

## HAMDAN, TERROR, WAR

by  
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*What makes a “war”? Professor Weiner argues that the self-styled “war on terror” launched by the United States against al-Qaeda and other terrorist entities mischaracterizes the nature of the conflict. This mischaracterization is not merely a matter of semantics, but has been used to vest the Executive Branch with substantial legal powers only available in wartime. Although Professor Weiner acknowledges certain important similarities between the “war on terror” and conventional forms of armed conflict, he submits that the Executive Branch has chosen not to accept wartime’s legal duties even as it claims wartime rights in the fight against terrorism. Professor Weiner criticizes the Supreme Court’s decision in Hamdan v. Rumsfeld that Common Article 3 of the Geneva Conventions applies to the Guantanamo detainees. Although this ruling extended some limited protections to the Guantanamo detainees, it effectively endorses the Executive Branch’s assertion of sweeping wartime powers in the fight against terrorism. Finally, Professor Weiner argues that the potentially unbounded character of the conflict against terrorism creates powerful reasons for the Judiciary to apply traditional principles of checks and balances and to limit Executive Branch powers in this new “war on terror.”*

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## I. INTRODUCTION

It has over been six years since the September 11, 2001, terrorist attacks against the United States. Despite myriad court decisions brought by or on behalf of persons detained in connection with the post-September 11 response to terrorism, the publication of countless scholarly articles, and a robust public discourse, the legal framework that governs the conflict remains contested and unresolved.<sup>1</sup> President Bush and other U.S. government officials have consistently characterized the conflict against terrorism as a *war*.<sup>2</sup> Others demur, and reject the notion that the struggle against terrorism constitutes “war,” at least in the broad sense in which the concept has been invoked by the Bush administration.<sup>3</sup> Indeed, even Gordon Brown, the Prime Minister of the closest United States ally in the international struggle against terrorism, has reportedly instructed senior members of his government not to use the phrase “war on terror.”<sup>4</sup> Whatever the merits of the debate, the phrase “war on terror” itself has become deeply ingrained in American national discourse.<sup>5</sup>

In this Article, I argue that the fight against terrorism does not qualify as “war,” at least as a positive law matter. In Part II, I acknowledge

<sup>1</sup> This Article draws in part on arguments I initially advanced in Allen S. Weiner, *Law, Just War, and the International Fight Against Terrorism: Is It War?*, in INTERVENTION, TERRORISM, AND TORTURE: CONTEMPORARY CHALLENGES TO JUST WAR THEORY (Steven P. Lee ed., 2007).

<sup>2</sup> On October 25, 2001, President Bush stated categorically: “As you all know, our nation is at war right now.” Remarks at the Thurgood Marshall Extended Elementary School, 2 PUB. PAPERS 1301, 1301 (Oct. 25, 2001). *See also* President George W. Bush, Remarks in Saginaw, Michigan, 40 WEEKLY COMP. PRES. DOC. 2647 (Nov. 1, 2004) (“We’re at war against a terrorist enemy unlike any we have ever seen.”). President Bush has steadfastly insisted on describing the conflict as war in the years since the September 11 attacks. Indeed, in 2005, a few days after the press began reporting that administration officials would cease calling the conflict a “global war on terror,” *see* Eric Schmitt & Thom Shanker, *New Name for ‘War on Terror’ Reflects Wider U.S. Campaign*, N.Y. TIMES, July 26, 2005, at A7, the President publicly overruled his top advisors, saying, “Make no mistake about it, we are at war.” Richard W. Stevenson, *President Makes it Clear: Phrase is ‘War on Terror,’* N.Y. TIMES, Aug. 4, 2005, at A12.

<sup>3</sup> *See* Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 680 n.14, 716 n.148 (2004) (listing authorities).

<sup>4</sup> *See* David Reiff, *Policing Terrorism*, N.Y. TIMES, July 22, 2007, § 6 (Magazine), at 13.

<sup>5</sup> Internet discussion provides a rough barometer of the public attention devoted to the post-9/11 response to terrorism. A Google search of the phrase “war on terror” in November 2007 produced about 8,650,000 hits. In comparison, a search of the phrase “health care reform” produced about 1,230,000 hits.

that a plausible prima facie case could be made for extending the legal regime that applies in wartime to the post-September 11 fighting against al-Qaeda. However, I contend that the Executive Branch's refusal to accept the legal duties that correspond with wartime rights has undermined the legitimacy of any claim for such a functional extrapolation. Moreover, whatever may have been the situation in late 2001, it is questionable whether even a functional extension of the war regime is today defensible in view of al-Qaeda's transformation since the war in Afghanistan began.

In Part III, I consider the Supreme Court's decision in *Hamdan v. Rumsfeld*,<sup>6</sup> which found that the conflict between the United States and al-Qaeda constituted "armed conflict not of an international character" within the meaning of Common Article 3 of the Geneva Conventions.<sup>7</sup> I note that although this decision was widely seen as a legal victory for the detainees at the Guantanamo Naval Station in Cuba and as setback for the Bush administration, the Supreme Court has in fact implicitly endorsed the Executive Branch's position that the law of armed conflict applies to at least some components of the fight against terrorism.

In Part IV, I argue that because the Judiciary now has effectively vindicated the Executive Branch's claim that it may exercise the broad governmental powers available in war time, the courts must take a more assertive role in defining the limits of those powers. Otherwise, the Executive Branch will be able to claim far-reaching powers regarding the use of force and detention, with few geographical and temporal limits. The Judiciary should not acquiesce in so substantial a deviation from the principles of checks and balances that underlie our constitutional system merely because the Executive Branch utters the word "war."

## II. "NOT A FIGURE OF SPEECH": IS THE FIGHT AGAINST TERRORISM REALLY WAR?

At first blush, the Bush administration's repeated insistence that the United States is engaged in war in fighting international terrorism might seem relatively innocuous. Other American leaders have in the past invoked the concept of "war" as a rhetorical device to attempt to inspire a concerted and comprehensive response to national crises. In the early 1970s, for instance, President Nixon launched a national "war" against crime.<sup>8</sup> Nearly twenty years later, President Reagan initiated a "war on

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<sup>6</sup> 126 S. Ct. 2749 (2006).

<sup>7</sup> *Id.* at 2794–95 (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 3, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]).

<sup>8</sup> Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 8, 12 (Jan. 22, 1970).

drugs.”<sup>9</sup> And during the 1960s, President Johnson famously declared “unconditional war on poverty in America.”<sup>10</sup>

In these past instances, however, presidents invoked the metaphor of war as just that: a *metaphor*. The Johnson, Nixon, and Reagan administrations did not claim that the United States was in a real state of war or armed conflict against poverty, crime, or drugs. More specifically, the administrations in these past instances did not assert the authority to exercise the *legal* rights that become available under either international or domestic law when a country is at war.

