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DANGER ANALYSIS APPLIED TO LAW OF WAR DETENTION FOR GUANTANAMO BAY DETAINEES

by Brian Griffin

INTRODUCTION

The creation of Guantanamo Bay Detention Camp (“Guantanamo Bay”) was arguably one of the greatest mistakes that the United States Government has ever made. This perspective is shared by many, including the Marine Major General that opened Guantanamo Bay, Michael Lehnert.¹ The Bush Administration, subsequent to September 11, 2001, created Guantanamo Bay out of necessity.² The current President, Donald Trump, feels that it remains a necessity, considering his recent Executive Order and comments on social media.³ The detention of individuals at Guantanamo Bay has raised questions regarding the application of the United States Constitution to both citizens and non-citizens of the United States of America. Further, the detention of individuals who were, or are currently, held without charges at Guantanamo Bay has raised substantial questions about the prisoners’ rights to habeas corpus and due process.

Al-Qaeda, a broad-based militant Islamist organization, claimed responsibility for the September 11, 2001 attack, which remains the largest terrorist attack on the United States to date.

¹ Sutton, Jane, *U.S. General Who Opened Guantanamo Prison Says Shut It Down*, Reuters (last visited May 1, 2018), <https://www.reuters.com/article/us-usa-guantanamo/u-s-general-who-opened-guantanamo-prison-says-shut-it-down-idUSBRE9BB0QM20131212>; Terrill, Marshall, *'Guantanamo Was A Huge Mistake,' Says ASU Law Professor And Former Homeland Security Counsel*, Arizona State University (last visited May 1, 2018), <https://law.asu.edu/content/guantanamo-was-huge-mistake-says-asu-law-professor-and-former-homeland-security-counsel>.

² Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (Congress authorized the Bush Administration to use “all necessary and appropriate force.”)

³ *Al Bihani v. Trump et. al.*, Petitioners’ Reply in Support of Motion for Order Granting Writ of Habeas Corpus, 2 (March 9, 2018) (“Its opposition studiously avoids any mention of the President’s past statements regarding Guantánamo—though they unmistakably indicate no one will leave the prison during his tenure...”); Exec. Order 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011).

On September 14, 2001, Congress passed the Authorized Use of Military Force (“AUMF”), authorizing the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided in the Sept. 11, 2001 attacks.”⁴ Guantanamo Bay was originally constructed for the purpose of detaining the members of al-Qaeda, the Taliban or associated forces in a location outside of the United States. Some of the prisoners detained in Guantanamo Bay are considered “enemy combatants” in connection with the conflict between the United States and al-Qaeda, the Taliban and associated forces. The authority to detain said prisoners was derived from “laws of war.”⁵ In Hamdi v. Rumsfeld, the Supreme Court articulated that the AUMF allowed for the detention of enemy combatants who were within the scope of the AUMF.⁶ The Bush Administration also argued that the President has sufficient authority to detain enemy combatants under Article II of the United States Constitution. The Supreme Court, in Hamdi, did not reach the question as to whether the President has this power under Article II, as it accepted the Government’s alternative theory that Congress had provided sufficient authority for the President to detain enemy combatants under the AUMF.⁷ To date, the Supreme Court’s decision in Hamdi is the controlling law. Lower courts, such as the Court of Appeals for the District of Columbia Circuit and the District Court for the District of Columbia have heard cases to answer questions derived from the Supreme Court’s analysis in Hamdi.

⁴ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

⁵ Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004) (plurality opinion) (“It is a clearly established principle of the law of war that detention may last no longer than active hostilities.”).

⁶ Id. at 523 (“To be clear, our opinion only finds legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, in fact, an enemy combatant”).

⁷ Id. at 517 (“We do not reach the question whether Article II provides such authority, however, because we agree with the Government’s alternative position, that Congress has in fact authorized Hamdi’s detention, through the AUMF”).

In 2011, President Barack Obama signed Executive Order 13,492.⁸ This Order provided that “Secretary of Defense shall coordinate a process of periodic review of continued law of war detention for each detainee.”⁹ Following the Executive Order, the 2012 National Defense Authorization Act (“NDAA”) was passed.¹⁰ The NDAA created procedural methods by which to accomplish the requirements in the Executive Order. A Periodic Review Board (“PRB”) was authorized to review detainee files on a three (3) year basis.¹¹ A file may also be reviewed in the event that there is a question raised as to the individual’s detention.¹² The PRB does not determine the legality of the detention. Rather, it determines whether the continued detention is necessary to protect against a threat to the nation’s security.¹³

Forty-one (41) prisoners remain in detention in Guantanamo Bay today.¹⁴ These prisoners have been detained a total of 16 years, and there is no pending release date. All of the prisoners have previously filed petitions for the granting of a writ of habeas corpus.¹⁵ Five (5) of the forty-one (41) prisoners have already been cleared by the Periodic Review Board (“PRB”) for release from detention, although no such release is scheduled.¹⁶ The Center for Constitutional Rights (“CCR”) recently filed a petition on behalf of eleven (11) of the forty-one (41) prisoners in an action known as Al Bihani v. Trump et. al.. The prisoners claim that the continuing detention

⁸ Exec. Order 13492, 74 Fed. Reg. 4897 (January 27, 2009).

⁹ Ibid.

¹⁰ See National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1023 (2011)

¹¹ Exec. Order 13,567, 76 Fed. Reg. 13,277, § 3(b) (Mar. 7, 2011).

¹² Id. at § 3(c)

¹³ Al Bihani v. Trump et. al., Respondents’ Opposition to Petitioners’ Motion for Order Granting Writ of Habeas Corpus, (Feb. 16, 2018).

¹⁴ Al Bihani v. Trump et. al., Motion for Order Granting Writ of Habeas Corpus, 9 (January 11, 2018); Roehm, Scott, *Today’s Mass Guantanamo Habeas Petition and the Ongoing Human Cost of America’s Battle Lab*, (January 11, 2018), <https://www.justsecurity.org/50888/todays-mass-guantanamo-habeas-petition/>.

¹⁵ Id.

¹⁶ Id.

violates the AUMF and is arbitrary detention in violation of due process. The prisoners request that the court use its broad equitable powers to grant the writ of habeas corpus.¹⁷

On January, 11, 2018, the Center for Constitutional Rights filed a Motion for Order Granting Writ of Habeas Corpus.¹⁸ On January 18, 2018, Judge Kollar-Kotelly ordered the Government to provide information relevant to the considerations made by the Periodic Review Board and Guantanamo Task Force, as to why the prisoners continue to be detained.¹⁹ On January 22, 2018, the Muslim, Faith-Based, And Civil Rights Community Organizations filed an amicus brief, which depicts detention under President Trump as a continuation of the anti-Muslim animus.²⁰ The brief further states that the United States Government allegedly continues to operate with this animus.²¹ Also, on January 22, 2018, Due Process Scholars filed an amicus brief claiming that continued detention is unconstitutional as it is a violation of due process.²² On January 24, 2018, an amicus brief was filed by the Center for Victims of Torture, arguing that continued detention at Guantanamo Bay is “human suffering.”²³ On January 30, 2018, President Donald Trump signed an Executive Order revoking “Section 34 of Executive Order 13492 of January 22, 2009 (Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities), ordering the closure of detention facilities at U.S. Naval Station Guantánamo Bay.”²⁴ On February 16, 2018, the U.S. Government provided a

¹⁷ *Id.*

¹⁸ *Al Bihani v. Trump et. al.*, Motion for Order Granting Writ of Habeas Corpus (January 11, 2018).

