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Executive Power in a War Without End: Goldsmith, the Erosion of Executive Authority on Detention, and the End of the War on Terror

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A stylized world map in shades of blue and white, overlaid on a grid of latitude and longitude lines. The map is centered on the Atlantic Ocean.

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EXECUTIVE POWER IN A WAR WITHOUT END:
GOLDSMITH, THE EROSION OF EXECUTIVE
AUTHORITY ON DETENTION, AND THE END OF
THE WAR ON TERROR

Sandra L. Hodgkinson

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*Sandra L. Hodgkinson**

*The post-9/11 world has provided an excellent environment to examine the reach of presidential power and the constraints placed upon it by Congress and the courts. Professor Jack Goldsmith argues that controversial Bush-era detention practices were “altered and blessed” by the Congress and courts “in ways that Barack Obama—seized of the responsibilities of the presidency—found impossible to resist.” If there was such a “blessing,” it was clearly in disguise. Notwithstanding, this piece largely endorses Jack Goldsmith’s principal theory in his recent book *Power and Constraint*, and offers several other reasons for the erosion of executive authority in the area of detention issues. It also addresses this author’s view that the War on Terror is not a “War Without End” at all, thereby limiting the executive’s supposed “indefinite” ability to detain enemy combatants.*

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The post-9/11 world and our War on Terror have provided an excellent backdrop to examine the breadth and scope of presidential power and the degree to which the Constitution, external influences, and constraints within the executive branch restrain this authority. Professor Jack Goldsmith describes the role that Congress and the courts played in ultimately paving the way for President Obama to endorse previously controversial Bush-era detention practices in his new book *Power and Constraint*.¹ He argues that “Congress and [the] courts pushed back harder against the presidency than in previous wars, in the process vetting, altering and ultimately *blessing* [President Bush’s] core counterterrorism policies.”² Goldsmith claims that by 2009 the policies had been “altered and *blessed* in ways that Barack Obama—seized of the responsibilities of the presidency—found impossible to resist.”³ Having held a front-row seat on this issue inside of the government during the challenging years from 2004–2009 and through the initial transition to President Obama’s team, if there was a “blessing,” it was clearly in disguise. This short piece will largely endorse Jack Goldsmith’s principal theory and offer several other reasons for this erosion of executive authority in the specific area of detention issues. It will also address this author’s view that the War on Terror is not a “War Without End” at all, thereby limiting the executive’s supposed “indefinite” ability to detain enemy combatants.

I. JACK GOLDSMITH’S ACCOUNTABLE PRESIDENCY

Professor Goldsmith’s new book *Power and Constraint* presents excellent insights into the extremely powerful role Congress and the courts played in shaping President Bush’s detention policies from 2004–2009. The book also helps to explain how Guantanamo Bay remains open today. Two very different Presidential hopefuls, Senators John McCain and Barack Obama, both agreed in the 2008 election that it was imperative to our national security that we close the detention facility at Guantanamo Bay.⁴ Yet, even after the 2012

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1. JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012).
 2. Jack Goldsmith, *Power and Constraint: The Accountable Presidency After 9/11*, LAWFARE, <http://lawfareblog.com/power-and-constraint-the-accountable-presidency-after-911/> (Mar. 12, 2012, 7:59 AM) (emphasis added) (describing *Power and Constraint*).
 3. *Id.* (emphasis added).
 4. Peter Finn, *Guantanamo Closure Called Obama Priority*, WASH. POST, (Nov. 12, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/11/AR2008111102865.html>; *The Candidates on Military Tribunals and Guantanamo Bay*, COUNCIL ON FOREIGN RELATIONS,

election, Guantanamo Bay is not only open, but more durable than ever.

Under Goldsmith's theory, Congress and the courts shaped and ultimately "blessed" these policies into something that President Obama could endorse. This author would argue the Supreme Court's blessings came in a round-about way; however, with every ruling against the Bush Administration on detention policy, there was some element of the policy the Court quietly endorsed.

For example, in the early seminal detention case of *Hamdi v. Rumsfeld*, the Supreme Court determined that Hamdi, a U.S. citizen, had the right to challenge his enemy-combatant status before a neutral decision-maker.⁵ In the Court's opinion, Justice O'Connor suggested that the proceedings used to determine status for prisoners of war set in the Army Field Manual⁶ would have been sufficient in this case to satisfy this requirement.⁷ This suggestion became the impetus for the more structured Combatant Status Review Tribunals (CSRTs), which were much closer to these Army Field Manual provisions.⁸ While the Supreme Court effectively ruled against the Bush Administration in this case, Justice O'Connor determined that the president could detain a U.S. citizen as an enemy combatant,⁹ and supported his underlying legal framework authorizing detention under the laws of war.