A. *The Invocation of Legal Wartime Powers*

The Bush administration’s characterization of the conflict against terrorism as “war” stands in sharp contrast to past invocations of the concept, and the significance of the claim should not be underestimated. The Executive Branch insists that the war on terror is a real war, a war in the legal sense. As President Bush said in a radio address, “The war on terror is not a figure of speech. It is the inescapable calling of our generation.”<sup>11</sup>

I have elsewhere noted some of the specific legal powers the United States has asserted in the fight against terrorism that under international law would be permissible only if the conflict is legally accepted as war, or in the parlance of international lawyers, as “armed conflict.”<sup>12</sup> First, in response to the September 11 attacks, the United States has claimed—and exercised—the right to use international armed force against both terrorist actors and governments that harbor them, notwithstanding the prohibition on the use of force that ordinarily applies in international relations. The United States in October 2001 launched a military campaign against the al-Qaeda terrorist organization and the de facto Taliban government in Afghanistan in the exercise of its rights under Article 51 of the United Nations Charter, which guarantees to states the right to use armed force in self-defense in the event of an armed attack.<sup>13</sup>

Second, the United States has exercised the right to kill persons outside the Afghan battlefield as combatants in the war against terrorism. In November 2002, a missile launched from an unmanned American aircraft killed al-Qaeda member Sinan al-Harethi and five associates traveling in a car in Yemen. One United States official justified the killing

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<sup>9</sup> Radio Address to the Nation on Economic Growth and the War on Drugs, 2 PUB. PAPERS 1310, 1311 (Oct. 8, 1988).

<sup>10</sup> Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 112, 114 (Jan. 8, 1964).

<sup>11</sup> President George W. Bush, Radio Address, 40 WEEKLY COMP. PRES. DOC. 437, 438 (Mar. 20, 2004).

<sup>12</sup> Weiner, *supra* note 1, at 139–40.

<sup>13</sup> Letter from John D. Negroponte, Permanent Representative of the U.S., to the President of the Security Council (Oct. 7, 2001), U.N. Doc. S/2001/946, *reprinted in* 40 I.L.M. 1281 (2001).

by stating: “We’re at war, and we’ve got to use the means at our disposal to protect the country.”<sup>14</sup> According to Administration officials, the killing did not violate the longstanding Executive Branch order prohibiting assassination<sup>15</sup> because al-Qaeda operatives had been defined as “enemy combatants and thus legitimate targets for lethal force.”<sup>16</sup> More recently, in January 2007, the United States launched at least two airstrikes in southern Somalia against targets suspected of having ties to al-Qaeda; the first attack killed eight to ten persons, according to U.S. estimates.<sup>17</sup>

Third, the Executive Branch has relied on the wartime right to detain enemy combatants in the war against terrorism without a judicial determination that they have committed crimes against the United States. Such detentions, in armed conflict, serve the preventive function of ensuring that enemy soldiers do not rejoin the conflict and participate in further battlefield action. The Executive Branch has claimed the authority to detain enemy combatants—both foreigners and American citizens<sup>18</sup>—at Guantanamo Bay, Cuba,<sup>19</sup> and at military facilities in the United States.<sup>20</sup> The Executive Branch has specifically invoked wartime legal authorities in justifying these detentions.<sup>21</sup> These powers, the Bush

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<sup>14</sup> David Johnston & David E. Sanger, *Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. TIMES, Nov. 6, 2002, at A16.

<sup>15</sup> United States Intelligence Activities, Exec. Order 12,333, 3 C.F.R. 200, § 2.11 (1982), available at <http://www.dod.mil/atsdio/documents/eo1233.html>.

<sup>16</sup> James Risen & David Johnston, *Bush Has Widened Authority of C.I.A. to Kill Terrorists*, N.Y. TIMES, Dec. 15, 2002, at A1.

<sup>17</sup> Michael R. Gordon & Mark Mazzetti, *U.S. Used Base in Ethiopia To Hunt Al Qaeda in Africa*, N.Y. TIMES, Feb. 23, 2007, at A1; *Raid Killed Somali Allies of Al Qaeda, U.S. Says*, N.Y. TIMES, Jan. 12, 2007, at A6.

<sup>18</sup> Yaser Hamdi and Jose Padilla, two American citizens, were initially designated as enemy combatants and detained in the United States. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004). In 2004, Padilla was transferred to civilian custody; he was later tried and convicted of terrorism conspiracy charges. Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. TIMES, Aug. 17, 2007, at A1.

<sup>19</sup> As of October 2007, the case of Salim Ahmed Hamdan is the only case of an enemy combatant detained at Guantanamo so far to have been decided by the Supreme Court. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). The United States detained as many as 750 individuals at the Guantanamo base, see Amnesty International, USA: Legal Concern/Health Concern/Torture: Unknown Number of Guantánamo Detainees (July 21, 2005), <http://web.amnesty.org/library/index/ENGAMR511142005>, although several hundred have been released since the detainee population reached its height. As of September 6, 2007, approximately 340 detainees remained at Guantanamo Bay, Cuba. See [GlobalSecurity.org, Guantanamo Bay Detainees](http://www.globalsecurity.org/military/facility/guantanamo-bay_detainees.htm), [http://www.globalsecurity.org/military/facility/guantanamo-bay\\_detainees.htm](http://www.globalsecurity.org/military/facility/guantanamo-bay_detainees.htm).

<sup>20</sup> Ali Saleh Kahlal al-Marri, a Qatari citizen, was designated as an enemy combatant in 2003 and has been detained at a U.S. military facility in South Carolina. *Al-Marri v. Wright*, 487 F.3d 160, 165 (4th Cir. 2007).

<sup>21</sup> See, e.g., Brief for the Respondents at 14, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696); see also Brief for the Petitioner at 9, *Rumsfeld v. Padilla*, 542

administration has argued, include the right to detain enemy combatants, without trial, for the duration of the armed conflict.<sup>22</sup>

The Bush administration has also invoked presidential authorities available only in wartime, under the “Commander in Chief” clause in Article II, Section 2 of the Constitution, as a basis for engaging in action that would at least arguably not otherwise be permissible as a matter of *domestic* law. In 2002, for example, the Office of Legal Counsel of the Department of Justice produced a memo interpreting the criminal U.S. statute implementing the Torture Convention<sup>23</sup> and its application to the interrogation of enemy combatant terrorists. The memo asserted that because the President was exercising his constitutional Commander in Chief powers in fighting terrorism, Congress could not prohibit torture notwithstanding its normal peacetime authority to “make all Laws which shall be necessary and proper” for the exercise of its functions.<sup>24</sup> “Even if an interrogation method arguably were to violate [the statutory prohibition on torture],” the memo states, “[a]s Commander-in-Chief, the President has the constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy.”<sup>25</sup>

The Executive Branch also relied in part on presidential powers available exclusively in wartime to justify an electronic surveillance program conducted by the National Security Agency (NSA) which apparently entailed surveillance of persons in the United States.

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U.S. 426 (2004) (No. 03-1027) (arguing that the President’s “wartime authority . . . to capture and detain enemy combatants [was] fully applicable” in the case of a U.S. citizen allegedly engaged in terrorist activity in the United States). In addition, the President’s Military Order of Nov. 13, 2001, authorizing the use of military commissions to try terrorists, stated explicitly that the attacks of September 11th “created a state of armed conflict.” Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, § 1(a) (2001).

<sup>22</sup> See Brief for Respondent, *Hamdi v. Rumsfeld*, *supra* note 21, at 14.

<sup>23</sup> 18 U.S.C. §§ 2340–2340A (2000).

<sup>24</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>25</sup> Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales Counsel to the President 31 (Aug. 1, 2002), *available at* [http://www.aclu.org/torturefoia/released/DOJ\\_Memo\\_080102.pdf](http://www.aclu.org/torturefoia/released/DOJ_Memo_080102.pdf) (regarding “Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A”). The Bybee memo also construed, in a very narrow fashion, what constitutes torture under the statute. In 2004, the Office of Legal Counsel withdrew the Bybee memorandum and replaced it with a less narrow definition of torture. The second memo did not, however, repudiate the assertion of presidential wartime power to disregard statutes set out in the Bybee memo. Rather, the 2004 memo concluded that discussion of that question was “unnecessary” because the President, in public statements, had directed that U.S. personnel not engage in torture. Memorandum from Daniel Levin, Acting Assistant Attorney Gen., to James B. Comey, Deputy Attorney Gen. 2 (Dec. 30, 2004), *available at* [http://fll.findlaw.com/news.findlaw.com/hdocs/docs/terrorism/doj\\_torture123004mem.pdf](http://fll.findlaw.com/news.findlaw.com/hdocs/docs/terrorism/doj_torture123004mem.pdf) (regarding “Legal Standards Applicable under 18 U.S.C. §§ 2340–2340A”).