¹⁹ *Al Bihani v. Trump et. al.*, Scheduling and Procedures Order, (January 18, 2018).

²⁰ *Al Bihani v. Trump et. al.*, Brief of Amici Curiae Muslim, Faith-Based, and Civil Rights Community Organizations in Support of Petitioners’ Motion for Order Granting Writ Of Habeas Corpus, (January 22, 2018).

²¹ *Id.*

²² *Al Bihani v. Trump et. al.*, Brief of Proposed Amici Curiae Due Process Scholars in Support of Petitioners, (January 22, 2018).

²³ *Al Bihani v. Trump et. al.*, Brief of *Amicus Curiae* Center for Victims of Torture in Support of Petitioners’ Habeas Corpus Motion, (January 24, 2018).

²⁴ Exec. Order 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011).

brief in opposition to the to the Petitioners' motion for order granting the writ of habeas corpus.²⁵ On March 9, 2018, the CCR filed a reply brief.²⁶ The increasing litigation is leading to further development of the legal framework for law of war detention.

The detention of the eleven petitioners in Al Bihani v. Trump et. al. has raised the specific legal question as to whether the continued detention of prisoners in Guantanamo Bay constitutes a violation of due process rights afforded to those individuals.²⁷ There is substantial literature that argues that the detention of individuals in Guantanamo Bay is indefinite and therefore a violation of due process.²⁸ Due Process Scholars in the amicus brief and the CCR in Al Bihani v. Trump et. al., indicate that indefinite detention is based primarily on time of the detention of the individual. The Government, in its response brief, argues that the Supreme Court precedent provides that the detention of individuals can last through the cessation of hostilities and that the authority to do so is vested in the AUMF. The Government further argues that the detention is not indefinite, as it is conditioned on the cessation of hostilities.²⁹ For these reasons, the government rejects the argument that time of detention should be considered.³⁰

This paper does not entirely submit to the Government's position. Dangerousness of the detainee, rather than time of detention, should be considered in whether the detention is arbitrary and therefore a violation of due process. Detention should not be conditioned solely on the cessation of hostilities, as the Government argues. The analysis argued in this paper is a

²⁵ Al Bihani v. Trump et. al., Respondents' Opposition to Petitioners' Motion for Order Granting Writ of Habeas Corpus, (Feb. 16, 2018).

²⁶ Al Bihani v. Trump et. al., Petitioners' Reply in Support of Motion for Order Granting Writ of Habeas Corpus, (March 9, 2018).

²⁷ See Al Bihani v. Trump et. al., Motion for Order Granting Writ of Habeas Corpus (January 11, 2018); see also Al Bihani v. Trump et. al., Brief of Proposed Amici Curiae Due Process Scholars in Support of Petitioners, (January 22, 2018).

²⁸ Id.

²⁹ Al Bihani v. Trump et. al., Respondents' Opposition to Petitioners' Motion for Order Granting Writ of Habeas Corpus, 23 (Feb. 16, 2018).

³⁰ Id. at 38 & 39

compromise between the Government’s analysis and the analysis of the Due Process Scholars and Center for Constitutional Rights. Analyzing an individual’s dangerousness is also more relevant to the purpose of law of war detention than the time of detention analysis.

Part I of this paper will focus on current analysis of law of war detention and habeas corpus petitions specific to Guantanamo Bay prisoners. Part II will focus on a proposed legal analysis that does not depend on the time of detention, but rather on the dangerousness of the detainee while hostilities continue. Part III of this paper discusses a suggested process by which a detainee’s potential dangerousness could be determined and appealed through the judiciary, if necessary. Part IV of this paper will discuss the reason that an analysis of time of detention is insufficient for the purpose of law of war detention. Part V is the conclusion, providing a summary of the analysis and implementation as to the reasons that an analysis as to individuals dangerousness is more appropriate than time of detention in determining whether detention is arbitrary and therefore in violation of due process.

I. DEVELOPMENT OF THE ANALYSIS OF LAW OF WAR DETENTION

Habeas corpus in Latin is translated to mean “that you have the body.”³¹ The writ of habeas corpus is considered the “Great Writ,” due to its importance in society, which is well established in history.³² The purpose of the Great Writ is to require a jailor to produce cause as to the detention of a prisoner.³³ If the jailor fails to produce sufficient cause for holding a prisoner,

³¹ Legal Information Institute, https://www.law.cornell.edu/wex/habeas_corpus (last visited May 1, 2018).

³² *Siegel, Ashley E.* Some Holds Barred: Extending Executive Detention Habeas Law Beyond Guantanamo Bay, *Boston University Law Review*, Vol. 92:1405, 1408. (July 2012).; Center for Constitutional Rights, <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/faqs-what-habeas-corpus> (last visited May 1, 2018); *Rasul v. Bush*, 542 U.S. 466, 473, (2004) (citing *Williams v. Kaiser*, 323 U.S. 471, 484, n. 2, 89 L. Ed. 398, 65 S. Ct. 363 (1945)) (“Habeas corpus is, however, “a writ antecedent to statute, . . . throwing its root deep into the genius of our common law.”)

³³ *Id.*

the prisoner is ordered to be released. Individuals that are detained have a right to the writ of habeas corpus, which can only be suspended in accordance with the Suspension Clause of the United States Constitution. The Suspension Clause states that the writ shall not be suspended “unless when in Cases of Rebellion or Invasion the public Safety may require it.”³⁴ The writ of habeas corpus is codified in 28 U.S.C. §2241-2255.

Eleven prisoners in Guantanamo Bay are petitioning the courts in Al Bihani v. Trump et. al. to require the Government to show cause as to their detention.³⁵ Although the Government has produced the required cause, the prisoners claim that the Government’s cause is legally insufficient.³⁶ The prisoners claim that their detention is indefinite, and therefore is a violation of due process.³⁷

One nation opposing another in war is considered International Armed Conflict. The United States was accustomed to this style of war prior to September 11, 2001. Where a non-state is involved in conflict with a State or another non-state the conflict is considered a Non-International Conflict. The conflict between the United States and Al-Qaeda, the Taliban and associated forces was considered tantamount to “war,” despite the force opposing the U.S. being a terrorist organization, rather than a foreign nation.³⁸ The conflict has also been referred to as the “global ‘war on terror’”.³⁹ Today, the United States defines the conflict with al-Qaeda as “the non-international armed conflict between the United States and its coalition partners against

³⁴ U.S. Const. art. I, § 9, cl. 2

³⁵ Al Bihani v. Trump et. al., Motion for Order Granting Writ of Habeas Corpus, 9 (January 11, 2018).