The 2006 *Hamdan* case¹⁰ was another example of the Supreme Court's quiet support for the Administration's law of war framework. The Supreme Court ruled against the Bush Administration in determining that the President's Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War on

(Aug. 24, 2008), <http://www.cfr.org/world/candidates-military-tribunals-guantanamo-bay/p14751>.

5. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).
6. See DEP'T OF THE ARMY, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES, ARMY REGULATION 190-8, at 1-19 (1997), available at <http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf>. These proceedings are commonly known as "Article 5" Tribunals, taken from Geneva Convention (III). An "Article 5" Tribunal is used to determine whether an enemy prisoner is a prisoner of war when status is in doubt. *Id.* at 2.
7. *Hamdi*, 542 U.S. at 538 (stating that "military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention").
8. See Department of Defense, *Combatant Status Review Tribunal Summary* (Feb. 10, 2009) [hereinafter DoD, *CSRT Summary*], available at <http://www.defense.gov/news/csrtsummary.pdf>.
9. *Hamdi*, 542 U.S. at 509.
10. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

Terrorism, which established military commissions did not comply with Common Article 3 of the Geneva Conventions¹¹ and that the charge of conspiracy could not be tried under the laws of war.¹² However, the Court did acknowledge that when the Authorization for Use of Military Force (AUMF) activated the president's war powers, this included the authority to convene military commissions.¹³ The Court went on to explain, in significant detail and using historical war-time cases and authorities, how the military commissions established by the president's military order, as constituted, violated the international law of war (indicating that the commissions would be legitimate if they better complied with the Geneva Conventions).¹⁴ This was additional quiet support for the Bush Administration's position that the United States was in an armed conflict and that the law of war framework was appropriate. While the Supreme Court generated front-page news by repeatedly striking down aspects of the Bush Administration's policy, it quietly endorsed two critical centerpieces of that policy—law of war detention and the use of military commissions to try enemy combatants.

Congress was more vocal in its support for the Bush Administration's policies than the Supreme Court. While there was certainly criticism coming from some members,¹⁵ as a whole Congress did try and provide the authority the administration needed to continue law of war detention and military commissions. First in 2005 following the *Hamdi* decision, Congress passed the Detainee Treatment Act,¹⁶ which carried a provision stripping detainees at

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11. Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism, 66 Fed. Reg. 57,831 (Nov. 13, 2001); see also *Hamdan*, 548 U.S. at 633–34. The Court determined that Common Article 3 of all four Geneva Conventions, the basic level of treatment afforded to individuals involved in non-international armed conflicts, was applicable to our conflict with al-Qaeda, rather than the full Geneva Conventions, as al-Qaeda was not a “High Contracting Party” to the Geneva Conventions. *Id.*
 12. *Id.* at 610.
 13. See *id.* at 594–95.
 14. See *id.* at 628–29, 632.
 15. See, e.g., Albert R. Hunt, *Bush's Terror Overreach Becomes 'New Normal' Under Obama*, BLOOMBERG, (May 27, 2012), <http://www.bloomberg.com/news/2012-05-27/bush-s-terror-overreach-becomes-new-normal-under-obama.html>
 16. See Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd (2006) (prohibiting the “cruel, inhuman or degrading treatment or punishment” of detainees and eliminating federal court jurisdiction over detainees from Guantanamo Bay challenging the legality of their detention in court).

Guantanamo of any habeas corpus rights.¹⁷ Later, Congress passed the Military Commissions Act of 2006¹⁸ to satisfy the *Hamdan* Court's ruling that military commissions were not a "regularly constituted court" under Common Article 3 of the Geneva Convention. Congress later supported the Obama Administration with the Military Commissions Act of 2009,¹⁹ which added a few rights to individual subject to military commissions in line with the Obama Administration's policies.²⁰ As the Supreme Court quietly supported the executive's policies, and Congress overtly supported them, it became clear that the executive branch needed the support of the other two branches in order to accomplish its own detention policies. (Reasonable minds can differ as to whether this shows a weak executive or a strong system of checks and balances.)