Congress, in the Foreign Intelligence Surveillance Act (FISA),<sup>26</sup> established a comprehensive regime for the electronic collection of foreign intelligence information, and elsewhere stipulated that the authority to engage in wiretapping under the provisions of FISA and another statutory system governing wiretapping in criminal cases<sup>27</sup> “shall be the exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted.”<sup>28</sup> The Office of Legal Counsel has taken the position that this apparent statutory restriction cannot limit the President’s wartime authority to engage in surveillance of the type conducted under the NSA program: “Because the President . . . has determined that the NSA activities are necessary to the defense of the United States from a subsequent terrorist attack in the armed conflict with al Qaeda, FISA would impermissibly interfere with the President’s most solemn constitutional obligation—to defend the United States against foreign attack.”<sup>29</sup>

*B. Is it Really War? A Pre-Hamdan Response*

The fact that the President has said that the fight against terrorism is war does not necessarily make it so. “War” and “armed conflict” are concepts with defined legal meanings. Whether the Executive Branch is legally justified in exercising wartime legal powers depends on whether the conflict against terrorism is really “war.” Although terrorism unquestionably involves violence and the threat of violence, the Bush administration’s position requires us to examine when political violence qualifies as war. And how does a security threat like international terrorism carried out by non-state actors fit within the concept?

*1. A Functional Extrapolation of the War Regime*

In an essay written before the Supreme Court issued its opinion in *Hamdan v. Rumsfeld*,<sup>30</sup> I argued that the fight against terrorism could not, as a narrow positive law matter, constitute “war” or “international armed conflict.”<sup>31</sup> The problem, of course, is that international armed conflict is generally a legal relationship between *states*.<sup>32</sup> Commentators defining

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<sup>26</sup> Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).

<sup>27</sup> Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2520 (2000).

<sup>28</sup> 18 U.S.C. § 2511(2)(f) (2000).

<sup>29</sup> U. S. Dep’t of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 34–35 (Jan. 19, 2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>.

<sup>30</sup> 126 S. Ct. 2749 (2006).

<sup>31</sup> See Weiner, *supra* note 1, at 140.

<sup>32</sup> For a discussion of the concept of “conflict not of an international character” within the meaning of Article 3 common to the 1949 Geneva Conventions, see *infra* Section III.

“war” under traditional customary international law describe it as “a hostile interaction between two or more *States*.”<sup>33</sup> Under treaty law, a state of international armed conflict exists when the international humanitarian law regime of the 1949 Geneva Conventions applies, namely, in the case of “declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties” to the relevant Convention.<sup>34</sup>

Although the fight against terrorism does not qualify as war or “international armed conflict” as a positive legal matter, I have nevertheless suggested that it would be normatively justifiable to extend the legal regime governing war (“the war regime”), at least to the post-September 11 violence between the United States and the al-Qaeda organization in Afghanistan. This position considers the *functional* reasons why we apply different rules in times of war, such as the right of combatants to kill their adversaries and to destroy enemy property, and the right of armed forces to detain enemy combatants as prisoners of war for the duration of a conflict, without any finding that they have engaged in offenses against the detaining party. The analysis draws on the criteria employed to determine whether violence that takes place within a single state, in the context of an internal conflict, amounts to “armed conflict.”<sup>35</sup>

Under these criteria, the use of force against al-Qaeda in late 2001 seems functionally comparable to international armed conflict between states for a number of reasons. First, al-Qaeda demonstrated the *capability* to inflict harm traditionally associated with states; that is, to engage in acts that would as a matter of international law be deemed sufficiently grave to constitute “armed attacks” within the meaning of Article 51 of the United Nations Charter.<sup>36</sup> Al-Qaeda organized not only the

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<sup>33</sup> YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 15 (4th ed. 2005) (emphasis added).

<sup>34</sup> The language comes from the Article 2 that is common to all four of the 1949 Geneva Conventions. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea art. 2, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Third Geneva Convention, *supra* note 7, art. 2; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

<sup>35</sup> I take up the question of whether these criteria could be applied directly, rather than by analogy, to the conflict against terrorism *infra* Section III, where I consider the *Hamdan* Court’s conclusion that the conflict with al-Qaeda is “conflict not of an international character” within the meaning of Common Article 3 of the Geneva Conventions. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2794-96 (2006) (quoting Third Geneva Convention, *supra* note 7, art. 3).

<sup>36</sup> *See* *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 101 (June 27) (distinguishing “the most grave forms of the use of force (those constituting an armed attack) from other less grave forms”); *see also* Sean D. Murphy, *Terrorism and the*

September 11 attacks against the United States, but also the devastating bombings of United States Embassies in Kenya and Tanzania in 1998 and the lethal attack against the warship USS *Cole* in Yemen in 2000. The multiplicity of attacks initiated by al-Qaeda, and the prospect that more attacks would come, imbued the violence with a “protracted” quality, another typical benchmark of the existence of a state of armed conflict.<sup>37</sup>

Second, al-Qaeda—at least prior to the United States military operations in 2001—displayed a *high degree of organization*.<sup>38</sup> The right to kill or detain enemy soldiers in war is based on the notion that the soldier is an agent of a state. This assumes a degree of hierarchy, command, and control within the enemy organization. It is this agency relationship that justifies infringing the human and civil rights of an enemy state’s soldiers on a collective basis, i.e., merely by virtue of their association with the organization, rather than a demonstration that they individually have engaged in harmful conduct. “The soldier’s association with the enemy state is sufficient; he is presumed to be an agent of a bureaucratically organized entity that is institutionally committed to committing violence against the first state to achieve some political goal.”<sup>39</sup>

Although al-Qaeda is not a state, it exhibits some important state-like characteristics in this regard. Al-Qaeda seems—or at least seemed in 2001—to possess clear, albeit decentralized, organizational and command structures.<sup>40</sup> It was, in other words, capable of acting as a “party” to an armed conflict.

Third, al-Qaeda’s violence against the United States was motivated by *political purposes* comparable to those of actors whose political violence might be deemed to trigger the existence of a state of armed conflict. In seeking to change United States foreign policy, e.g., attempting to end cooperative American military arrangements with Arab states in the Middle East, al-Qaeda sought to use violence for matters that are ordinarily the subject of international relations among sovereign states.

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*Concept of “Armed Attack” in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 47 (2002) (arguing that the events of September 11 “constituted an ‘armed attack’” within the meaning of Article 51 of the United Nations Charter).

<sup>37</sup> See *Prosecutor v. Tadic*, Case No. IT-94-I-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction ¶ 70 (Oct. 2 1995), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm> (finding “that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”).

<sup>38</sup> Cf. INT’L COMM. OF THE RED CROSS, COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 50 (Jean S. Pictet ed., 1952) (noting that a factor in determining whether political violence amounts to armed conflict is whether “the insurgents have an organization purporting to have the characteristics of a State”).

<sup>39</sup> Weiner, *supra* note 1, at 141.

<sup>40</sup> See generally ROHAN GUNARATNA, INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR (2002).