³⁶ Id.

³⁷ Id.

³⁸ *Azmy, Baher*, Executive Detention, Boumediene, and the New Common Law of Habeas, *Iowa Law Review*, 449, (2012). (“In defining detention authority, these courts imported principles from international armed conflicts and concluded that members of al-Qaeda and the Taliban are tantamount to uniformed members of the “armed forces who the Government can target under the Geneva Conventions and, according to Hamdi, detain to prevent return to the battlefield.”)

³⁹ Hafetz, Jonathan, *Habeas Corpus, Judicial Review, and Limits on Secrecy in Detentions at Guantanamo*, *CARDOZO PUB. LAW, POLICY & ETHICS J.*, Vol. 5:127, 139-140 (2005).

al Qaeda, the Taliban, and associated forces.”⁴⁰ Both international and non-international conflicts are governed by laws of war, which are further referenced below. These laws are the International Humanitarian Law, the Geneva Convention and the Human Rights Law.

After the September 11, 2001 attack on the United States, Congress passed the AUMF, allowing the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided in the Sept. 11, 2001 attacks.”⁴¹ Detentions under the AUMF rest on the following premises: (1) the United States is engaged in an armed conflict of global scope with al-Qaeda and associated forces, (2) Congress has empowered the president to detain those who are part of, or who have substantially supported, those enemy forces, and (3) the detention of covered individuals may last for the duration of the conflict.⁴²

The landmark cases for law of war detention in relation to Guantanamo Bay may be collectively referred to as the “Enemy Combatant Triad.”⁴³ The Triad consists of Hamdi v. Rumsfeld, Rasul v. Bush and Hamdan v. Rumsfeld.⁴⁴ In 2004, the Supreme Court decided the case Hamdi v. Rumsfeld.⁴⁵ Yaser Hamdi was an American citizen captured on the battlefield of Afghanistan in the conflict between the United States and al-Qaeda, the Taliban and associated forces.⁴⁶ He was classified as an “enemy combatant” and detained by the United States

⁴⁰ Al Bihani v. Trump et. al., Respondents’ Opposition to Petitioners’ Motion for Order Granting Writ of Habeas Corpus, 1 (Feb. 16, 2018).

⁴¹ AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001)

⁴² Hafetz, Jonathan, Detention Without End?: Reexamining the Indefinite Confinement of Terrorism Suspects Through the Lens of Criminal Sentencing, UCLA Law Review, 61 UCLA L. Rev. 326 (2014).

⁴³ *Azmy, Baher*, Executive Detention, Boumediene, and the New Common Law of Habeas, Iowa Law Review, 449, (2012).

⁴⁴ Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006);

⁴⁵ Hamdi at 509.

⁴⁶ Id.

Government. Hamdi filed for a writ of habeas corpus.⁴⁷ The Supreme Court in Hamdi accepted the government's proposed definition of the term "enemy combatant," defining enemy combatant as an individual who was "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States".⁴⁸ The Court found that Hamdi could be held as an enemy combatant pursuant to the "laws of war," as informed by the AUMF.⁴⁹ Further, the Court acknowledged that enemy combatants may be held until the cessation of active hostilities between the opposing forces in light of the Congressional authority provided in the AUMF.⁵⁰ The Supreme Court held that a citizen held in the United States as an enemy combatant must be afforded due process rights consisting of the right (1) to be provided notice of the reason for detention and (2) to have an opportunity to refute the reasons for detention (3) in front of a neutral decision-maker.⁵¹

Consistent with the decision in Hamdi, Guantanamo Bay Prisoners petitioned for orders granting the writ habeas corpus to defend against their jailing. The Government argued that there was no jurisdiction, as detainees were held outside territory where the United States possessed

⁴⁷ Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

⁴⁸ Id. at 526.

⁴⁹ Id.

⁵⁰ Id. at 520-521

It is a clearly established principle of the law of war that detention may last no longer than active hostilities. See Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3406, T. I. A. S. No. 3364 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities"). See also Article 20 of the Hague Convention (II) on Laws and Customs of War on Land, July 29, 1899, 32 Stat 1817 (as soon as possible after "conclusion of peace"); Hague Convention (IV), *supra*, Oct. 18, 1907, 36 Stat 2301 ("conclusion of peace" (Art. 20)); Geneva Convention, *supra*, July 27, 1929, 47 Stat 2055 (repatriation should be accomplished with the least possible delay after conclusion of peace (Art. 75)); Paust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 *Harv. Int'l L. J.* 503, 510-511 (2003) (prisoners of war "can be detained during an armed conflict, but the detaining country must release and repatriate them 'without delay after the cessation of active hostilities,' unless they are being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences" (citing Arts. 118, 85, 99, 119, 129, Geneva Convention (III), 6 U. S. T., at 3384, 3392, 3406, 3418)).

⁵¹ Id. at 533 ("We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.").

formal sovereignty.⁵² The Supreme Court heard Rasul v. Bush in 2004.⁵³ The main question presented in this case was whether federal courts could hear habeas corpus cases from non-citizen detainees in Guantanamo Bay.⁵⁴ Rasul was detained as an enemy combatant and petitioned for an order granting the writ of habeas corpus.⁵⁵ The Court found that detainees at Guantanamo Bay could apply for habeas corpus and the federal courts could hear these cases.⁵⁶ This led to numerous filings in the federal district courts that would not have otherwise been possible without the Supreme Court's decision in this case. These cases have been further clarifying law of war detention⁵⁷ and the holding set forth in Hamdi.

The Supreme Court in Hamdan v. Rumsfeld, addressed the question of whether the trial by military commission was authorized in the Constitution. The Court determined that the military commission did not comport with the laws of the United States Uniform Code of Military Justice (UCMJ) or the Geneva Convention.⁵⁸ This brought more claims to the federal courts that were no longer able to be brought to military commissions.

The Government then attempted to have Congress eliminate the jurisdiction found in the Court's decision in Rasul. Congress passed the Detention Treatment Act ("DTA"), which

⁵² Rasul, 542 U.S. at 475-476 (Respondents' primary submission is that the answer to the jurisdictional question is controlled by our decision in *Eisentrager* . . . On this set of facts, the Court concluded, "no right to the writ of *habeas corpus* appears.").

⁵³ Rasul v. Bush, 542 U.S. 466 (2004).