Apart from the role of the courts and Congress, it was actors within the executive branch that played a large role in moving policies forward. Several colleagues in key political assignments²¹ advocated for changes from within the Bush Administration to make the detention policies more sustainable. Career government officials, who served in both the Bush and Obama Administrations, also focused on positive policy changes and over time became invested in the decisions and recommendations they had made. These personnel were a strong factor in continuing the policies across the two administrations. While there is a perception on the outside that U.S. detention policy was constructed and defended by hard core President Bush political appointees, the reality is that career officials throughout the departments played a large role in the evolution of these policies and many were ultimately convinced by the time the Obama Administration arrived that the policies had reached a decent balance between respect for human rights and due process and the need to protect our national security or were the least worst option.²²

17. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004). The provision in the Detainee Treatment Act was designed to strip the statutory habeas corpus granted to Hamdi by the Supreme Court in the *Hamdi* decision.

18. Military Commissions Act of 2006, 10 U.S.C. §§ 948a–950w (2006).

19. Military Commissions Act of 2009, 10 U.S.C. §§ 948a – 950t (2009).

20. See generally *id.* (removing, for example, the definition of "Unlawful" and "Lawful Enemy Combatants").

21. John Bellinger, National Security Council and State Department Legal Advisor, Matt Waxman, Deputy Assistant Secretary of Defense for Detainee Affairs, and Pierre Prosper, Ambassador-at-Large for War Crimes Issues are good examples.

22. Views did differ broadly on the question of whether or not to close the detention facility at Guantanamo Bay by either moving the detainees to the United States or transferring or releasing the remaining detainees to their home countries or willing third countries. There was much more generalized consensus on the law of war framework for detention and

Those who remained in place in the Obama Administration provided continuity of policy. As a career civil servant and reserve Navy JAG myself who worked the detainee issue at the National Security Council (NSC) staff, State Department and Defense Department during both Administrations, my own personal motivation for improving our detention policies into something sustainable was non-partisan. It stemmed from a view that military detention must remain a legitimate tool for battlefield commanders in times of war. It helps to keep our enemies off of the battlefield and helps us to gather timely intelligence—both of which are essential to our national security.

As a result of these personnel factors, President Obama's initial detainee-review process reached very similar outcomes as the final reviews under the Bush Administration. "High-threat detainees" were still classified as high threat, "medium-threat detainees" were still medium threat, and so on. For example, Yemenis of varying threat levels were still too dangerous to send to Yemen. Now, four years into the Obama Administration, only about eighty additional detainees have been transferred or released (approximately fifty of whom were already slated for the same disposition at the time of the transition) in contrast with more than 500 during the Bush Administration.²³ This was a key area of continuity.

Lastly, a key contributing factor to the continuity of policy across the administrations was the fact that most of the key steps needed had already been taken by the Bush Administration. Common Article 3 was applicable as a matter of law and policy to all Department of Defense detainees wherever they were held.²⁴ Military commissions had already been regularized through the Military Commissions Act of 2006 and various aspects of the process improved upon, such as hearsay evidence, confrontation, and the use of coercive statements.²⁵ Key allies were now working more closely with the Bush Administration on the detainee issue in areas like Afghanistan. Through the CSRT and Administration Review Board procedures,

the threat level of these detainees. *See* Interview with Christopher Boucek, Associate, Carnegie Endowment, Middle East Program (Nov. 24, 2008), *available at* <http://www.carnegieendowment.org/2008/11/24/closing-guantanamo-bay-options-and-decisions/z5j> (discussing the basic options for Guantanamo Bay closure).

23. Human Rights First, *Fact Sheet, Guantanamo by the Numbers*, (Sept. 10, 2012), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/U-SLS-Fact-Sheet-Gitmo-Numbers.pdf>.
24. Department of Defense Directive No. 2310.01E, The Department of Defense Detainee Program, ¶ 4.2.
25. Military Commissions Act of 2006, 10 U.S.C. §§ 948b(a), 949a(b) (2006) (establishing procedures for the use of military commissions, specifically regarding an accused's right to confront allegations against him, evidence obtained through coercion, and hearsay evidence).

more than two-thirds of the detainee population had already left Guantanamo Bay.²⁶ All of these steps taken together set the stage for President Obama to adopt the policies of his predecessor, despite the campaign promises that both he and presidential hopeful John McCain made.