Fourth, the United States had by October 2001 *exhausted non-military alternatives* for confronting the security threat posed by al-Qaeda. In the context of internal violence, one factor in assessing whether a state of armed conflict exists is whether “the legal Government is obliged to have recourse to [its] regular military forces against insurgents,”<sup>41</sup> e.g., because less extreme defensive mechanisms have failed to suppress insurgent violence. The United States, prior to 2001, had actively pursued counter-terror strategies, including working for the adoption of a binding Security Council resolution requiring the Taliban regime in Afghanistan to surrender Osama bin Laden for trial in a country where he had been indicted.<sup>42</sup> These methods failed, suggesting that non-armed conflict options had been exhausted.

2. *The End of the Analogy: Rights Without Duties*

Even if it might have been justifiable to extend the war regime to the conflict against al-Qaeda on the basis of a functional analysis of the kind set forth above, the United States has been willing to consider only the extension of war-time *rights* in the course of the conflict. The existence of a state of war does not imply only the applicability of belligerent rights, however. The war regime also imposes *restraints* on the conduct of war. Although the United States, when it claims wartime rights, has been prepared to overlook the fact that its enemies in the war on terrorism are not states, it has refused to apply the same reasoning with respect to the assumption of wartime duties.

I have elsewhere elaborated on ways in which the United States has disregarded rules that would apply to its enemies if the conflict against terrorism were treated as functionally equivalent to international armed conflict.<sup>43</sup> Were the United States prepared to accept the extension of wartime duties as well as rights, for instance, it would not assert that it has the right not only to use force against the entity that attacked it—al-Qaeda—but against all terrorist organizations,<sup>44</sup> even those that may not have committed an “armed attack” against the United States, and against states that “harbor or support” such groups.<sup>45</sup> Nor would it categorically declare that the very al-Qaeda combatants against whom it has asserted a right to wage war—despite their non-state status—are not entitled to be treated in accordance with the standards in the Third Geneva Convention Relative to the Treatment of Prisoners of War on the technical grounds that: “Al Qaeda is an international terrorist group and

<sup>41</sup> INT’L COMM. OF THE RED CROSS, *supra* note 38, at 49.

<sup>42</sup> S.C. Res. 1267, ¶ 2, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

<sup>43</sup> Weiner, *supra* note 1, at 142–48.

<sup>44</sup> Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001) (“Our war on terror begins with Al Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.”).

<sup>45</sup> *Id.* at 1142 (stating that the United States will regard any state that “harbor[s] or support[s] terrorism . . . as a hostile regime”).

cannot be considered a state party to the Geneva Convention. Its members, therefore, are not covered by the Geneva Convention, and are not entitled to POW status under the treaty.”<sup>46</sup>

In addition, if the war regime were extended to the conflict against terrorism, the basic principles of reciprocity that underlie the law of war should apply. A state that decides to wage war against another state ordinarily accepts that its adversary may wage war in return. The parties to international armed conflict ordinarily accept that both sides, and not just one of them, may assert wartime rights to kill and detain enemy soldiers. As Michael Walzer has noted, in wartime, soldiers “face one another as moral equals” regardless of the justice of their cause.<sup>47</sup>

In waging war against terrorism, however, the United States has been unwilling to recognize reciprocal belligerent rights on the part of those we have identified as our adversaries. Although United States forces have claimed the combatant’s privilege to kill both al-Qaeda and Taliban combatants in Afghanistan, we have refused to allow enemy fighters to claim their own combatant’s privilege, even when they engage in traditional, non-terrorist forms of armed combat. Some of those charged by Military Commissions at Guantanamo have in fact been charged with “murder by an unprivileged belligerent,”<sup>48</sup> “attempted murder by an unprivileged belligerent,”<sup>49</sup> or conspiracy to commit “murder by an unprivileged belligerent,”<sup>50</sup> even though they appear to have been engaged in combat with members of the U.S. Armed Forces.

I should stress that I am in no way suggesting that acts of terrorism, as such, would be privileged if belligerent rights were applied reciprocally in the context of a justifiable extension of the war regime to the struggle against terrorism. To the contrary, acts of terrorism—the intentional killing of civilians by sub-state groups for political purposes—are prohibited means of conducting war, and may be prosecuted as such.

Nevertheless, the means by which the United States is conducting its war on terrorism undermines the legitimacy of the claim that conflict should be governed by the war regime:

This one-sided approach—claiming the legal rights associated with a state of war but refusing to recognize the full range of associated

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<sup>46</sup> The White House, Statement by the Press Secretary on the Geneva Convention (Feb. 7, 2002), *available at* <http://www.state.gov/s/1/38727.htm>.

<sup>47</sup> MICHAEL WALZER, *JUST AND UNJUST WARS* 127 (2d ed. 1992). *See also id.* at 137 (explaining that the “war convention,” i.e., the moral regime governing the means by which war is fought, “stipulates [combatants’] battlefield equality”).

<sup>48</sup> Charge Sheet ¶ 23, *United States v. Khadr* (U.S. Military Comm’n Nov. 4, 2005), *available at* <http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf>.

<sup>49</sup> Charge Sheet ¶ 21, *United States v. Hicks* (U.S. Military Comm’n June 10, 2004), *available at* <http://www.defense.gov/news/Jun2004/d20040610cs.pdf>.

<sup>50</sup> Charge Sheet ¶ 14(q), *United States v. Al Sharbi* (U.S. Military Comm’n Nov. 4, 2005), *available at* <http://www.defenselink.mil/news/Nov2005/d20051104sharbi.pdf> (charged with conspiracy in connection with a plan to use remote-control devices to detonate car bombs “against United States forces”).

restraints—undermines the justification for the United States'[] effort to move beyond positive international law and to extend the war regime to the struggle against terrorism. In the context of a conflict that does not satisfy a positivist definition of war, a state cannot justifiably invoke war powers and authorities unless it is prepared to recognize both the associated constraints and the reciprocal rights of its adversary.<sup>51</sup>

3. *Function and the Changing Form of Al-Qaeda*

The unwillingness of the Executive Branch to recognize wartime responsibilities along with wartime rights may not be the only reason for questioning the prima facie case for extending the war regime to the conflict against terrorism on functional grounds. If there were sound grounds for such an extrapolation to the conflict with al-Qaeda after September 11, 2001, it is far from clear that the justifications for doing so still pertain. In particular, it is unclear whether the entity colloquially known as “al-Qaeda” continues to exhibit the degree of organization and operational command and control of terrorist agents it did prior to the U.S.-led attack against Afghanistan. In 2004, Paul Pillar argued:

The disciplined, centralized organization that carried out the September 11 attacks is no more. Most of the group's senior and midlevel leaders are either incarcerated or dead, while the majority of those still at large are on the run and focused at least as much on survival as on offensive operations. Bin Laden and his senior deputy, Ayman al-Zawahiri, have survived to this point but have been kept on the run and in hiding, impairing their command and control of what remains of the organization.<sup>52</sup>

Pillar suggests that in the future, the “radical Islamist threat will come from an eclectic array of groups, cells, and individuals,” many of whom are “best labeled simply as jihadists, who carry no group membership card but move through and draw support from the global network of like-minded radical Islamists.”<sup>53</sup>

In a more recent essay, Bruce Reidel takes a different view and suggests that al-Qaeda has regrouped since the U.S.-led attack against Afghanistan. “Al Qaeda,” he asserts, “today is a global operation—with a well-oiled propaganda machine based in Pakistan, a secondary but independent base in Iraq, and an expanding reach in Europe.”<sup>54</sup> Although al-Qaeda possesses a “decentralized command-and-control structure,” he argues that “[i]ts leadership is intact.”<sup>55</sup> Reidel concludes that al-Qaeda is “well placed to threaten global security in the near future.”<sup>56</sup>

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<sup>51</sup> Weiner, *supra* note 1, at 150.