⁵⁴ Id.

⁵⁵ Id. at 471-472.

⁵⁶ Id. at 485 ("What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand these cases for the District Court to consider in the first instance the merits of petitioners' claims.")

⁵⁷ While some cases clarify rulings, create confusion. See generally Awad v. Obama, 608 F.3d 1, 391 U.S. App. D.C. 79 (D.C. Cir. 2010) and Anam v. Obama, 696 F. Supp. 2d 1, 4 (D.D.C. 2010) (both cases holding that danger was not a consideration in the detention of enemy combatants; Basardh v. Obama, 612 F. Supp. 2d 30, 33-35 (D.D.C. 2009) (rejecting the government's argument that it could necessarily hold detainees until the end of hostilities irrespective of the threat each individual detainee presently posed).

⁵⁸ Hamdan v. Rumsfeld, 548 U.S. 557, 653 (2006) ("In light of the conclusion that the military commission here is unauthorized under the UCMJ")

eliminated the jurisdiction for Guantanamo detainees.⁵⁹ In 2008, the Supreme Court heard petition for a writ of habeas corpus was applied for by a detainee, Lakhdar Boumediene.⁶⁰ The Government argued that the U.S. Constitution did not apply to the non-citizen detainees in Guantanamo Bay.⁶¹ The Supreme Court furthered its decision in Rasul, by deciding in Boumediene v. Bush that the Suspension Clause “has full effect” in Guantanamo Bay, despite its location outside U.S. borders.⁶²

The Supreme Court determined in the cases above that the federal courts have jurisdiction to hear habeas corpus cases. The Court further found that the U.S. Constitution applies to the detainees held in Guantanamo Bay.

Today, lower courts, such as the United States Court of Appeals for the District Court of Columbia Circuit and the District Court for the District of Columbia continue to hear cases to further clarify the Supreme Court’s analysis in Hamdi. The definition of enemy combatant was redefined to relate closer to the AUMF. The enemy combatant definition accepted was “‘an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners,’ or the modified definition offered by the government that requires that an individual ‘substantially support’ enemy forces.’”⁶³

The lower courts, such as the District Court and the United States Court of Appeals for the District of Columbia Circuit, have made numerous holdings on more particular areas not answered by the Supreme Court decision. These cases clarify certain analysis or specific

⁵⁹ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739 (codified at 42 U.S.C. §§ 2000dd-2000dd-1)

⁶⁰ Boumediene v. Bush, 553 U.S. 723 (2008).

⁶¹ Id.

⁶² Id. at 771, 128 S. Ct. 2229, 2262 (“We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay”).

⁶³ Al-Bihani v. Obama, 590 F.3d 866, 872 (2010).

questions surrounding law of war detention, including (1) the handling of evidence presented by the Government⁶⁴, (2) the required standard to prove an individual is “part of” al-Qaeda⁶⁵, (3) determination as to whether dangerousness of a detainee is applicable in detention⁶⁶, (4) the limitations of the Government’s detention authority under the AUMF⁶⁷, (5) determining tests to assess for determining who is “part of al-Qaeda” or the Taliban,⁶⁸ and (6) determining when hostilities have ceased.⁶⁹

Law of war detention is controversial, as its definition, purpose and process are largely indeterminable from legal precedent.⁷⁰ Scholarly literature on the subject, including amicus briefs provided in connection with the CCR court filing of a mass habeas corpus petition noted above, rely on sources that are not directly related to currently laid foundation of legal precedent,

⁶⁴ Al-Adahi v. Obama, 613 F.3d 1102, 392 U.S. App. D.C. 135 (D.C. Cir. 2010) (showing district court error in handling Government evidence)

⁶⁵ Bensayah v. Obama, 610 F.3d 718, 391 U.S. App. D.C. 333 (D.C. Cir. 2010) (holding that evidence presented was insufficient to show that the detainee was ‘part of’ al-Qaeda)

⁶⁶ Awad v. Obama, 608 F.3d 1, 391 U.S. App. D.C. 79 (D.C. Cir. 2010) and Anam v. Obama, 696 F. Supp. 2d 1, 4 (D.D.C. 2010) (both cases questioning the danger analysis and determining that lower courts may not make this decision under current precedent; Basardh v. Obama, 612 F. Supp. 2d 30, 33–35 (D.D.C. 2009) (rejecting the government’s argument that it could necessarily hold detainees until the end of hostilities irrespective of the threat each individual detainee presently posed).

⁶⁷ Al-Bihani v. Obama, 590 F.3d 866, 872–73 (D.C. Cir. 2010) (describing the scope of the government’s detention authority under the Authorization for Use of Military Force (AUMF)).

⁶⁸ Salahi v. Obama, 625 F.3d 745, 751–52 (D.C. Cir. 2010) (utilizing functional test, rather than formal test to determine who is part of al-Qaeda);

⁶⁹ Al-Alwi v. Trump, 236 F. Supp. 3d 417, 420 (D.D.C. 2017).

⁷⁰ Id.; As one example, Hamdi provides the following articulation of how courts should proceed in enemy combatant hearings. The instructions are difficult to follow and there is no further clarification. This leaves the lower courts to guess what procedures to follow.

Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant.

such as criminal detention of aliens and juvenile detention.⁷¹ Thus, the limited authority discussed herein is the lens through which enemy combatant detention under the AUMF must be viewed.

This Part provided the legal precedent set forth for law of war detention today. The following Part provides an analysis that this paper argues should be adopted in future cases.

II. DANGEROUSNESS AS A LIMITATION ON DETENTION

The CCR argues that time of detention cannot be indefinite, as detention would then violate due process.⁷² The Government argues that detention of enemy combatants can last until the cessation of active hostilities. This Part discusses that dangerousness of detainees should be considered in whether the detention is arbitrary and in violation of due process.

The Supreme Court held in Hamdi that individuals classified as enemy combatants that are held pursuant to the AUMF may be detained based on laws of war, as informed by the AUMF.⁷³ The Supreme Court stated that “it is a clearly established principle of the law of war that detention may last no longer than active hostilities.”⁷⁴ Detention was argued to be limitless in geography, as an enemy combatant could be located anywhere in the world at any given time, due to the global nature of the war.⁷⁵ Defining a conflict broadly can result in a broad basis for

⁷¹ The legal sources cited to in Brief of Proposed Amici Curiae Due Process Scholars in Support of Petitioners (Jan. 22, 2018) are Zadvydas v. Davis, 533 U.S. 678 (2001), Foucha v. Louisiana, 504 U.S. 71, 80 (1992)); The Motion For Order Granting Writ Of Habeas Corpus (Jan. 11, 2018) cites to numerous sources as well, such as Zadvydas, Clark v. Martinez, 543 U.S. 371, (2005), and United States v. Salerno, 481 U.S. 739 (1987).

