists . . . in fidelity to freedom's first principles,"[148] but other than establishing that habeas cannot be suspended for detainees, the Court did not establish what rights detainees have. They left that determination for the district courts to sift out amongst themselves.

3. Heightened Security Interest in Military Commissions

Military commissions play an important role in military operations in preventing future terrorist attacks. Major General Michael J. Nardotti, Jr., a retired Judge Advocate General of the Army, emphasized the importance of military commissions by stating that they are needed to address "legitimate concerns for public and individual safety, the compromise of sensitive intelligence, and due regard for the practical necessity to use as evidence information obtained in the course of military operation rather than through traditional law enforcement means."[149] The sensitive nature of these cases require that certain considerations relevant to national security allow them to be treated differently, while still providing the accused with constitutional protections. Although the tribunals may vary in procedures, structure, or composition, they still fall into the category of a "regularly constituted court."[150]

C. Federal Court Intervention & the Necessity of Maintaining National Security

The United States' current military commissions system "is the product of an extended dialogue among the President, Congress, and the Supreme Court."[151] Although the Supreme Court has not provided concrete guidance, the Military Commissions Act of 2009 ("MCA"), as upheld by the *Al-Nashiri* court, provides sufficient procedural protections and review mechanisms for military commissions and also provides an adequate framework for reviewing challenges to enemy combatants' status.[152] The MCA established the Court of Military Commission Review ("CMCR"), which reviews decisions of military commissions.[153] As part of the revised

148. *Id.* at 797 (Kennedy, J.).

149. September 11, 2001: Attack on America DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism - Statement of Michael J. Nardotti Before the Committee on the Judiciary United States Senate; December 4, 2001, http://avalon.law.yale.edu/sept11/nardotti_001.asp. (last visited September 28, 2017).

150. Hamdan v. Rumsfeld, 548 U.S. 557, 727-28 (2006) (Alito, J., dissenting).

151. In re al-Nashiri, 791 F.3d 71, 73 (D.C. Cir. 2015).

152. In re al-Nashiri, 835 F.3d 110, 120 (D.C. Cir. 2016).

153. *Id.* at 115.

MCA, Article III courts are given jurisdiction to review the legal conclusions of the CMCR, but only after the CMCR has actually made a final determination on the merits.[154] In *Al-Nashiri*, the D.C. Circuit upheld the process of the CMCR; key to its determination were certain comity factors.[155] The first factor is advancing the military's interest in allowing these commissions to proceed uninterrupted in order to achieve the efficient operation of the military free from regular interference by civilian courts.[156] The second is the deference duly owed to Congress when it created "an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges completely removed from all military influence or persuasion."[157] These same comity factors, which were crucial to the holding of *Al-Nashiri*, should also be central when determining the system of review of an enemy combatant's status.

1. *Al-Nashiri*

In *Al-Nashiri*, the petitioner, Abd Al-Rahim Hussein Muhammed Al-Nashiri, was the alleged mastermind of the U.S.S. *Cole* and the French supertanker, the M/V *Limburg*, bombings, as well as the attempted bombing of the U.S.S. *The Sullivans*.[158] Directed by Osama bin Laden, Al-Nashiri and his co-conspirator, Walid bin Attas, traveled to Yemen, bought explosives and a boat, and obtained false identification documents.[159] Al-Nashiri also received explosives training from an al-Qaeda expert when he returned to Afghanistan.[160] Al-Nashiri directed his suicide bombers to fill their boat with explosives and steer it alongside their targets and then detonate the explosives.[161] Together, the completed attacks killed eighteen crew members and injured dozens more.[162] Al-Nashiri was arrested by the local authorities in Dubai, turned over to U.S. custody, and transferred to Guantanamo Bay in 2006.[163] A CSRT determined that Al-Nashiri was an

154. *Id.*
155. *Id.* at 119.
156. *Id.*
157. *Id.*
158. *Al-Nashiri*, 835 F.3d at 113.
159. *Id.*
160. *Id.*
161. *Id.* at 114.
162. *Id.* at 113.
163. *Id.* at 114.

enemy combatant and, thus, detainable under the AUMF.[164] Al-Nashiri filed a petition for a writ of habeas corpus challenging various aspects of his detention.[165] Though his habeas petition is still pending, a military commission has convened to try him for terrorism, murder in violation of the law of war, and attacking civilians.[166] The government is seeking the death penalty.[167]