<sup>52</sup> Paul R. Pillar, *Counterterrorism After Al Qaeda*, 27 WASH. Q. 101, 101 (2004).

<sup>53</sup> *Id.* at 102.

<sup>54</sup> Bruce Riedel, *Al Qaeda Strikes Back*, FOREIGN AFF., May–June 2007, at 24.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

It is difficult to resolve the competing claims about whether al-Qaeda remains a coherent, albeit decentralized, group carrying out a strategy of terrorist violence directed by its leadership, or whether the most active jihadist terrorist groups are largely independent entities for whom Osama bin Laden serves principally as a “symbol[ ] of Islamic resistance.”<sup>57</sup> If there is a functional justification for extending the war regime to the fight against terrorism, however, the organized nature of the terrorist adversary is one of the principal rationales for doing so. The evolution of al-Qaeda since the U.S. military intervention in Afghanistan weakens the arguments for treating the fight against terrorism as an armed conflict, and it certainly heightens the need for scrutiny about which particular terrorist groups, cells, or individuals might justifiably be treated as targets in a war against the al-Qaeda organization that attacked the United States.

### III. HAMDAN AND NON-INTERNATIONAL ARMED CONFLICT

The discussion in the preceding Part is rooted in the premise that the conflict against terrorism does not, as a matter of positive international law, constitute an “international armed conflict.” Although the analysis draws on principles used to assess when violence in circumstances other than state-to-state conflict rises to a level of sufficient intensity to constitute “armed conflict,” I have assumed that the fighting between the United States and terrorist actors is not “armed conflict not of an international character” within the meaning of Common Article 3 of the 1949 Geneva Conventions.<sup>58</sup>

This assumption is significant. I have challenged the application of the war regime to the fight against terrorism on the grounds that the terrorist groups against which the United States is waging war are not states. But international law does recognize that conflicts between a state, on the one hand, and sub-state entities, on the other, can amount to armed conflict. Common Article 3 enumerates a limited set of protections of persons taking no active part in hostilities; these protections apply in “the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>59</sup>

Traditionally, I think it is fair to say that most international lawyers understood Common Article 3 as applying only in the context of civil or

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<sup>57</sup> *Id.*

<sup>58</sup> Each of the four 1949 Geneva Conventions regulating the humane treatment of victims of war contains an identical Article 3, which is known as Common Article 3. See First Geneva Convention, *supra* note 34, 6 U.S.T. at 3116–18, 75 U.N.T.S. at 32–34; Second Geneva Convention, *supra* note 34, 6 U.S.T. at 3320–22, 75 U.N.T.S. at 86–88; Third Geneva Convention, *supra* note 7, 6 U.S.T. at 3318–20, 75 U.N.T.S. at 136–38; Fourth Geneva Convention, *supra* note 34, 6 U.S.T. at 3518–20, 75 U.N.T.S. at 288–90 [hereinafter “Common Article 3”].

<sup>59</sup> Common Article 3, *supra* note 58, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

internal wars taking place *within* the territory of a single state.<sup>60</sup> The text of the article itself refers to conflict “not of an international character” that takes place “in the territory of one” of the parties.<sup>61</sup> This understanding is also reflected in Jean Pictet’s authoritative commentary to the 1949 Geneva Conventions:

Speaking generally, it must be recognized that the conflicts referred to in [Common] Article 3 are armed conflicts, with *armed forces* on either side engaged in *hostilities*—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.<sup>62</sup>

This conventional understanding received something of a jolt following the Supreme Court’s decision in *Hamdan v. Rumsfeld*.<sup>63</sup> There, the Court took a different view, and held that Common Article 3 applied to conflict that was “not international,” i.e., not between—“inter”—two *nations*. The Court rejected the notion that U.S. military action against al-Qaeda could not be deemed “conflict not of an international character,” even though the fighting had occurred transnationally:

The term “conflict not of an international character” is used here in contradistinction to a conflict between nations. . . . Common Article 3 . . . affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory “Power” who are involved in a conflict “in the territory of” a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the

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<sup>60</sup> See, e.g., Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* 27 FLETCHER F. WORLD AFF. 55, 58–59 (2003) (“Non-international armed conflict has historically been thought of as involving rebels *within a state* against the state or against other rebels.” (emphasis added)). *But see* Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 12 (2003) (suggesting that in the context of the post-September 11 conflict between the United States and al-Qaeda, “the only potentially applicable body of law is the law of war governing internal armed conflicts”).

<sup>61</sup> Common Article 3, *supra* note 58, 6 U.S.T. at 3518, 75 U.N.T.S. at 288. The 1977 protocol elaborating on the international humanitarian law norms applicable in such cases similarly applies to:

all armed conflicts . . . which take place *in the territory of a High Contracting Party* between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, *adopted* June 8, 1977, 1125 U.N.T.S. 609 (emphasis added).

<sup>62</sup> INT’L COMM. OF THE RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 37 (Jean S. Pictet ed., A.P. de Heney trans., 1960).

<sup>63</sup> 126 S. Ct. 2749 (2006).

phrase “not of an international character” bears its literal meaning.<sup>64</sup>

The *Hamdan* Court essentially defined the word “international” in the phrase “not of an international character” to mean “between two nations,” and not to mean “transcending the boundaries of a single state.”

The Court obliquely referred to the categorical statement in the Pictet commentary that Common Article 3 applies to conflicts that “take place within the confines of a single country.”<sup>65</sup> It stated:

Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of “conflict not of an international character,” *i.e.*, a civil war, the commentaries also make clear “that the scope of the Article must be as wide as possible.” In fact, limiting language that would have rendered Common Article 3 applicable “especially [to] cases of civil war, colonial conflicts, or wars of religion,” 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.<sup>66</sup>

I read Pictet’s exhortation that the scope of Common Article 3 “must be as wide as possible” differently than the Court. That passage in Pictet’s commentary endorses employing a liberal approach in assessing when violence is of sufficient *intensity* to qualify as an armed conflict. It does not, in my view, intimate that Common Article 3 should apply in conflicts transcending a single state’s boundaries. The context makes clear that Pictet’s call for wide application of Common Article 3 applies “in cases where armed strife breaks out *in a country*, but does not fulfil”<sup>67</sup> some of the indicative criteria developed to ascertain when violence has risen to the level of “armed conflict.” Pictet’s commentary accordingly does not seem to support the Court’s conclusion that Common Article 3 should govern transnational conflicts between a state and a non-state party.

The *Hamdan* decision regarding the application of Common Article 3 strikes me as a Pyrrhic victory for those who would like to see international law rules restrain the wide discretion the Bush administration has claimed in its war on terror. On the one hand, the Supreme Court issued a decision that takes international law seriously. A majority of the Court struck down the system of military commissions authorized by the President to try members of al-Qaeda<sup>68</sup> in part because of its failure to comply with the requirement of Common Article 3 that

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<sup>64</sup> *Id.* at 2795–96.

<sup>65</sup> INT’L COMM. OF THE RED CROSS, *supra* note 62, at 37.

<sup>66</sup> *Hamdan*, 126 S. Ct. at 2796 (citations omitted).

<sup>67</sup> INT’L COMM. OF THE RED CROSS, *supra* note 62, at 36 (emphasis added).