⁷² Al Bihani v. Trump et. al., Motion for Order Granting Writ of Habeas Corpus, 20 (January 11, 2018) (“First, detention without charge or trial of this length, which is still without foreseeable end and potentially permanent, violates the Due Process Clause’s durational limits on detention”).

⁷³ Hamdi, 542 U.S. at 520-521

⁷⁴ Id.

⁷⁵ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001)

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist

detention. The conflict with al-Qaeda was also, at the outset, understood to have the potential for prolonged detention.⁷⁶ Today, the Government argues that enemy combatants may continue to be detained under law of war detention until the cessation of active hostilities.⁷⁷ The Government further alleges that the conflict with al-Qaeda continues today.⁷⁸ Despite conflicting opinions as to whether hostilities in the conflict with al-Qaeda remain active,⁷⁹ the Government has continued to detain prisoners in Guantanamo Bay for over fifteen (15) years.

The phrase “cessation of active hostilities” is referred to commonly.⁸⁰ This paper argues dangerousness of the detainee should be analyzed to determine whether the detention is purposeful, rather than arbitrary. The determination as to whether an individual is dangerous should be conducted through the Periodic Review Boards, which should be reviewable by the judiciary. Since the PRB is already fully functional, the review of the PRB is the only process that must be amended to comport with the danger analysis.

A. DANGER ANALYSIS

This Section argues that dangerousness of the detainee should be assessed to determine whether the detention of enemy combatants is purposeful. Arbitrary detention is a violation of due process. If it became clear that a detainee is no longer dangerous to the security of the United

attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons;

Rumsfeld v. Padilla, 542 U.S. 426, 456, (2004) (“the President determined that respondent is an ‘enemy combatant,’ that he is ‘closely associated with al Qaeda, an international terrorist organization with which the United States is at war,’”)

⁷⁶ Hafetz, 61 UCLA L. Rev. 326 at 348

⁷⁷ Al Bihani v. Trump et. al., Respondents’ Opposition to Petitioners’ Motion for Order Granting Writ of Habeas Corpus, 2 (Feb. 16, 2018).

⁷⁸ Id.

⁷⁹ Al-Alwi v. Trump, 236 F. Supp. 3d 417, 420 (D.D.C. 2017); Al-Bihani v. Obama, 590 F.3d 866, 869 (2010))

⁸⁰ See Hamdi, 542 U.S. at 520-521

States of America, the detention becomes purposeless and would therefore be a violation of due process.

The Supreme Court, in *Hamdi*, provides that the Executive may detain individuals classified as enemy combatants in accordance with the law of war, through the Congressionally granted power in the AUMF.⁸¹ This detention may last until the cessation of active hostilities.⁸² The Government submitted its opposition to the motion for order granting writ of habeas corpus in *Al Bihani v. Trump et. al.* and explained that the purpose of its detention is to prevent return of the enemy to the battlefield.⁸³ The Government further explained “[L]ongstanding law-of-war principles and “common sense” dictate that “release is only required when the fighting stops.”⁸⁴ The Government argues that the detention of these prisoners was not arbitrary, since “continued detention still serves the purpose justifying it: to prevent Petitioners’ return to the battlefield.”⁸⁵ Despite the foregoing, the Government’s analysis fails to include the entirety of the purpose behind law of war detention. The limit, as articulated by the Government, on detention is the cessation of active hostilities, but this limit is not the purpose of detention. Dangerousness of the individual must be a factor in determining whether the detention is purposeful, rather than arbitrary.

The prevention of danger is an inherent purpose of law of war detention. Where the Government argues that detention may continue through the cessation of active hostilities, the Government fails to mention that the full purpose behind this detention is to prevent the detainee from returning to the field of battle “*and taking up arms once again.*”⁸⁶ Continued detention

⁸¹ See *Hamdi*, 542 U.S. at 509-534.

⁸² *Id.* at 520-521

⁸³ *Al Bihani v. Trump et. al.*, Respondents’ Opposition to Petitioners’ Motion for Order Granting Writ of Habeas Corpus, 24-25 (Feb. 16, 2018); *Al-Bihani*, 590 F.3d at 874;

⁸⁴ *Id.*

⁸⁵ *Id.* at 39

⁸⁶ *Hamdi* 542 U.S. at 518 (emphasis added).

necessary to avoid “constantly refresh[ing] the ranks” of enemy forces.⁸⁷ Though the Supreme Court does not explicitly provide that the reason for detention is to prevent the release of a dangerous detainee, it is nevertheless implied by the meaning of the phrases “taking up arms once again” and “refreshing the ranks.” The implication is that an enemy combatant detainee that would not “take up arms” or “refresh the ranks” upon release is obviously not a danger, and therefore may be released. Thus, the Supreme Court in Hamdi has used ambiguous statements that lead to the logical conclusion that detention of the enemy combatant is purposeless if the individual is not a danger upon release. For this reason, detention until the cessation of active hostilities is purposeless from the time that the individual would no longer take up arms once again or refresh the ranks.

In 2009, Judge Huvelle of the District Court for the District of Columbia issued an opinion in support of this analysis. Judge Huvelle stated "the AUMF does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining the battle."⁸⁸ The determination as to whether an individual may continue to be detained is for the purpose stated in Hamdi, in accordance with the Congressionally granted power through the AUMF. Despite the “power” of this particular opinion, it has been distinguished and criticized by the Court of Appeals for the District of Columbia Circuit.⁸⁹

The Government opposes the viewpoint that a determination should be made as to

⁸⁷ Al Bihani v. Trump et. al., Respondents’ Opposition to Petitioners’ Motion for Order Granting Writ of Habeas Corpus, 14 (Feb. 16, 2018).

⁸⁸ Basardh v. Obama, 612 F. Supp. 2d 30, 33–35 (D.D.C. 2009)

⁸⁹ Adham Mohammed Ali Awad v. Obama, 646 F. Supp. 2d 20, 24 (D.D.C. 2009)

I acknowledge the power of Judge Huvelle's argument in Basardh v. Obama, 612 F.Supp.2d 30, 34 (D.D.C. 2009), that "the AUMF does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining battle," but I decline to follow it in this case and have not considered whether or to what extent the continued detention of Awad supports' the AUMF's self-stated purpose of "prevent[ing] . . . future acts of international terrorism").

whether an individual is dangerous.⁹⁰ The Government uses legal precedent set forth by lower courts interpreting the Supreme Court’s decision in Hamdi to support its argument.⁹¹ In citing authority for its viewpoint, the Government uses the determination made in Awad v. Obama, that dangerousness is not a consideration and that individuals may be detained as enemy combatants until the cessation of hostilities.⁹² However, for the foregoing reasons, the detention of enemy combatants is meaningless without the individual being a danger upon release.

