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THE END OF AL QAEDA? RETHINKING THE LEGAL END OF THE WAR ON TERROR

*Adam Klein**

As the war on terrorism approaches its second decade, the open-ended nature of the 2001 Authorization for the Use of Military Force (AUMF) has given rise to the legal question of when, and how, the conflict will end. The indeterminate nature of the conflict has raised fears that the war powers will continue to be exercised indefinitely—a prospect noted with concern by the Supreme Court in Boumediene v. Bush. *The prevailing view among legal scholars is that under existing precedents, the AUMF and the concomitant war powers will continue indefinitely in force until the political branches officially declare the conflict to have ended. This Note argues that this binary, "on/off" model of conflict termination is ill-adapted to a war against a rapidly evolving, amorphous terrorist threat. Contrary to the monolithic conception of "terrorism" relied upon by many legal scholars, the nature and structure of the terrorist threat are disputed within the counterterrorism community. Some analysts argue that the primary terrorist threat to the United States emanates from the hierarchically organized "core" al Qaeda based in the Pakistani tribal areas; others, from a decentralized "leaderless jihad" conducted by self-directed homegrown terrorists. This Note uses this debate, together with recent historical studies analyzing how terrorist groups end, as a lens through which to demonstrate how the amorphous, evolving nature of the al Qaeda threat undermines the prevailing on/off model of the legal end of the war on terrorism. It concludes by suggesting principles for constructing a more apt legal model of how and when the war on terrorism, and the legal authorities for fighting it, will come to an end.*

INTRODUCTION

2009 was a perplexing year in the "war on terrorism."[1] The gravest terrorist threats to the U.S. homeland arose not from the meticulous plot-

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1. Many argue that the "war on terrorism" is not a war at all. See, e.g., Bruce Ackerman, This Is Not a War, 113 Yale L.J. 1871, 1873 (2004) [hereinafter Ackerman, Not a War] ("This is not a war, but a *state of emergency*."); Michael Howard, Are We at War?, Survival, Aug.–Sept. 2008, at 247, 254 ("'9-11' and similar atrocities should be seen, not as acts of war, but as 'breaches of the peace' . . . ."). Conceptually, whether a "war on terrorism" can be a true "war" is beyond the scope of this Note. For the purposes of this Note, the existence of a war under American law is settled by the September 2001 Authorization for the Use of Military Force (AUMF), discussed infra at notes 5–7, 65–74, and accompanying text, and the Supreme Court's holding in Hamdi v. Rumsfeld, 542 U.S. 507, 519–21 (2004) (plurality opinion), that the AUMF authorized the exercise of "law-of-war" detention powers. See Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2057 (2005) (rejecting "misconception . . . that the powers granted to the President in the AUMF are limited or truncated in some fashion because an armed conflict with terrorists is not a 'real war'"). Bradley and Goldsmith argue that "the scope of authority conferred on the President" by a force authorization turns not "on the metaphysical question of whether a particular

ting of al Qaeda masterminds in a cave in the Hindu Kush, but from the impetuous acts of a baseball cap-wearing pushcart vendor, a U.S. Army psychiatrist, a former high school defensive lineman, a gang of ne'er-do-well ex-cons, and the confused, frustrated scion of a wealthy banking family.[2] Meanwhile, Osama bin Laden, Ayman al-Zawahiri, and other top al Qaeda leaders are reportedly ensconced in Pakistan's tribal areas, and, though "substantially weaker than . . . on the eve of the 9/11 attacks, . . . still pose[ ] an active and immediate threat to the United States."[3] Over nine years after September 11, 2001, the war on terrorism shows no sign of drawing to a close.[4]

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conflict qualifies as a 'war,'" but on "how the political branches view the conflict and how they characterize the belligerents." Id. In the current conflict, "the political branches have clearly indicated . . . that [it] is a war." Id.; see also Hamdan v. Rumsfeld, 548 U.S. 557, 594 (2006) (assuming "the AUMF activated the President's war powers" but finding "nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the" scope of authority to convene military commissions under Article 21 of the Uniform Code of Military Justice (UCMJ)); The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862) (accepting Lincoln's proclamation of blockade of Confederate ports as "conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to" blockade).