<sup>68</sup> Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FED. REG. 57,833 (2001).

states engaged in conflict not of an international character may not pass sentences or carry out executions against persons covered by that article “without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>69</sup>

Nevertheless, in my estimation, the Court’s decision to apply Common Article 3 to a conflict that is not an internal conflict taking place within a single country reflects, for the reasons outlined above, an erroneous interpretation of the text of the Geneva Conventions. Of much greater concern than the question of whether the *Hamdan* Court got Common Article 3 right, however, are the implications of the Court’s decision. Common Article 3 encompasses only a limited set of humanitarian protections that apply in non-international armed conflict, and more particularly to those who are “taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.”<sup>70</sup> Persons covered by Common Article 3 may not be subjected to murder, cruel treatment, or torture or humiliating and degrading treatment, and wounded and sick persons covered by Common Article 3 must be cared for.<sup>71</sup>

Common Article 3 does not, however, include the far more detailed provisions enumerated in the four Geneva Conventions that apply to protected persons covered by each of those treaties in the context of international armed conflict. For example, the rights of enemy combatants detained as prisoners of war under the Third Geneva Convention regarding such issues as conditions of internment, interrogation, medical treatment, and relations with outside world, to name just a few, do not apply to persons in the hands of the enemy under Common Article 3. As a legal matter, detainees covered by Common Article 3 are entitled to little more than the basic right to humane treatment, a standard the Executive Branch announced in 2002 it would in any event apply as a matter of policy to those detained in its war on terror.<sup>72</sup>

Still more significant is the question of the price to be paid for those in the “war on terror” who gain the limited benefits of the application of Common Article 3. The *Hamdan* Court appears to have resolved the

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<sup>69</sup> Common Article 3, *supra* note 58, 6 U.S.T. at 3518, 75 U.N.T.S. at 288. See *Hamdan*, 126 S. Ct. at 2798 (concluding that the military commission scheme created by President Bush does not meet the requirements of Common Article 3).

<sup>70</sup> Common Article 3, *supra* note 58, 6 U.S.T. at 3518, 75 U.N.T.S. at 288.

<sup>71</sup> *Id.*, 6 U.S.T. at 3520, 75 U.N.T.S. at 290.

<sup>72</sup> Memorandum from President Bush to the Vice President et al. 2 (Feb. 7, 2002) available at [http://www.pegc.us/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf) (regarding “Humane Treatment of Taliban and al Qaeda Detainees”) (“As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.”).

fundamental question explored in this Article of whether the conflict against al-Qaeda amounts to war in the affirmative. As such, the Supreme Court seems to have implicitly upheld the widely questioned assertion by the Executive Branch that the United States may wage “war” against non-state terrorist actors outside the United States. The consequences of this ruling are sweeping: the Court has arguably affirmed the asserted right of the United States to engage in extrajudicial killings of terrorists abroad, to destroy their property, and to detain them for the duration of hostilities as a prophylactic measure, with no requirement that those detained be convicted of having committed an offense against the United States.

As such, although the President initially determined that Common Article 3 did not apply to the conflict against al-Qaeda or the Taliban regime in Afghanistan,<sup>73</sup> and although the Executive Branch vigorously opposed the application of Common Article 3 to detainees like Hamdan in litigation in federal court,<sup>74</sup> it appears that the *Hamdan* Court effectively handed the Bush administration a major victory. Depending on how *Hamdan* is ultimately construed and applied, the decision may well amount to judicial endorsement of the administration’s general approach of treating the campaign against terrorist groups as armed conflict, or war, rather than as a situation covered by the traditional law enforcement approach to counter-terrorism under which the United States was obligated to comply with domestic due process and international human rights requirements.

#### IV. ENTER THE COURTS

The legacy of the *Hamdan* decision, the preceding paragraph notes, will depend on how the decision is “ultimately construed and applied.” Perhaps the central challenge that arises in the wake of *Hamdan* is to determine *who* will do the construing. Because the existence of a state of war confers extraordinary power in the Executive Branch that would not be available in peacetime, the dangers that the Executive Branch will improperly extend the scope of war regime—whether due to error,<sup>75</sup> an overemphasis on security considerations,<sup>76</sup> or abuse<sup>77</sup>—are grave. These

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<sup>73</sup> *Id.* at 1–2 (containing the President’s determination that “common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to ‘armed conflict not of an international character’”).

<sup>74</sup> Brief for Respondents at 48–49, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184).

<sup>75</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 532–33 (2004) (noting the importance of due process guarantees to guard against the “‘risk of an erroneous deprivation’ of a detainee’s liberty interest” (citation omitted)).

<sup>76</sup> *See id.* at 545 (Souter, J., concurring in the judgment) (“For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the

concerns were at the core of the Supreme Court's decision in *Rasul v. Bush* that foreign nationals detained at Guantanamo were statutorily entitled to bring habeas corpus petitions challenging the legality of their detention.<sup>78</sup> Such concerns also informed the Court's ruling in *Hamdi v. Rumsfeld* that United States citizens held in the United States as enemy combatants must be given a fair opportunity to contest the factual basis for their detention before a neutral decision maker.<sup>79</sup>

A. *Rethinking Judicial Deference to Executive Branch Views on War*

U.S. courts have generally been deferential to determinations by the Executive Branch about when a state of war exists,<sup>80</sup> even though concerns about errors or excesses in the governmental exercise of war powers might also arise in the context of traditional armed conflict. Whether such judicial deference in the context of traditional armed conflicts represents an appropriate allocation of powers among the branches of our government is a topic beyond the scope of this Article. In the context of the fight against terrorism, however, such judicial deference is misplaced. As other commentators have noted, the fight against terrorism presents qualitatively different challenges in ascertaining the scope of the war power than arise in traditional armed conflict.<sup>81</sup> At least as framed by the Bush administration, the war against terrorism knows no geographical or temporal limits. Moreover, the amorphous and clandestine character of many terrorist groups and the ambiguous nature of the ties between particular terrorist actors and the

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responsibility for security will naturally amplify the claim that security legitimately raises.”).

<sup>77</sup> *Id.* at 530 (plurality opinion) (“[A]s critical as the Government’s interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.”).

<sup>78</sup> *Rasul v. Bush*, 542 U.S.466, 484 (2004).

<sup>79</sup> *Hamdi*, 542 U.S. at 533.

<sup>80</sup> *See, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863) (“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.”); *see also* *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (“Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.”); *Ludecke v. Watkins*, 335 U.S. 160, 170 (1948) (stating that whether a “state of war” exists is a “matter[] of political judgment for which judges have neither technical competence nor official responsibility”); *The Three Friends*, 166 U.S. 1, 63 (1897) (suggesting that “it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted”).

<sup>81</sup> *See, e.g.*, Brooks, *supra* note 3, at 711–43.

terrorist organizations against which the war power may be asserted heighten the danger of vesting the Executive Branch with exclusive authority to determine how far its war powers extend. As my colleague Tino Cuéllar has noted:

[S]ome features of the current conflict make external checks more important than before. The present conflict is less bounded in terms of time and place than other conflicts . . . . Far from diminishing the importance of review, such conditions arguably make it more important. Because the theater of war is less bound by conventional limits, many of the traditional, contemporary factual circumstances indicating that someone is a combatant subject to detention may not arise. In order to strike a balance between providing flexibility for vigorous executive action in a nontraditional conflict and placing limits on authorities not bound by time and place, policymakers should develop mechanisms capable of helping executive branch decisionmakers learn from the shortcomings of previous judgments made in an information-poor environment. Enemy combatant designations in our present circumstances are likely to reap pronounced benefits from meaningful external review.<sup>82</sup>

The less conventionally bounded character of the fight against terrorism, combined with concerns about the concentration of undue power in the hands of the Executive Branch in determining the applicable boundaries, suggest that the Judicial Branch must play a more active role in determining the scope of war powers than has traditionally been the case. The *Hamdan* Court took a first step in determining that part of the legal regime applicable in wartime applies to at least some part of the conflict against terrorism. Having opened that Pandora's Box, the Judiciary must now go further, and should help determine the legal limits of the application of the war regime.