In Awad, the Court of Appeals for the District of Columbia Circuit cites to a particular determination made in the case Al-Bihani v. Obama.⁹³ Al-Bihani argued that the conflict in which he was detained is different than that of the current conflict.⁹⁴ He argued that the active hostilities of which he was a participant were ceased and subsequent battles were separate “hostilities.”⁹⁵ In response, the Court found that the determination as to the differentiation between the terms “active hostilities” and “conflict” or “state of war” was not intended to mean that the “hostilities” are a battle, rather than a war.⁹⁶ The court then found that ““The Geneva Conventions require release and repatriation only at the “cessation of active hostilities.””⁹⁷ This is the context in which the Court made its decision in Al-Bihani, and the analysis did not proceed with a discussion of dangerousness. The holding of the court in Al-Bihani references only that one battle does not constitute the termination of hostilities. The argument that this paper brings to light is that the detention would be arbitrary if the individual did not present a danger upon release. These are different viewpoints. The Court, in Awad, forecloses any mention of danger,

⁹⁰ Al Bihani v. Trump et. al., Respondents’ Opposition to Petitioners’ Motion for Order Granting Writ of Habeas Corpus, 25-26 (Feb. 16, 2018).

⁹¹ Id. at 26.

⁹² Id.

⁹³ Awad v. Obama, 608 F.3d 1, 11 (2010); Al-Bihani v. Obama, 590 F.3d 866, 874 (2010).

⁹⁴ Id. (“Al-Bihani contends the current hostilities are a different conflict”)

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Id.

despite the difference in the arguments presented.⁹⁸ The argument that dangerousness should be a consideration for the release of detainees should not be foreclosed by the Court's analysis in Al-Bihani, or in Awad in reliance thereof.

The Government contends that it may hold individuals until the cessation of hostilities.⁹⁹ However, the Government's actions and words portray that it also considers danger in its own analysis as to whether the detention is no longer required. The Government's words indicate that the purpose of detention is based on the dangerousness of the detainee. The Government's definition of "cessation of hostilities" includes a danger analysis. The Government noted in its brief that hostilities do not end until al-Qaeda "unconditionally surrendered, or no longer poses a continuing threat to the United States warranting hostilities against it, or has been destroyed to such an extent that it cannot engage in hostilities against the United States."¹⁰⁰ The Government contends that an individual may be detained until al-Qaeda ceases to be a threat.¹⁰¹ It does not follow that detention of an individual who is not a danger could be arbitrarily detained for the duration in which al-Qaeda remains a danger, despite that individual not being a danger upon release. The alternative interpretation of the Government's definition of the cessation of active hostilities is that the individual may be released if the individual would not contribute to that threat presented by al-Qaeda.

⁹⁸ Awad v. Obama, 608 F.3d 1, 11 (2010)

Awad next argues that the district court erred in denying his petition without a specific factual finding that Awad would pose a threat to the United States and its allies if he were released. Again, Al-Bihani forecloses this argument. Al-Bihani makes plain that the United States's authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities. Awad again attempts to insert uncertainty into this court's prior holding where there is none. Whether a detainee would pose a threat to U.S. interests if released is not at issue in habeas corpus proceedings in federal courts concerning aliens detained under the authority conferred by the AUMF.

⁹⁹ Al Bihani v. Trump et. al., Respondents' Opposition to Petitioners' Motion for Order Granting Writ of Habeas Corpus, 23 (Feb. 16, 2018).

¹⁰⁰ Id. at 30.

¹⁰¹ Id. at 29 & 30

Further, the Government concedes in its own brief that the Geneva Convention allows for release of those individuals that are “seriously wounded and sick prisoners of war because they are no longer likely to take part in hostilities against the Detaining Power.”¹⁰² The Supreme Court, in *Hamdi*, held that “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”¹⁰³ The Supreme Court anticipated circumstances that would cause the purpose of detention to change. These could be injuries,¹⁰⁴ replacement of the position the detainee previously held in the organization, old age, and more. The wounded individuals that would not refresh the ranks of the enemy are the prime example of the individuals that should be released, as they present no danger to the United States. The circumstances of these individuals have likely unraveled.¹⁰⁵ Continuing to hold those individuals would otherwise be arbitrary detention. This means that individuals who are not likely to take part in hostilities, and are therefore no longer a danger, should be released. While the laws of war only contemplate this matter in terms of injury, it is nevertheless reason to support that dangerousness of the individual should be considered and that detention should not be based solely upon the cessation of hostilities. There is no limitation on the number of years that a detainee may be held in the laws of war. The analysis of the danger that a detainee imposes is therefore less attenuated to law of war detention than an analysis of a limitation of the time of detention.

¹⁰² *Id.* at 25

¹⁰³ *Hamdi*, 542 U.S. at 521.

¹⁰⁴ *Al Bihani v. Trump et. al.*, Respondents’ Opposition to Petitioners’ Motion for Order Granting Writ of Habeas Corpus, 25 (Feb. 16, 2018).

What the treatise actually says is that “the Third Geneva Convention requires the repatriation of **seriously wounded and sick prisoners of war** because they are no longer likely to take part in hostilities against the Detaining Power.” 1 Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* 345 (2005) (emphasis added).

¹⁰⁵ *Al Bihani v. Trump et. al.*, Petitioners’ Reply in Support of Motion for Order Granting Writ of Habeas Corpus, 23 (March 9, 2018).

B. THE ROLE OF PERIODIC REVIEW BOARDS IN DANGER ANALYSIS

The Government's words imply that danger is in fact a factor in an analysis as to whether detention is arbitrary, as explained in Section A. In addition, the actions of the Government insinuate the same. The Government has a Periodic Review Board to determine whether a detainee is a threat. The analysis as to whether detainees are dangerous is already regularly performed by the Government. In 2011, President Barack Obama signed Executive Order 13,492, which required a process whereby detainee files could be reviewed.¹⁰⁶ The 2012 NDAA provided a process wherein the United States Government would review the detention of enemy combatants every three (3) years to determine dangerousness.¹⁰⁷ This process today is known as the Periodic Review Board. Pursuant to the Executive Order, the PRB's purpose is to assess whether "continued custody of a detainee is necessary to protect against a significant threat to the security of the United States." Accordingly, if the individual is not a threat, the individual may be released, charged with a crime or transferred.¹⁰⁸ While PRB is not currently required by due process, the Government's actions in creating these review boards and the determination made are worthy of note, as they show that the Government conducts its own analysis as to whether the individual is a danger. The Government states that a PRB determination that the individual could be released was not considered "a decision that the detainee poses no threat or risk of recidivism. Rather, a designation as eligible for transfer merely reflected a judgment that the threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in

¹⁰⁶ Exec. Order 13492, 74 Fed. Reg. 4897 (January 27, 2009).