Al-Nashiri claims that a military commission does not have jurisdiction to try him under the MCA because he did not commit a war crime.[168] He claims that his actions were "not 'committed in the context of and associated with hostilities.'"[169] Al-Nashiri moved for a preliminary injunction to prevent his trial by military commission until the district court issued a decision on his habeas petition.[170] The government filed a counter motion to hold the habeas proceedings in abeyance in order for the commission to continue its proceedings and the government's interlocutory appeals to be completed.[171] The government argued that the same logic found in *Schlesinger v. Councilman*, which prohibited courts from interfering with ongoing courts-martial, equally applies here to direct federal courts to abstain from interfering with ongoing proceedings in a military commission.[172] Al-Nashiri unsuccessfully argued that, despite the MCA revisions, abstention was inappropriate as decided in *Hamdan*.[173] The district court agreed with the government, finding that Al-Nashiri's habeas petition would "unduly interfere" with the proceedings of the military commission.[174]

2. Incorporating Al-Nashiri into the Detainment Framework

The court's underlying rationale and analysis in determining that the MCA provided adequate procedural safeguards that satisfy both liberty and security provides a solid framework for allowing military detention operations to operate without unduly burdensome interference from Article

164. *Al-Nashiri*, 835 F.3d at 114.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 116.
169. *Id.* (quoting 10 U.S.C. § 950p(c)).
170. *Al-Nashiri*, 835 F.3d at 116.
171. *Id.*
172. *Al-Nashiri*, 835 F.3d at 116-17.
173. *Id.* at 120.
174. *Id.* at 117.

III courts. The court looked to "equally compelling" factors to determine whether the revised MCA was sufficient to replace what was purportedly lacking in *Hamdan*.[175] First, the court must be assured of the adequacy of the alternative system in protecting defendant's rights.[176] The D.C. Circuit correctly concluded that the adequacy of the alternative system could be "assumed" due to deference to the legislature.[177] The *Al-Nashiri* court concluded that the MCA's review structure was adequate based on its similarities to the court-martial review system approved in *Schlesinger*.[178] Second, the court must be assured of the "*importance* of the interests served by allowing that system to proceed uninterrupted by federal courts."[179] The countervailing interest at the top of the list for military review tribunals is national security. In analyzing the second factor, the D.C. Circuit Court in *Al-Nashiri* correctly deferred to the political branches in the arena of national security.

a. Factor one: the adequacy of the alternative system

The MCA review structure affirmed in *Al-Nashiri* is not only adequate for military commissions, but is also adequate for reviewing status determinations. The MCA requires a trial with a military judge and a twelve-person jury, consisting of military officers called "members."[180] If the defendant is found guilty, the Defense Department official who referred the case to trial, known as the convening authority, then reviews the guilty finding. The convening authority has the ability to reduce conviction to a lesser-included offense of guilt.[181] The convening authority may either approve the sentence, disapprove, commute, or suspend either the entire sentence, or any part thereof.[182] If the convening authority confirms or modifies the guilty finding, then the conviction goes through another level of review under the CMCR, unless the defendant waives such review.[183] The CMCR provides a level of review that is more insulated from military influence because it contains not only military judges, but also civilian

175. *Id.* at 121.
176. *Id.*
177. *Al-Nashiri*, 835 F.3d at 121.
178. *Id.*
179. *Id.*
180. *Id.* at 122.
181. *Id.*
182. *Id.*
183. *Al-Nashiri*, 835 F.3d at 122.

judges who have Article III life tenure and salary protection.[184] The CMCR has the power to review both factual and legal questions. The district court can then review all questions of law and the sufficiency of the evidence upon appeal.[185] Finally, the ruling of the district court can be challenged by filing a petition of writ of certiorari before the Supreme Court.[186]

Therefore, the defendant has the protection of four layers of review, and the Article III courts cannot interfere until the military has completed its trial and review of a guilty finding. Important in the *Al-Nashiri* court's rationale, and, what the Supreme Court should adopt, was the principle that intervention into the "on-the-ground" performance of the system (consisting of military commissions designed by Congress and the Executive) was not warranted.[187] By allowing the defendant to be processed through the respective military review tribunals, the D.C. Circuit implicitly acknowledged that the military system is adequate and trustworthy enough to perform its assigned task.[188] In this regard, the congressional judgment must be respected.[189] Although the D.C. Circuit has adopted this principle, prior decisions of the Supreme Court refused to do so.[190]

b. Factor two: the important countervailing interest

The second factor that directs a federal court to abstain from interfering in a military commission proceedings is the "important countervailing interest."[191] The Supreme Court should adopt an approach that allows the military system established by the Congress and the President to be completed before any Article III courts can interfere in either status determinations or trials for war crimes.[192] The framers of the MCA implicitly intended that there should be no interference from the federal courts until military commissions complete their work.[193] Key to a better detainment strategy is the principle that courts must give due deference to the other branches on matters of national security. As in *Al-Nashiri,* the court recognized that judgments from military commission arose "out of