#### B. *Questions for the Courts*

##### 1. *With Which Terrorist "Powers" Are We at War?*

*Hamdan* itself, I should stress, provides scant guidance on the scope of application of the war power. In deciding that Common Article 3 applied to *Hamdan*, the Court described the relevant conflict alternatively as "the armed conflict during which *Hamdan* was captured,"<sup>83</sup> "the United States' war with al Qaeda,"<sup>84</sup> and "[t]he conflict with Al Qaeda."<sup>85</sup> It is not clear whether the conflict during which *Hamdan* was captured is the armed conflict that took place between the

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<sup>82</sup> See *Restoring Habeas Corpus: Protecting American Values and the Great Writ: Hearing Before the S. Comm. on the Judiciary* 3–4 (May 22, 2007) (responses by Mariano-Florentino Cuéllar to written questions) (on file with author) [hereinafter Cuéllar].

<sup>83</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2794 (2006).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 2795.

United States and al-Qaeda in Afghanistan, or whether it reaches violence with other terrorist entities in the broader war against terrorism invoked by the Bush administration. It is notable in this regard that at least some of those detained at Guantanamo, according to one study, are not linked to al-Qaeda, but either to the Taliban or to some other terrorist organization.<sup>86</sup> As an example, the study highlights the presence at Guantanamo of a group of at least two dozen Uighers, members of a Turkic Muslim minority group primarily located in China, who were detained after fleeing from China to Pakistan and Afghanistan.<sup>87</sup>

Having determined that a state of armed conflict may exist between the United States and “individuals associated with neither a signatory nor even a nonsignatory ‘Power’ who are involved in a conflict,”<sup>88</sup> it would be highly problematic for the Court now to defer to the Executive Branch regarding *which* of these powers are engaged in conflict with the United States for purposes of Common Article 3. Does the logic of the Court’s holding apply only to al-Qaeda, or also to other terrorist groups, such as Uigher separatists? Are members of the Jemaah Islamiya organization or the Abu Sayyaf Group, just two of forty-two entities that have been designated by the Secretary of State as foreign terrorist organizations in accordance with federal law,<sup>89</sup> also “involved in” an armed conflict with the United States for purposes of Common Article 3?

2. *What Nexus to an Enemy Terrorist “Power” Is Required for the Exercise of War Powers?*

Even if the relevant armed conflict is limited to fighting against al-Qaeda, the *Hamdan* decision also leaves unclear whether the conflict encompasses only members of al-Qaeda engaged in combat with U.S. forces in Afghanistan (where Hamdan himself was initially detained), or whether it reaches *any* “member” of al-Qaeda. A substantial number of those held in Guantanamo were detained by Pakistani authorities (although this may not be dispositive of whether they had participated in fighting in Afghanistan),<sup>90</sup> and at least six detainees are long-time residents of Bosnia who were handed over to United States forces by

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<sup>86</sup> Mark Denbeaux & Joshua Denbeaux, *Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data 2* (2006) [hereinafter Denbeaux Study], available at [http://law.shu.edu/news/guantanamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf). The report was prepared by lawyers representing two detainees at Guantanamo but is based solely on Department of Defense data.

<sup>87</sup> *Id.* at 21.

<sup>88</sup> *Hamdan*, 126 S. Ct. at 2796.

<sup>89</sup> Designations of foreign terrorist organizations are made pursuant to 8 U.S.C. § 1189(a) (2000). The list of designated Foreign Terrorist Organizations is available at <http://www.state.gov/s/ct/rls/fs/37191.htm>.

<sup>90</sup> Denbeaux Study, *supra* note 86, at 14.

Bosnian authorities after being acquitted of charges of plotting to bomb the U.S. and British embassies in Sarajevo.<sup>91</sup>

It should also be for the Judiciary, and not solely the Executive Branch, to determine the nature of the link or nexus that must be established between an individual and a non-state “power” against which the United States is engaged in armed conflict to determine whether the United States may appropriately exercise war powers such as the right to detain an enemy combatant for the duration of a conflict. According to the Denbeaux Study of detainees at Guantanamo, for instance, the United States has determined that only eight percent of the detainees were actual “fighters for” the terrorist organization with which they are affiliated; another 30 percent are deemed to be “members of” the organization.<sup>92</sup> Sixty percent of the detainees have been determined merely to be “associated with” the organization in question.<sup>93</sup>

In traditional armed conflict, mere “association” with an enemy power would not provide a legal justification for the kind of prophylactic detention to which members of the enemy’s armed forces (or others defined as prisoners of war) may be subjected. For others “associated with” an enemy party, detention powers are much more limited. For instance, the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War does envision the possibility that *nationals* of an enemy state may be interned, but only “if the security of the Detaining Power makes it absolutely necessary,”<sup>94</sup> and subject to a requirement of periodic review of the basis for internment.<sup>95</sup> Mere association with the enemy power does not itself justify detention. A proper balancing of security concerns, on one hand, and civil liberties and human rights considerations, on the other, calls for the Judiciary, and not the Executive Branch, to determine the relevant legal nexus between an individual and a terrorist group against which the United States is engaged in armed combat that must be established before war powers may be applied against that person.

### 3. *Where May War Powers Be Exercised?*

Other ambiguities of the conflict against terrorism also invite review from outside the Executive Branch to determine where and when war powers may appropriately be invoked. In terms of *geographic* limits, during conventional war, when regular units of armed forces are arrayed against one another, it is ordinarily a relatively simple task to determine the territorial scope of a conflict. The presence of the enemy’s armed forces engaged in combat operations in the territory of a third country

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<sup>91</sup> Nicholas Wood, *For Bosnia, Getting 6 Freed From Guantanamo Is a Balancing Act*, N.Y. TIMES, Oct. 21, 2004, at A5.

<sup>92</sup> Denbeaux Study, *supra* note 86, at 9.

<sup>93</sup> *Id.*

<sup>94</sup> Fourth Geneva Convention, *supra* note 34, art. 42, 6 U.S.T. at 3544, 75 U.N.T.S. at 314.

<sup>95</sup> *Id.*

provides a clear indication that that country may now be brought within the theater of war.<sup>96</sup> Whether the war against terrorism may be fought not only in Afghanistan, where al-Qaeda was based before the September 11 attacks, but also in Pakistan, or Somalia, or the Philippines, or in the United States itself, is less clear cut. The temptation for the Executive Branch to claim expansive wartime authorities on virtually a global basis militate in favor of vesting the Judiciary with greater authority to determine the limits of the geographic scope of the conflict.