II. ERODING EXECUTIVE AUTHORITY THROUGH THE NATIONAL SECURITY STAFFING PROCESS

The National Security Staff (NSS) decision-making process on the detention issue, through its desire for consensus decisions, also contributed to a weakening of executive authority on detention issues during this critical period. The National Security Act of 1947 was the original impetus for today's NSS and NSS decision-making process, which is an interagency coordination process.²⁷ During both the Bush and Obama Administrations, this interagency coordination process was used to tackle the detainee issue.²⁸

The National Security Act was originally designed to improve coordination among the various military services and the other arms of national security, such as the intelligence community,²⁹ and continues to perform this function today, although it has broadened

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26. See DoD, *CSRT Summary*, *supra* note 8 (summarizing CSRT statistics); Press Release, Department of Defense, Guantanamo Bay 2006 Administrative Review Board Results Announced, (Mar. 6, 2007), available at <http://www.defense.gov/releases/release.aspx?releaseid=10582> (showing an example of the routine departures from Guantanamo Bay due to ARBs); *Guantanamo Ten Years On: Facts and Figures*, HUMAN RIGHTS WATCH, <http://www.hrw.org/features/guantanamo-facts-figures> (last visited Jan. 10, 2013) (noting that roughly 600 of the 779 detainees that have been held at Guantanamo Bay since the September 11, 2001 attacks have been released, with another 86 currently approved for transfer).
27. See National Security Act of 1947, 50 U.S.C. § 401 (1947); *National Security Act of 1947*, U.S. DEP'T OF STATE, OFF. OF THE HISTORIAN, <http://history.state.gov/milestones/1945-1952/NationalSecurityAct> (last visited Jan. 10, 2013).
28. See National Security Presidential Directive 1, Organization of the National Security Council System, Feb. 13, 2001 [hereinafter NSPD-1]; Presidential Policy Directive 1, Organization of the National Security Council System, Feb. 13, 2009 [hereinafter PPD-1]. Presidents Bush and Obama both set forth the same basic three-level staffing process that has been in place since 1989. During the Bush Administration, the NSPD-1 set forth six specific Policy Coordination Committees (PCCs), and originally, the detainee issue was technically formed under the Democracy, Human Rights and International Operations PCC, although it ultimately became the Detainee PCC. See NSPD-1, *supra* note 28 (listing the established PCCs).
29. National Security Act of 1947, 50 U.S.C. § 401.

its scope to a relatively wide array of subjects. Today's NSS decision-making process is comprised of three levels of authority.³⁰

The first level of the process was known in the Bush Administration as the Policy Coordinating Committee (PCC)³¹ and now in the Obama Administration as the Interagency Policy Committee (IPC).³² During the Bush Administration, this interagency coordination process was increasingly used to address challenges of the detainee issue starting in 2004 and remained focused on this issue throughout the remainder of President Bush's term and the Obama Administration. For each meeting, a select group of representatives from the National Security Council staff, the Defense, State, Justice, and Homeland Security Departments, and the intelligence community would meet regularly at the Assistant Secretary or Deputy Assistant Secretary level at the White House to address the detainee issue.

The PCC and IPC participants would serve up key issues for resolution or approval at the second level, the Deputies Committee (DC),³³ which was a group of delegated Deputy or Under Secretaries of the various departments, or their designees (often department General Counsels). The DC would consider the recommendations made by the PCC or IPC but struggled to reach consensus on any particular course of action. When this happened, there were three options: (1) the Deputy National Security Advisor could adjudicate or referee among the agencies to work out differences; (2) the DC could send the PCC or IPC back to "work the issue further" or develop new recommendations; or, (3) if the DC was satisfied that sufficient work had been done and the issue was ready, it would send it up to the

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30. See NSPD-1, *supra* note 28; PPD-1, *supra* note 28. In January 2010, President Obama announced that the National Security Council (NSC) would be renamed the National Security Staff (NSS) and would merge the former National Security Council and the Homeland Security Council. See Laura Rozen, *Introducing the National Security Staff*, POLITICO, (Jan. 4, 2010), http://www.politico.com/blogs/laurarozen/0110/Introducing_the_National_Security_Staff.html. As a result, today the President Bush- and before-era NSC staff is now known as the NSS. *Id.*
31. See NSPD-1, *supra* note 28 (stating that "[t]he NSC/PCCs shall be the main day-to-day fora for international coordination of national security policy").
32. See PPD-1, *supra* note 28 (also stating that "[t]he NSC/PCCs shall be the main day-to-day fora for international coordination of national security policy").
33. See NSPD-1, *supra* note 28 ("[The DC] will also continue to serve as the senior sub-Cabinet interagency forum for consideration of policy issues affecting national security."); PPD-1, *supra* note 28 ("[The NSC DC] shall review and monitor the work of the NSC interagency process").