184. *Id.* at 123.
185. *Id.* at 122.
186. *Id.*
187. *Id.* at 123.
188. *Al-Nashiri*, 835 F.3d at 123.
189. *Id.*
190. *Boumediene*, 553 U.S. at 729.
191. *Al-Nashiri*, 835 F.3d at 124.
192. *Id.*
193. *Id.*

concern for national security needs," which deserve "wide deference."[194] Thus, the *Al-Nashiri* court concluded that the important countervailing interest was "the need for federal courts to avoid exercising their equitable powers in a manner that would unduly impinge on the prerogatives of the political branches in the sensitive realm of national security."[195] Comity guides this decision, resulting in restraint of the courts from interfering with such a "sensitive realm."[196]

The key provision of the MCA is that it provides for Article III review, but only at a specific point, and no sooner.[197] First, there must be a status determination initially made by a CSRT, then approved by a Department of Defense official.[198] Furthermore, there is a trial and a conviction in the military system, approved by the convening authority, and then an appeal to the CMCR.[199] After this layer of review, there should be an additional layer of review by a military review commission consisting of a civilian judge and military judge before a challenge to detainment based on status can be heard by an Article III court. Such a scheme not only provides the military more control over matters of national security, but also allows the *end result* to be reviewed in Article III courts only after passing through the layers of the military system.[200] By giving deference to the words of the legislature, it is obvious that "[l]itigants may not . . . prevent the proper operation of the congressional scheme by pursuing equitable relief in district court."[201] Instruction by the "political branches" on the structure of the military review system is enough to "qualif[y] as an 'important countervailing interest' warranting abstention . . . where that instruction is based on those branches' assessment of national security needs."[202] As the D.C. Circuit states in *Al-Nashiri*, the expertise of the political branches in the realm of national security is at its "apogee."[203]

Alleviating the Need for Judicial Intervention

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194. *Id.*

195. *Id.*

196. *Id.*

197. *Al-Nashiri*, 835 F.3d at 124.

198. *Id.* at 122.

199. *Id.* at 124-25.

200. *Id.* at 125-26.

201. *Id.*

202. *Id.*

203. *Al-Nashiri*, 835 F.3d at 125-26. Apogee has been defined as, "the farthest or highest point" or culmination. Meriam-Webster Online Dictionary, *Apogee*, https://www.merriam-webster.com/dictionary/apogee (last visited June 14, 2017).

The *Al-Nahsiri* court recognized key advantages to maintaining the system established by the political branches.[204] First, the need for immediate intervention significantly decreases because an Article III court has the opportunity to eventually remedy any errors on appeal after review by a military review commission consisting of a civilian judge and military judge.[205] Also, following the guidance in *Schlesinger*, abstention in such matters emphasizes and respects military expertise.[206] Additionally, the advantage of abstaining in pretrial intervention is that it "eliminates 'duplicative proceedings,' potentially 'obviat[ing] the need for judicial intervention,' [while] 'inform[ing] and narrow[ing]' eventual Article III review."[207]

V. DETERMINING DURATION OF DETENTION

After a detainee's status is determined and the procedural process attaches, the next step is to determine how long detention is warranted. This part of the detainment strategy also warrants less judicial interference and more deference to the military. The *Hamdi* Court noted that indefinite imprisonment, even on reasonable suspicion, was simply not an available option of treatment for those accused of aiding the enemy.[208] However, defining what parameters constitute "definite" detention has proven problematic. Unlike past wars, the War on Terrorism has not provided the luxury of a defined limit in duration.[209] This phenomenon poses a problem to the detention of combatants involved in the War on Terror.

A. Two Schools of Thought

The majority holds to the principle that detention may last no longer than active hostilities.[210] The main question then becomes whether the existence of hostilities is determined by a totality of the circumstances analysis or by some declaration by one of the political branches. The plurality view expressed in *Hamdan* states that a political, public act is

204. *See, e.g.,* In re Al-Nashiri, 791 F.3d 71 (D.C. Cir. 2015).

205. *Al-Nashiri*, 835 F.3d at 127.

206. *Id*. at 125.

207. *Id.* at 127.

208. Benjamin S. White, *Al-Aulaqi v. Obama: Must Eliminating Dangerous Terrorists Entail Accepting Dangerous Political Doctrines?*, 8 LIBERTY U. L. REV. 411, 433 (2014).

209. *Boumediene*, 553 U.S. at 797-98.