¹⁰⁷ *Id.*; *Al Bihani v. Trump et. al.*, Respondents' Opposition to Petitioners' Motion for Order Granting Writ of Habeas Corpus, 4 (Feb. 16, 2018).

¹⁰⁸ See National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1023 (2011) (determination of the PRB should include "the likelihood the detainee will reestablish ties with al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States")

the receiving country.”¹⁰⁹ Again, regardless of the outcome of the PRB decision, the Government indicates that it regularly reviews the dangerousness of the individual. This means that detention, in some manner, is based on the dangerousness of the individual and pays significant deference to consider detainee release. Therefore, if an individual is no longer dangerous, even during active hostilities, the individual must be released, as the detention would otherwise be arbitrary. In sum, from the inception of the PRB, many detainees in Guantanamo have been released because they were later believed to not pose a threat.¹¹⁰

Dangerousness must be a factor in considering whether detention is a violation of due process. Continued detention is necessary to prevent a return of the battlefield to avoid constantly refreshing the ranks of enemy forces and the taking up of arms against the United States. However, if the individual detained is no longer a threat, the detention becomes purposeless. If, even during active hostilities, an individual is no longer dangerous, continued detention would be arbitrary.¹¹¹

C. DANGER IS SUFFICIENT WITHOUT A “SPECIAL CIRCUMSTANCE”

Due Process Scholars argue in the amicus brief that detention based on dangerousness alone, is insufficient to detain individuals in accordance with due process.¹¹² The detention, the brief argues, must contain some “special circumstance” in addition to dangerousness.¹¹³ The brief cites legal precedent rooted in immigration detention and detention of individuals with mental

¹⁰⁹ *Al Bihani v. Trump et. al.*, Respondents’ Opposition to Petitioners’ Motion for Order Granting Writ of Habeas Corpus, 4 (Feb. 16, 2018) (internal quotations omitted).

¹¹⁰ See Matthew C. Waxman, Administrative Detention of Terrorists: Why Detain, and Detain Whom?, 3 J. NAT’L SECURITY L. & POL’Y 1, 29–30 (2009)

¹¹¹ *Al Bihani v. Trump et. al.*, Respondents’ Opposition to Petitioners’ Motion for Order Granting Writ of Habeas Corpus, 25 (Feb. 16, 2018).

¹¹² *Al Bihani v. Trump et. al.*, Brief of Proposed Amici Curiae Due Process Scholars in Support of Petitioners, (January 22, 2018).

¹¹³ *Id.* at 8

disabilities.¹¹⁴ Supreme Court jurisprudence in this area consists of holdings where a “special circumstance” is required, in addition to dangerousness, to detain individuals.¹¹⁵ The case law cited in the amicus brief, however, is not in line with the cases referenced in Part I. For this reason, the amicus brief does not fully accomplish its goal of convincing readers that the legal precedent set forth should govern law of war detention. This argument also does not comport with the purpose of the detention.

The purpose of law of war detention is unique. Detention of enemy combatants is for the purpose explained in Hamdi: “The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.”¹¹⁶ The detention is therefore not for the purpose of punishment, rehabilitation, prevention of dangerousness alone, or detention due to citizenship concerns. The purpose of law of war detention is specifically to prevent dangerous individuals from threatening the nation’s security. The detention of enemy combatants is not a law enforcement function, but a counter-terrorism or military function. No “special circumstance” should be required to prevent those who have already supported a conflict against the United States from returning to the battlefield.

Although there have been compelling arguments made to combine principals of criminal sentencing and principles of the detention of terrorism suspects under the AUMF¹¹⁷, there is no present parallel to the requirement for enemy combatant detention to criminal detention. The purpose of the detention must be until the cessation of hostilities, or – as this paper argues – until the individual is no longer dangerous enough for the detention to be purposeful. If individuals

¹¹⁴ Id. at 8-14

¹¹⁵ Id.

¹¹⁶ Hamdi, 542 U.S. at 521

¹¹⁷ Hafetz, Jonathan, Detention Without End?: Reexamining the Indefinite Confinement of Terrorism Suspects Through the Lens of Criminal Sentencing, *UCLA Law Review*, 61 *UCLA L. Rev.* 326 (2014).

were to be released upon detention, due to lack of a “special circumstance” that justifies the detention, then the Government would be required to return dangerous individuals to the battlefield during the conflict simply because the Government’s proof may be difficult to provide.¹¹⁸ Specifically, the Supreme Court found that hearsay evidence, banned under the Rules of Evidence, may be accepted by the courts in habeas corpus enemy combatant cases, as it may be the only reasonable and reliable evidence that the Government could provide. It is common sense that this release would then be contrary to the purpose of the detention of enemy combatants. Dangerous individuals should continue to be held during hostilities until either the cessation of active hostilities or until the individual is no longer dangerous enough to be purposefully detained, whichever occurs first. The only additional “special circumstance” could be the active hostilities in law of war detention. There is no other purpose in which a “special circumstance” could be present in the unique nature of law of war detention.

If the danger analysis were to be instituted, the CCR and the detainees it represents, may be concerned that dangerousness is difficult to determine. The Supreme Court must articulate a standard of dangerousness is appropriate to prevent indefinite detention. Regardless of any ambiguity in a standard of dangerousness determined, the analysis of dangerousness is more appropriate than a standard for the limitation of time of detention.

III. TIME OF DETENTION IS AN INSUFFICIENT ANALYSIS

The Due Process Scholars argue in the motion for order granting the writ of habeas corpus that the Supreme Court’s jurisprudence has defined “meaningful durational limitations” on detention.¹¹⁹ The meaningful durational limitation is a period of time in which detention would

¹¹⁸ Hamdi, 542 U.S. at 533 (discussing Government’s ability to introduce hearsay evidence).

¹¹⁹ Al Bihani v. Trump et. al., Brief of Proposed Amici Curiae Due Process Scholars in Support of Petitioners, 14 (January 22, 2018).

arguably become arbitrary. The amicus brief cites the seventeen (17) day time period for accused juvenile delinquents¹²⁰ and a six-month limitation on detention of presumed dangerous immigrants.¹²¹ By arguing that the detention in immigration and juvenile are synonymous, the CCR and Due Process Scholars argue that a time period should be placed on law of war detention. This argument encourages the Supreme Court to provide a limit on detention by determining a number of years in which detention becomes a violation of due process.

Limiting the time of detention of an individual is not applicable to the purpose of law of war detention, nor is it compatible with the current limitations on law of war detention. The remedy to resolve the concern of indefinite detention would be to limit the number of years that the detention can last. To select a number of years in which detention would become arbitrary would be incongruous with the cessation of active hostilities requirement. Law of war detention lasts until the cessation of active hostilities.¹²² This is the current time limit on the detention. By its very nature, law of war detention is otherwise indefinite as the detention period is not known at any point during the detention. Active hostilities may last one year or one hundred years, and it is subject to the will of the parties to the conflict. So long as the cessation of hostilities remains the only method by which detention is limited, individuals could very well be detained for the entirety of their lives. However, by imposing an additional, single time limit on all detentions, the Supreme Court would be providing an arbitrary limit to prevent arbitrary detention.