third and final level, the Principals Committee (PC).³⁴ Decisions could be taken at the PC or DC level based on consensus or if the national security advisor or deputy national security advisor made the decision. Ultimately, there was recourse to the National Security Council, if needed, comprised of the president and his cabinet.³⁵ Detainee issues made their way up and down the full range of meetings, but due to the contentious nature of the issue, rarely resulted in consensus decisions. The NSS decision-making process aims to achieve better “coordination” of interagency policy issues.³⁶ As a result, the National Security Advisor and Deputy National Security Advisors did not generally act decisively for fear of shutting down the views of a major department or entity in the national security arena. The President or the full National Security Council would be necessary to make major changes.³⁷

The purpose of this section is not to provide a bogged down analysis of the staff and decision-making process working on national security issues, but to take the position that the detainee issue was one which was not easily served by the existing process: it often got caught in a giant loop. The PCC/IPC would typically generate work for the DC, which would fail to reach consensus on the recommendations and send it back again for a do over or modification. If the DC did forward an issue to the PC, it was often with a split recommendation involving key agencies on opposite sides of the recommendation. Favoring consensus over hard choices, the PC and DC generally continued to send work back down the PCC/IPC level, often failing to make the hard decisions needed to break the logjam on Guantanamo Bay or other detainee issues. As a result, the courts, Congress, and other external actors had more time and space to weigh into, and wade into, the detainee issue in the way Professor Goldsmith depicts.

As a strong believer of the need for a strong interagency coordination mechanism, this is not meant to be a criticism of the U.S. government. In fairness, a great deal of credit should be given to both administrations for assembling such high-level teams to examine an issue as small as the detainee issue, particularly given that few people in the government were raising their hands enthusiastically to take the issue on. Furthermore, any decisive course of action was

34. See NSPD-1, *supra* note 28 (“[The PC is the] senior interagency forum for consideration of policy issues affecting National Security. . . .”); PPD-1, *supra* note 28.

35. See *National Security Council*, THE WHITE HOUSE, <http://www.whitehouse.gov/administration/eop/nsc> (last visited Jan. 10, 2013).

36. See text accompanying notes 28 and 31.

37. See *National Security Council*, *supra* note 35 (listing the regular attendees of NSC meetings).

truly difficult, with staunchly opposing teams on either side of the following types of issues: (1) whether to close Guantanamo Bay or affirmatively stand behind its existence; (2) whether to shutter or overhaul military commissions; (3) whether to transfer back medium- and high-threat individuals into uncertain security environments or leave them in detention; and (4) whether to scrap military detention altogether and rely solely on Article III courts.³⁸ Without extremely decisive leadership at the top ruling in favor of one side or against another, the NSS decision-making process was unable to address these contentious issues early on and then back action with solid messaging and commitment to the policies adopted. Instead, a continued evaluation and re-evaluation of the same issues in both administrations resulted in a weaker executive as the Supreme Court and Congress whittled away executive authority by acting in areas where the president could have acted by exercising his national security authorities.

One could argue that the Bush Administration did act decisively by establishing a detention facility at Guantanamo Bay (rather than keeping the detainees closer to the battlefield in Afghanistan) and in deciding that Article 5 tribunals would not be used for members of al-Qaeda or the Taliban—two rapid decisions that were challenged directly for years to come. Perhaps this had a chilling effect on the desire of the Bush Administration to remain decisive on detainee issues in following years. It became easy to predict the public reaction to the status quo. It is likewise possible that the Obama Administration was able to blame the former administration for the ills of Guantanamo long enough that the impetus to act decisively was less critical. Unfortunately, that time the administration lost ended up costing the president the ability to close Guantanamo Bay during the only window of time possible—the first four months of his administration, before the political opposition began to build.

Whatever the reasons on either side, the NSS decision-making processes as they existed were not nimble enough to force decisive or bold changes. And while extremely hardworking staff-level and senior leadership wrestled with these very difficult issues week after week, often making slow but steady improvements to the overall process, the bleeding on Guantanamo Bay continued from outside, from abroad, and from the other branches of government. The net result was a series of national security laws and policies that did not all originate with the executive and had the practical effect of eroding executive authority.

38. See generally Sarah Mendelson, *Closing Guantanamo: From Bumper Sticker to Blueprint* (Ctr. for Strategic Int'l Stud., Draft Rep't, (July 15, 2008), available at http://csis.org/files/media/csis/pubs/080715_draft_csis_wg_gtmo.pdf (describing the various options available for the Obama Administration in moving forward on Guantanamo).