4. *For How Long May War Powers Be Exercised?*

The *temporal* dimension of the conflict against terrorism also poses challenges in determining the scope of application of the war regime. As Rosa Ehrenreich Brooks has noted, “the laws of armed conflict draw a sharp distinction between armed conflict on the one hand, and the ‘cessation of hostilities’—peace—on the other hand.”<sup>97</sup> Wars end “when the opposing parties formally agree to stop fighting.”<sup>98</sup> In the conflict against terrorism generally, and even against a specific entity like al-Qaeda, there appears to be no prospect or mechanism for the enemy to agree to stop fighting. In the prevailing security climate, it seems likely that the United States will face an indefinite prospect that some actor or another will seek to engage in terrorist attacks against it. As a result, “there is no obvious point at which the U.S. will be able to declare victory and end the conflict.”<sup>99</sup>

These ambiguities give rise to a range of competing legal interpretations about when particular manifestations of claimed wartime authorities expire. Indeed, with respect to the detainees at Guantanamo apprehended during U.S. combat operations in Afghanistan, a plausible argument can be made that, as a legal matter, the conflict has already ended. Under this view, the *international* armed conflict between the United States and Afghanistan that began in October 2001 ended once the government of President Karzai was established, either as the Interim Government in December 2001 or as the Transitional Government in June 2002. At that point, the United States and Afghanistan were no longer at war. As a legal matter, the ongoing hostilities in Afghanistan are part of an internal conflict between the government of Afghanistan which is seeking, with United States assistance, to suppress an internal rebellion of residual Taliban and al-Qaeda forces. Under this view, because the legal character of the hostilities has changed, the United States may no longer assert rights with respect to detainees from

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<sup>96</sup> Under customary international law, the rules of belligerency and neutrality governed the obligations of third states that sought to stay outside the scope of an armed conflict between two other states. For a general discussion of the traditional conception of neutrality, see STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS* 191–94 (2005).

<sup>97</sup> Brooks, *supra* note 3, at 725.

<sup>98</sup> *Id.* at 726.

<sup>99</sup> *Id.*

Afghanistan derived from the existence of a state of international armed conflict.<sup>100</sup> Although the laws of war allow a state to charge an enemy combatant with crimes committed before he was detained, the legal entitlement of the United States to detain combatants on a *preventive* basis disappears once the international armed conflict has ended.<sup>101</sup>

C. *Boumediene: An Opportunity for the Courts*

The case of *Boumediene v. Bush*<sup>102</sup> provides the Supreme Court with an important initial opportunity to assert its proper role in determining the legal limits of the armed conflict recognized in *Hamdan v. Rumsfeld*. The case itself is limited to the question of whether the Military Commissions Act of 2006<sup>103</sup> validly deprived federal courts of jurisdiction over habeas corpus petitions filed by any “alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant.”<sup>104</sup> As such, the case does not invite the Supreme Court to pass on the lawfulness of the petitioners’ detention itself. Nevertheless, preserving a right of habeas corpus review provides an important mechanism for the Judiciary to review the legality of detentions on a case-by-case basis. Moreover, the knowledge on the part of Executive Branch actors that their decisions to detain enemy combatants will be subject to third party review will serve as an important restraint on unwarranted extensions of war powers, at least in the context of detentions. Preserving a third party accountability mechanism of this kind is fundamentally compatible with the American constitutional scheme of checks and balances.

Without habeas review, the Executive Branch will be vested with vast authority to engage in the potentially indefinite and unreviewable detention of non-citizens, either within or outside of the United States. Under the statutory scheme that currently regulates review of detentions, those held at Guantanamo will retain a right to seek limited judicial

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<sup>100</sup> Under the Third Geneva Convention, prisoners of war must be released and repatriated “without delay” after the cessation of active hostilities. Third Geneva Convention, *supra* note 7, art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224.

<sup>101</sup> In *Hamdi v. Rumsfeld*, the Court briefly considered the potentially indefinite nature of the petitioner’s detention under the most expansive view of the war on terror claimed by the Executive Branch. 542 U.S. 507, 520 (2004). The Court noted that the obligation to return detainees without delay upon the cessation of active hostilities under the laws of war, a requirement reflected in Article 118 of the Third Geneva Convention, did not apply in Hamdi’s case because “[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan.” *Id.* at 521. The Court’s opinion was issued in June 2004, after the legal character of those hostilities had changed. The Court did not explicitly address the question of whether the changed legal nature of hostilities affected the right of the United States to detain enemy combatants.

<sup>102</sup> 476 F.3d 981 (D.C. Cir.), *cert. granted*, 127 S. Ct. 3078 (June 29, 2007) (No. 06-1195).

<sup>103</sup> Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

<sup>104</sup> *Id.* § 7, 120 Stat. at 2636 (codified at 28 U.S.C. § 2241(e)(1)).

review of decisions by Combatant Status Review Tribunals, the administrative tribunals established beginning in 2004 to enable detainees to contest their status as enemy combatants.<sup>105</sup> As Professor Cuéllar has argued, however, the “truncated review” of Guantanamo Combatant Status Review Tribunal decisions currently provided for by statute<sup>106</sup> does not permit:

the type of case-by-case determination striking a reasonable balance between societal and governmental interests that is historically associated with review of habeas petitions. Part of the problem is with the determination procedures themselves, which establish a presumption that the government’s evidence is genuine and accurate, and deny basic protections to detainees. . . . Across-the-board constitutional determinations, by their nature, cannot reasonably be expected to take account of how factual ambiguities, legal uncertainties, and bureaucratic judgments operate in individual cases.<sup>107</sup>

Of perhaps greater concern is the status of any detainees the United States is currently holding—or may detain in the future—outside Guantanamo as enemy combatants in the exercise of its claimed wartime authorities. Section 7 of the Military Commissions Act divests federal courts of jurisdiction not only of habeas petitions brought by those detained at Guantanamo, but by *any* “alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant.”<sup>108</sup> Accordingly, the jurisdiction-stripping provisions of the statute, if upheld by the Supreme Court, would empower the Executive Branch to engage in detentions of non-Americans either inside the United States or in places outside the United States other than Guantanamo. Such persons would not be able to avail themselves of even the “truncated” judicial review of Combatant Status Review Tribunals that has been established for detainees at Guantanamo. The only review that would be available to such detainees of the

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<sup>105</sup> DefenseLink News Release, Combatant Status Review Tribunal Order Issued (July 7, 2004), *available at* <http://www.defenselink.mil/releases/2004/nr20040707-0992.html>.

<sup>106</sup> Under the Detainee Treatment Act of 2005, judicial review by the Court of Appeals for the District of Columbia Circuit is limited to consideration of:

- (i) whether the final [detention] decision [of a Department of Defense Combatant Status Review Panel] was consistent with the standards and procedures specified in [the Secretary of Defense’s Military Commission Order No. 1, dated August 31, 2005]; and
- (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(3)(D), 119 Stat. 2739, 2743.

<sup>107</sup> Cuéllar, *supra* note 82, at 8.

<sup>108</sup> Military Commissions Act of 2006 § 7, 120 Stat. at 2636 (codified at 28 U.S.C. § 2241(e)(1)).

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lawfulness of their detention would be such review as the Executive Branch, as a matter of discretion, elected to extend to them.

#### V. CONCLUSION

The ambiguities regarding the scope of the “war” against terrorism are well known. What is less settled is who will resolve them. The lack of clarity about the limits of the application of the war power, and the danger that the Executive Branch may assert war powers in circumstances beyond which they may justifiably be invoked, suggest that the Judiciary must revisit its traditional deference to the Executive Branch in matters of war. Granting the Executive the power to exercise extraordinary wartime powers in a conflict in which the boundaries of war are murky and almost infinitely elastic would dangerously tip the constitutional separation of powers in favor of the Executive Branch. Traditional judicial deference in the face of a radically non-traditional conflict endangers the civil and human rights of all those—Americans and others—against whom the war power might be invoked.