Philip Bobbitt suggests that the unfamiliarity of mass casualty global terrorism may underlie the hesitancy to employ the label "war." See Philip Bobbitt, Terror and Consent: The Wars for the Twenty-First Century 7 (2008) ("If the events that take place are not those that experience has led you to expect to accompany warfare, then you are not very likely to believe you are at war in the first place.").

2. See Reassessing the Evolving al Qa'ida Threat to the Homeland: Hearing Before the Subcomm. on Intelligence, Info. Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Sec. 2–7 (Nov. 19, 2009) (prepared statement of Peter Bergen, Senior Fellow, New America Foundation), available at http://homeland.house.gov/SiteDocuments/20091119111322-14267.pdf (on file with the *Columbia Law Review*) (discussing cases of Najibullah Zazi, Major Nidal Malik Hasan, and Daniel Boyd); Mark Hosenball et al., The Radicalization of Umar Farouk Abdulmutallab, Newsweek, Jan. 11, 2010, at 37 (discussing Abdulmutallab's background); Bobby Ghosh, How the Riverdale Bomb Plot Unraveled, Time, May 21, 2009 [hereinafter Ghosh, Riverdale], at http://www.time.com/time/nation/article/0,8599,1900151,00.html (on file with the *Columbia Law Review*) (describing Riverdale plotters). The May 2010 Times Square bombing attempt by "suburban father and financial analyst" Faisal Shahzad also fits this pattern. Andrea Elliott, A Bloody Siege, A Call to Action, A Times Sq. Plot, N.Y. Times, June 23, 2010, at A1.

3. Reassessing the Evolving al Qa'ida Threat to the Homeland: Hearing Before the Subcomm. on Intelligence, Info. Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Sec. 1 (Nov. 19, 2009) (prepared statement of Martha Crenshaw, Senior Fellow, Center for International Security and Cooperation), available at http://homeland.house.gov/SiteDocuments/20091119111255-63126.pdf (on file with the *Columbia Law Review*).

4. See Boumediene v. Bush, 128 S. Ct. 2229, 2262, 2277 (2008) (noting current conflict "is already among the longest wars in American history" and raising concerns about potentially indefinite duration of war on terrorism). Justice Kennedy suggested that the Court would not indefinitely accept such indeterminacy and alluded to the need for further action by the political branches:

> Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, *the*

The length and novelty of the conflict and the open-ended Authorization for the Use of Military Force (AUMF) have led courts and legal scholars to comment on the uncertain prospects for a determinate legal end to the conflict.[5] Supporters of presidential discretion, acknowledging the "novel features of the current conflict," emphasize that "the AUMF does not purport to limit the time period in which the President can act."[6] Even skeptics acknowledge that, under "a fair reading" of prior Supreme Court precedents, the open-ended AUMF could mean that "the President may continue to use many of his war powers . . . indefinitely."[7] Whether unperturbed or deeply concerned, both sides accept the legal proposition that the war powers may continue in force until some future date upon which the enemy is declared, by an action of the political branches, to have been defeated.[8] In *Boumediene v. Bush*, the Supreme Court expressed concern about this indefiniteness, suggesting it might "not have [the] luxury" of leaving undefined the "outer boundaries" of the duration of war powers in this conflict and alluding to the need for action by the political branches to address this uncertainty.[9]

This Note argues that a binary, on/off model of when and how a war on terrorism ends under law does not adequately reflect the multifaceted nature of the overall al Qaeda threat to the United States. The status quo also raises the prospect of judicial refereeing of an issue more suited to resolution by the political branches, as underscored by the Court's warning in *Boumediene*.[10] Nor does the current model serve the political

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Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.

Id. (emphasis added).

5. Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001); see also *Boumediene*, 128 S. Ct. at 2277 (comparing war on terrorism to past wars "of limited duration, [in which] it has been possible to leave the outer boundaries of war powers undefined"); Stephen I. Vladeck, *Ludecke*'s Lengthening Shadow: The Disturbing Prospect of War Without End, 2 J. Nat'l Security L. & Pol'y 53, 53 (2006) ("The 'war' on terrorism may never end. At a minimum, it shows no signs of ending any time soon.").

6. Bradley & Goldsmith, supra note 1, at 2066, 2123. Rejecting claims that this runs counter to Congress's intent in enacting the AUMF, they add that: "[M]any members of Congress noted in the debates over the AUMF that the war against the perpetrators of the September 11 attacks might take a very long time, and none suggested an implicit time limitation on the authorization." Id. at 2123 n.333 (quoting September 2001 statements by congressional leaders).

7. Vladeck, supra note 5, at 56. Vladeck describes "permanent presidential war powers" as "an outcome appropriately feared by the Founders and guarded against in the Constitution." Id. at 58.

8. See id. at 94 (noting under existing precedent "*when* the war has ended is a political question").

9. *Boumediene*, 128 S. Ct. at 2277; see also supra note 4 (quoting at greater length); infra note 207 (noting Justice Souter's articulation of similar concerns at oral argument in *Hamdi*).

10. See supra note 4.

branches well, as it places on them the awkward obligation, fraught with political risk, of pinpointing the "end" of such a nebulous conflict. This Note thus proposes a more nuanced, better fitting legal model of conflict termination for the war on terrorism.

Part I reviews past Supreme Court practice in fixing the end date of hostilities and the evolution of the principle that the end of a war is to be determined by reference to a public act of the political branches.[11] It then considers scholarly attempts to apply this doctrine to the current conflict.

Part II.A offers a brief description of competing "top-down" and "bottom-up" views within the counterterrorism community about the structure of the Islamist terrorist threat to the United States, and argues that prior analyses have relied on a view of the terrorist threat insufficiently informed by counterterrorism scholarship. Part II.B considers the implications of each model for two elements of the end of the conflict: (1) the possibility of the conflict against a terrorist *group* ending at a sufficiently clear point to be legally cognizable, and (2) when the conflict ends with respect to an *individual* terrorist combatant. This analysis illustrates how the nature of the enemy—an amorphous, continuously evolving nonstate actor—renders untenable the notion of a single legal endpoint for this conflict.

Part III addresses these complexities by proposing a "hybrid" model of conflict termination in the war on terrorism, which would disaggregate legal authorities for counterterrorism and permit, to the extent desired, the assignment of a distinct termination provision to each. It further argues that each authority's termination should reflect an analysis of how the aspect of the terrorist threat it seeks to address might terminate in fact, and whether such termination would appropriately be identified by a political or adjudicative determination.

I. WHEN DOES A "WAR ON TERRORISM" END UNDER AMERICAN LAW? HISTORICAL PRECEDENTS AND THE PROSPECT OF "WAR WITHOUT END"

Part I.A traces the historical development of three important doctrines: that the end of a war is, for legal purposes, fixed by reference to a public act of the political branches; that war powers may continue in force until the *legal* end of the war, even after the shooting stops; and that conflict termination is not required to be unitary, but may be *relative* to particular legal rights and authorities. Part I.B then considers the limited scholarly attempts to apply these doctrines to the question of the legal end of the war on terrorism.

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11. See infra Part I.A.1.a (describing historical source of this principle).