III. THE “WAR ON TERROR” IS NOT A “WAR WITHOUT END”

There is no such thing as a war without end. All wars come to an end, even though it may be hard to predict when that end will be. When President Woodrow Wilson first coined the phrase “the war to end all wars” when speaking to Congress about World War I³⁹ or when President Roosevelt referred to World War II as the “Long War,”⁴⁰ neither president could easily predict when the war would end. At some level of destruction, some level of defeat, or some level of fighting fatigue, one way or another, wars end. In a classic state-on-state conflict, the typical ways to end a war are through a peace treaty, defeat, or surrender.⁴¹ World War I ended with the Treaty of Versailles,⁴² while World War II ended with Germany and Japan surrendering.⁴³ Generally, upon conclusion of the war, it is presumed that most, if not all, members of the country’s regular armed forces will lay down their arms and comply with the outcome of the war. This, however, is not always the case. Many modern conflicts have evolved into protracted insurgencies when non-government controlled forces are not ready to give up the fight, and are able to continue to fight. The recent example of Iraq is illustrative, as Iraqi insurgents have continued to destabilize the country long after the official war has ended.⁴⁴ Northern Ireland is another example of a country where the fighting continued long after the peace process was in place.⁴⁵

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39. See Doug Griffin, *To End All Wars*, DISSIDENT VOICE, <http://dissidentvoice.org/2012/07/to-end-all-wars/> (July 24, 2012) (describing how Woodrow Wilson is most closely associated with the famous phrase stemming from his speech to Congress on April 2, 1917).
40. See President Franklin Delano Roosevelt, Fireside Chat (Dec. 9, 1941) (speaking to the American people about the “long war” ahead following the attack on Pearl Harbor), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=16056>.
41. See DAN REITER, *HOW WARS END 1* (2009).
42. *World War 1 Ended with the Treaty of Versailles June 28, 1919*, AMERICA’S LIBRARY, http://www.americaslibrary.gov/jb/jazz/jb_jazz_ww1_1.html (last visited Jan. 10, 2012).
43. See Surrender of Italy Germany and Japan, World War II, Instruments of Surrender, Public Papers and Addresses of the President, 79th Cong., 1st Sess., DOC Y1.1/2 10949 (Oct. 4, 1946), at 3, 39–44, 107.
44. See Yasir Ghazi & Rod Nordland, *Iraq Insurgents Kill at Least 100 in Cascade of Attacks*, N.Y. TIMES, July 23, 2012, at A4 (setting forth details of al-Qaeda in Iraq’s recent attacks in the ongoing insurgency); *US Would Not ‘Admit’ the Insurgency in Post-War Iraq*, BBC (Dec. 15, 2009), http://news.bbc.co.uk/2/mobile/uk_news/politics/8412317.stm.
45. Guy Chazan, *Insurgency Rises in Northern Ireland*, WALL ST. J., (Feb. 23, 2012), <http://online.wsj.com/article/SB1000142405274870418810457583263160945250.html> (describing how continued attacks undermine

There is a path to victory for the United States in this war against the transnational non-state actor al-Qaeda, even if every member of al-Qaeda does not lay down his arms in surrender or acknowledge defeat. There are four steps on this path to victory.

First, the United States and its allies must kill or capture the senior al-Qaeda leadership. We are doing that. The point regarding kill *or* capture is critical, as a state cannot have a policy that requires it to kill an enemy who surrenders.⁴⁶ There must always be a detention option available, which is why military detention must remain a legitimate tool for use in this and future wars.⁴⁷ Drone strikes are a principal tool being used to kill senior al-Qaeda leadership who are not encountered directly on the traditional kinetic battlefield and are a legitimate use of force under the law of armed conflict.⁴⁸

Second, the United States and its allies must cut off al-Qaeda's methods of travel. We have been working with allies consistently on this issue since September 11, 2001, through a vast array of terrorist watch lists, which identify terrorists and prevent them from traveling, particularly to areas where they may pose a threat to United States, allied forces, or other personnel.⁴⁹

Third, the United States and its allies must cut off al-Qaeda's funding sources. We have been working with allies to freeze assets associated with terrorism in banks around the world, while at the same time creating new laws that criminalize financial support to

fragile peace process); *see also* Douglas Woodwell, *The "Troubles" of Northern Ireland: Civil Conflict in an Economically Well-Developed State*, in UNDERSTANDING CIVIC WAR 161, 178–79, 182 (Paul Collier & Nicholas Sanbanis eds., 2005) (discussing the violence in Northern Ireland).