To decide when hostilities have ceased is a matter for lower courts decide. It is also a “political decision.”¹²³ An arbitrary time limit selected would not be suitable for all conflicts

¹²⁰ Id.

¹²¹ Id.

¹²² Hamdi, 542 U.S. at 521

¹²³ Al-Alwi v. Trump, 236 F. Supp. 3d 417, 420 (D.D.C. 2017) (quoting Al-Bihani v. Obama, 590 F.3d 866, 869 (2010))

collectively. The Supreme Court would be required to determine the time limit on detention across the board to all cases of enemy detention, rather than on a case-by-case basis. Limiting detention would not be proper without a case-by-case analysis. In the case of certain detainees, a number of years in detention does not mean that the detainee is no longer a danger. A more accurate criterion would be a consideration of the danger that the detainee imposes upon release. For example, a lowly foot soldier may not remain a danger upon ten (10) year detention, whereas a high-level executive in al-Qaeda may remain a danger beyond ten (10) years in detention. If ten (10) years was the limit imposed to prevent arbitrary detention, the executive would then be released while being a danger. The executive would therefore be refreshing the ranks of enemy forces and taking up arms once again, contrary to the purpose of law of war detention. Conversely, if the lowly foot soldier ceased being a danger (possibly due to an illness or being seriously wounded), then the individual could remain in detention for additional years until the ten (10) year timeline has been reached if hostilities did not cease prior to that time. For these reasons, placing a time limit on detention is not feasible in the context of law of war detention.

Time itself is not the determinative factor. Instead the determinative factors should be the dangerousness of the detainee and whether the hostilities have ceased. Through the passage of time, some individuals become less dangerous while others do not. Lowly foot soldiers fighting for al-Qaeda may not desire to return to the battlefield after 15 years in detention, especially if old age, injuries, or other impairments have prevented their ability to be a foot soldier. However, a highly positioned executive may desire to return to al-Qaeda with every skill that the individual possessed at the time of detention after 15 years in detention. It would be impractical to impose a bright line rule preventing detention for a certain number of years.

Time is a critical measurement. While the simple passage of time may eliminate the reason for the detention of an enemy combatant, it is not time alone that is responsible. Time is a measurement, not a cause. Throughout time, there are certain variables that may eliminate the purpose of detention. Time itself, however, is not the sole reason behind detention becoming arbitrary. If the Supreme Court were to accept the position that individuals can be detained, despite not presenting a danger, the Supreme Court would be certifying that arbitrary detention is acceptable. The Supreme Court should not accept the arguments that the simple passage of time should be the reason for release. It should consider factors that change during the course of time and adjust the standard of dangerousness to control the determination as to whether the enemy combatant should continue to be detained.

IV. INSTITUTING THE DANGER ANALYSIS

This paper argues that dangerousness is a factor to consider whether detention violates due process. There is opportunity to institute the danger analysis in the already existing Periodic Review Boards. The Supreme Court or Congress could expand the method by which the analysis is instituted. While there are many different methods to implement this analysis, this Part argues that the Government should utilize methods already in existence to determine whether a detainee is dangerous.

The PRB makes a determination as to whether a detainee is a threat to the United States.¹²⁴ If the PRB determines that the detainee is not a threat, then the detainee may be released.¹²⁵ Alternatively, the PRB may decide to continue detention, as the detainee would be a threat upon

¹²⁴ *Al Bihani v. Trump et. al.*, Respondents' Opposition to Petitioners' Motion for Order Granting Writ of Habeas Corpus, 4 (Feb. 16, 2018)

¹²⁵ *Id.*

release.¹²⁶ The PRB decision is a quasi-judicial determination, as it is a sentence of detention, in so far as the detainees' status of detention does not change unless otherwise challenged legally in the judiciary. Despite the quasi-judicial nature of this decision, it is not required by due process, nor does the court accept jurisdiction to require the Executive to take action based on an Executive Order.¹²⁷ For this reason, there is no purpose in a judiciary review of the decision.

The PRB decision should be an enforceable decision, subject to judicial review¹²⁸. By implementing a proper review of the quasi-judicial action, the PRB that is already in existence would be granted authority and purpose. The PRB could then be reviewable in the judiciary.

Refurbishing a process that is already in existence is more feasible than imposing a time limit on detention. The time limit on detention would not properly apply on an individualized scale, such as the PRB, which analyzes each individual detainee. In sum, the Periodic Review Boards should be utilized, rather than ignored.¹²⁹ The PRB decision should be reviewable by the judiciary, similar to that of any final decision of a federal agency.

V. CONCLUSION

Enemy Combatants may be detained until the “cessation of hostilities.” The Constitution is in “full effect in Guantanamo Bay.” Habeas corpus petitions may be heard by federal courts. Accordingly, the Supreme Court has the power to make a decision that could forever impact

¹²⁶ Id.

¹²⁷ Mohamedou Ould Salahi v. Obama, 2015 U.S. Dist. LEXIS 168879, *7 (D.D.C. Dec. 17, 2015) (determining that the Court did not have jurisdiction to hear the claim that the government must fix a date for the PRB, as the Court cannot require action based on an executive order).

¹²⁸ This paper recognizes that the courts cannot hear cases requiring the Executive to take action based on an Executive Order. This paper argues that other arrangements should be made by the Government to ensure that PRBs are reviewable by the courts. The method by which the Government would decide to do so is not relevant to this paper.

¹²⁹ Five (5) Guantanamo Bay detainees currently in detention and in litigation have been cleared by the PRB, but there is no pending release date. The detention of these individuals is arbitrary and in violation of due process. Al Bihani v. Trump et. al., Petitioners' Reply in Support of Motion for Order Granting Writ of Habeas Corpus, 9 (March 9, 2018).

enemy combatant detention, such as Hamdi v. Rumsfeld. At this time, amicus briefs, scholarly literature and the Center for Constitutional Rights have alleged that indefinite detention creates a violation of due process, even if that detention is in accordance with the literal words set forth in Hamdi v. Rumsfeld. Indefinite detention should not be determined by creating a time limit on detention. Instead, law of war detention should remain contingent upon (1) findings of danger and (2) a finding of a continuing active hostilities. The Periodic Review Boards should determine whether an individual is dangerous. This decision should ultimately be reviewable by the judiciary, although it must first be removed from the Executive Order and placed into actual legislation. If an individual is not a danger, the individual should be released, even if hostilities are active. If the individual remains a danger, but hostilities have ceased, the individual may be released. If, however, the detainee remains a danger, and hostilities remain active, the detainee may be detained so long as either factor is eliminated.