210. *Hamdi*, 542 U.S. at 520.

needed to establish hostilities.[211] The dissent's view in *Hamdan* was that a contemporaneous public act is not required, but that the determination depends on a retrospective analysis.[212]

The U.S. government argues that the correct standard should be that hostilities are determined by a retrospective and prospective analysis of the factual situation on the ground.[213] If it is determined that active hostilities exist, or remain, then detainment is justified so long as it is necessary to prevent enemy combatants from returning to the battlefield.[214] Even a complete withdrawal of all combat troops from a country does not end hostilities, because there are other factual scenarios to be considered. The first is whether Al Qaeda, the Taliban, or other hostile enemy forces have the *capacity* to engage in hostilities based on their "embedment in local or regional insurgencies."[215] Another factor to be considered is the hostile group's aggregate of affiliated groups who help plan and conduct attacks.[216] This includes the recognition of a transnational conflict, not bound to any geographic territory.[217] The nature of the transnational conflict makes it difficult for some to accept that the mere capability of a wide-reaching network to engage in hostilities can justify detainment.[218]

Some argue, instead, that the standard is not based on whether hostilities cease to exist with terrorist organizations, but whether they have ceased with the detained individual "because he no longer poses a substantial danger of rejoining hostilities."[219] However, determining whether an enemy combatant poses a threat to rejoining can be precarious. A Summary Report of Detainees Formerly Held at Guantanamo Bay confirmed that, as of January 15, 2016, 30.2% of 676 detainees released from Guantanamo Bay have rejoined militant activity or are suspected of rejoining militant activity.[220]

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211. *Al-Nashiri*, 835 F.3d at 137.

212. *Id.*

213. Bettina Scholdan, *"The End of Active Hostilities:" The Obligation to Release Conflict Internees Under International Law,* 38 HOUS. J. INT'L L. 99, 106 (2016).

214. *Hamdi*, 542 U.S. at 264.

215. Scholdan, *supra* note 213, at 114.

216. *Id.* at 115.

217. *Id.* at 116.

218. *Id.*

219. Scholdan, *supra* note 213, at 167.

220. Director of National Intelligence, *Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba*, OFFICE OF DIR. OF NAT'L INTELLIGENCE, https://www.dni.gov/files/documents/Newsroom/Reports%20

Justice Holmes once said, "Public danger warrants the substitution of executive process for judicial process."[221] Because the executive branch possesses the power of Commander in Chief, decisions pertaining to matters of national security should fall squarely on his shoulders and not on those of the Judiciary. The standard should be that detainment is necessary so long as the detainee poses a threat of re-engaging in militant activity against the United States. In *Hamdi*, Justice Thomas put greater weight in the security interest than the liberty interest by recognizing that "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous."[222]

B. Deference to the Executive

Whether or not the "end of hostilities" has arrived in the fight against the Taliban, there is still the potential that these detainees will return to the battlefield and the service of another emerging terrorist group. While the modern expansion of the theatre of war raises the stakes primarily in protecting America's security interests, it also affects liberty interests. However,

> [T]he Executive's decision that a detention is necessary to protect the public need not and should not be subjected to judicial second-guessing. Indeed, at least in the context of enemy-combatant determinations, this would defeat the unity, secrecy, and dispatch that the Founders believed to be so important to the war-making function.[223]

Detaining enemy combatants and preventing them from returning to the theatre of war heightens the need to ensure that the basis of their detention is justified, and that their detention is not constantly subject to judicial second-guessing. With the processes outlined above, the adequate protections afforded to detainees' liberty interests during the detainee's

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and%20Pubs/Summary_of_the_Reengagement_of_Detainees_Formerly_Held_at_GTMO_Ma%204_2016.pdf (last visited June 14, 2017).

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

222. *Hamdi*, 542 U.S. 507, 591 (2004) (Thomas, J., dissenting) (quoting United States v. Salerno, 481 U.S. 739 (1987)).

223. *Id.* at 592.

classification stage allow for a stronger argument to be made for indefinite detention based on the continued dangerousness of the detainee or his likelihood of re-engaging in hostilities against the United States. Thus, the court should leave the determination of whether a detainee will return to the battlefield to the political branches because the political braches have far more experience and better authority to do so.

VI. CONCLUSION

Balancing security and liberty is difficult, but it is essential to a sustainable detainment strategy. The Court, in *Hamdan, Boumediene,* and *Hamdi* failed to provide any guidance on the specific rights that detainees enjoy, and made no determination on what the political branches could do to avoid judicial interference. As recognized in *Al-Nashiri*, judicial review must be used as a last resort in military detainment systems. More deference must be given to the political branches to craft a system that highlights our military expertise on the ground and does not detract from the maintenance of national security.

This requires redefining our traditional definitions to better assess our modern enemies' methods of combat. Clearly defining the standards in conjunction with a detainment strategy, both in classifying and trying detainees, will prevent undue interference from federal courts and allow the political branches and the military to operate in a manner that will best protect the nation's security.

The very nature of war grants the Executive a measure of deference, but a common concern is that this deference lays the foundation for political abuse of our liberty.[224] However, national security and liberty can both be maintained, without sacrificing either, by maintaining a detainment strategy at the lowest level possible, away from judicial second-guessing and within routine military operations in the theatre of war. Those on the ground, not in chambers, are in the best possible position to determine a detainee's status and the likelihood that he will reengage in militant activity. Therefore, it is within the Commander in Chief's, and the military's power to make these decisions, not the Judiciary's.

224. *Id.*