46. *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].
47. *See id.* art. 5 (providing for tribunals and detention in cases where “doubt arise[s]” as to a person’s status).
48. *See* Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Speech at the Annual Meeting of the American Society of International Law, (Mar. 25, 2010) *available at* <http://www.state.gov/s/1/releases/remarks/139119.htm> (setting forth the position that the drone strikes are a legitimate use of force under the law of war).
49. *See, e.g.,* *Sharing with International Partners*, INFO. SHARING ENV’T, <http://ise.gov/sharing-international-partners> (last visited Jan. 10, 2013) (describing efforts to combat terrorism by facilitating the two-way flow of information and terrorist watch-lists between the U.S. and its international partners).

terrorists.⁵⁰ The United Nations has called on countries to cut off terrorist means and methods of travel, and their funding.⁵¹

Lastly, the United States and NATO allies will have to continue efforts to “win the peace” in Afghanistan and elsewhere through continued counter-insurgency efforts, rehabilitation and reintegration programs, and developmental assistance and funding.⁵²

Achieving these objectives will not make every member of al-Qaeda and their affiliated groups lay down their weapons, but it will make their ability to act on a global scale in the way that they did on 9/11 and the years following much more difficult. They will become, in essence, splintered or localized terrorist groups, with the ability to certainly carry out harm and terrorist threats on a more localized scale, but not on the same global scale on which al-Qaeda has operated. As a result, they will be more similar to the other terrorist groups in the world that the United States is currently not at war with, such as Hamas, Hezbollah, and FARC, despite the fact that al-Qaeda could continue to be a threat, as these groups have been for decades and continue to be.⁵³ However, the organization will no longer be a terrorist organization which behaves like a state actor engaged in

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50. See FIN. ACTION TASK FORCE, TERRORIST FINANCING 28 (2008), available at <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Terrorist%20Financing%20Typologies%20Report.pdf> (recommending that countries “develop and implement targeted financial sanctions regimes that identify, freeze the assets of, and prohibit making funds necessary to deprive terrorists and their support networks without delay”).
51. Eben Kaplan, *Tracking Down Terrorist Financing*, COUNCIL ON FOREIGN RELATIONS, (Apr. 4, 2006), <http://www.cfr.org/international-crime/tracking-down-terrorist-financing/p10356>. See generally FINANCIAL ACTION TASK FORCE, *supra* note 50, at 27–31.
52. See Major General Phil Jones, *Reintegration & Reconciliation*, COIN COMMON SENSE, Jan. 2011, at 1, available at <https://ronna-afghan.harmonieweb.org/CAAT/Shared%20Documents/COIN%20Common%20Sense%20Issue%206.pdf> (describing the Afghanistan Peace and Reintegration Program’s purpose to “bring former fighters back to their communities with honor and dignity so that they can live peaceful and productive lives”).
53. See, e.g., *Terrorist Groups: Hamas*, NAT’L COUNTERTERRORISM CTR., <http://www.nctc.gov/site/groups/hamas.html> (last visited Jan. 10, 2013) (describing the localized terrorist group and its anti-Israel attacks); Nicholas Kulish, *Despite U.S. Fear Hezbollah Moves Openly in Europe*, N.Y. TIMES, Aug. 16, 2012, at A1 (noting that some analysts say Hezbollah “pose[s] less of a risk” than Al Qaeda); Sibylla Brodzinsky, *FARC and Colombian Government Launch Peace Talks*, THE GUARDIAN (UK), Oct. 18, 2012 <http://www.guardian.co.uk/world/2012/oct/18/farc-colombian-government-peace-talks> (reporting on negotiations between the rebel forces and the Colombian government after fifty years of regional conflict)

a military conflict, and as a result, the United States will no longer be at war.

As a matter of law and policy, the United States has been at war with al-Qaeda, the Taliban, and their affiliates and associates responsible for the attacks of 9/11.⁵⁴ The early policy statements of the Bush Administration that we were in a “War on Terror” were policy statements, rather than statements of a legal nature,⁵⁵ as the war was always confined to the groups that “planned, authorized, committed or aided” the 9/11 attacks as per the AUMF.⁵⁶ Some have argued that both the Bush and Obama Administrations have fairly liberally interpreted this authority.⁵⁷ It is the “warlike” characteristic of al-Qaeda’s attack and the AUMF that supported the U.S. response that gave both administrations the legitimacy that they did have to treat members of these forces as enemy combatants, killing them on the battlefield and in other types of targeted strikes. When al-Qaeda is no longer behaving like a military enemy, we should continue to treat them as we treat other terrorist groups around the world—using traditional methods of law enforcement.

Achieving this military victory over al-Qaeda has another extremely significant implication for the United States. It will have to begin an orderly drawdown of the detainees remaining at Guantanamo Bay, consistent with the international law of war.⁵⁸ In Iraq, during 2008–2009, the United States was able to drawdown nearly 25,000 detainees predominantly from the facilities in Camp Bucca and Camp Cropper over the course of about eighteen months

54. See Authorization for the Use of Military Force, S.J. Res. 23, 170th Cong. § 2 (2001) (enacted) [hereinafter AUMF] (granting the President authority to use all “necessary and appropriate force” against those whom he determined “planned, authorized, committed or aided” the attacks of September 11).

55. John B. Bellinger, III, *Legal Issues in the War on Terrorism*, 8 GER. L.J. 735, 738 (2007) (“We do not believe we are in a legal state of war with every terrorist group everywhere in the world.”).

56. AUMF, *supra* note 54, § 2.

57. See Emptywheel, *John Bellinger: If the War is Illegal, Just Change the Law*, FIREDOGLAKE, (Nov. 27, 2010, 7:05 AM) <http://emptywheel.firedoglake.com/2010/11/27/john-bellinger-if-the-war-is-illegal-just-change-the-law> (arguing that Republicans are seeking “more and more war powers”); see also Jonathan Masters, *Revisiting a Stale Counterterrorism Law*, COUNCIL ON FOREIGN RELATIONS, (Sep. 1, 2011) <http://www.cfr.org/counterterrorism/revisiting-stale-counterterrorism-law/p25742> (John Bellinger commented that “it is becoming increasingly difficult for the Obama administration to justify some of its counterterrorism operations under this limited statutory authority”).

58. See Geneva Convention III, *supra* note 46, art. 118 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).

as the conflict was ending.⁵⁹ While it was a challenging process, it was achieved in an orderly and timely manner consistent with the laws of war. There are some people that would argue that we should keep the detainees at Guantanamo Bay locked away forever, or at least as long as one or every one of these detainees poses a threat to us.⁶⁰ The detainees at Guantanamo Bay are not being held under a security detention framework, which would make their individual threat level relevant to an individualized determination. Instead, they are held under the law of war, so when that war is over, they must be repatriated or released.⁶¹ They may be tried for crimes they committed during the war, either at military commissions, Article III courts, or by host nations.⁶² Unless some new security detention framework is developed, which seems unlikely at present, the detainees who have not been tried and convicted must be repatriated or released consistent with every other war in history.

IV. CONCLUSION

Professor Goldsmith has offered a plausible and realistic explanation for how President Obama ended up not just inheriting, but perpetuating, the same detention policies as the Bush Administration. Fortunately for President Obama, Guantanamo Bay has started to fade into the background noise and did not even surface in this past year's presidential election as an issue. It is hard to argue, however, that the net effect of the detention policies from the last ten years has left us with a stronger executive when it comes to detention issues. The two other branches of government have weighed in heavily to assert their view on how the executive should use battlefield detention in the ongoing conflict with al-Qaeda and in so doing have eroded the role of the executive branch. More decisive national security decision-making processes, and perhaps, a media and external audience that was as kind to President Bush on detention issues as it is to President Obama could have mitigated this effect.

59. Alissa J. Rubin, *Out. Now What?* N.Y. TIMES, AT WAR BLOG, (Feb. 13, 2009), <http://atwar.blogs.nytimes.com/2009/02/13/out-now-what/>; *World Briefing/Iraq: U.S. Shuts Main Detention Facility*, L.A. TIMES, (Sep. 18, 2009), <http://articles.latimes.com/2009/sep/18/world/fg-briefs18.S2>.

60. Cf. Edwin Meese III, *Guantanamo Bay Prison is Necessary*, CNN, (Jan. 11, 2012, 2:46 PM), <http://www.cnn.com/2012/01/11/opinion/meese-gitmo/index.html> (arguing Guantanamo Bay is necessary for “keeping [terrorists] off the battlefield and allowing for lawful interrogations”).

61. Geneva Convention III, *supra* note 46, art. 118.

62. *See id.* arts. 118, 119 (acknowledging that prisoners of war charged with criminal offenses may be detained until the end of the court proceeding or their sentence if convicted).

However, in the literature that ultimately captures this period in time, there may be a storyline that shows how two strong but different presidents both agreed in the end that military detention has to be a critical tool in our fight against al-Qaeda—at least if we hope to win. And we can win this war. To believe that this is a war without end is to admit defeat from the start, and this author believes we are nearing the endgame. Echoing the famous line from Casablanca, “we will always have Guantanamo” has been heard in the halls of Washington. The reality is we will always have the legacy of Guantanamo Bay, but the detainees who we do not try at some point will be long gone before the “reasonable drawdown” period after we win this war with al-Qaeda.