A. *Historical Precedents: The Legal End of the War in the Civil War, World War I, and World War II*

Throughout American history, courts have been called upon to determine the legal end dates of wars.[12] These questions have generally arisen in the context of a dispute over the exercise of a presidential war power, or a statutory scheme in which Congress tied some legal right, prohibition, or grant of authority to the existence or end date of a state of war.[13] Despite prudential and constitutional concerns about judicial determination of fundamental issues of war and peace, such claims have repeatedly compelled the Supreme Court to fix the legal endpoint of an armed conflict.[14]

During and after the Civil War, World War I, and World War II, various wartime statutes gave rise to litigation in which private claims of right were contingent upon the date on which the conflict terminated.[15] Part I.A reviews this history, illustrating the foundations of the prevailing rule

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12. Prior analyses of this history have considered the willingness of courts to adjudicate the existence or end of a war. E.g., Manley O. Hudson, The Duration of War Between the United States and Germany, 39 Harv. L. Rev. 1020, 1020–21 (1926); Note, Judicial Determination of the End of the War, 47 Colum. L. Rev. 255, 255 (1947) [hereinafter Note, Judical Determination]; John M. Hagan, Note, From the XYZ Affair to the War on Terror: The Justiciability of Time of War, 61 Wash. & Lee L. Rev. 1327, 1328 (2004).

The question of justiciability is not the focus of this Note. More relevant in this context is the Supreme Court's actual practice in determining whether a war has ended, or when it ended, in cases where fixing an end date was necessary to determine the applicability of a statute or continued availability of a presidential authority. See Theodore French, The End of the War, 15 Geo. Wash. L. Rev. 191, 191 (1947) (noting that "[a]lmost from the beginning of the nation" courts have confronted question of "duration of war" and that in post-World War II period, "many powers of the government have been and are dependent on the existence of 'war' or 'hostilities'"); Hudson, supra, at 1020 ("For the purpose of determining when [various juridical] consequences are produced . . . it is important to ascertain the date of the beginning and the date of the termination of a war, and it is desirable that these dates be fixed with exactness.").

13. See Baker v. Carr, 369 U.S. 186, 213–14 (1962) (citing cases where questions pertaining to "[d]ates of duration of hostilities" were before the Court, in context of discussion of political question doctrine).

14. See Hudson, supra note 12, at 1020–21 ("If these questions are in some degree 'political questions' . . . they also present juridical problems which the courts cannot escape." (footnote omitted)).

15. The existence of Supreme Court case law on how, and whether, the Court will determine that a conflict ended on a specific date, is in itself a phenomenon meriting comment. Traditionally, the existence of a state of war is "a question to be decided by [the President], and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted." The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862). In *Baker v. Carr*, the Court noted "isolable reasons for the presence of political questions, underlying this Court's refusal to review the political departments' determination of when or whether a war has ended," in particular the need for finality in the wartime determinations of the political branches. 369 U.S. at 213. However, in cases that "may not seriously implicate considerations of finality [of executive decisions]" and where "clearly definable criteria for decision may be available[,] . . . the political question barrier falls away." Id. at 213–14.

that courts will look to an act of the political branches to fix the end date of armed conflicts,[16] and that the war powers may continue to be exercised until such date.

1. *The Civil War Cases: Foundational Principles of the Law of Conflict Termination.* — Post-Civil War cases established two important, still valid propositions concerning the legal end of hostilities: that the Court would look to actions of the political branches—rather than inquiring into the end-in-fact of hostilities—to fix the end date of a conflict; and that the constitutional war powers of Congress and the President could continue in force after actual fighting ended. They also suggested a third insight, which has been less widely discussed by courts and commentators but which is central to the discussion in Part III: that the legal "end of the war" need not be unitary, but may be defined *relative* to the person, power, or right at issue. This section discusses the line of post-Civil War cases establishing these three propositions.

a. *"Some public act of the political departments."* — The post-Civil War cases established the still valid principle[17] that, when called upon in the course of private litigation to fix the dates of the termination of hostilities, the Court will make reference to "some public act of the political departments of the government to fix the dates."[18] In several postwar cases, the Court relied upon presidential proclamations to fix the termination date of hostilities in the course of resolving private claims. For example, in *The Protector*, the Court identified President Lincoln's proclamation of April 19, 1861[19] and President Johnson's proclamation of April 2, 1866[20] "as ascertaining the commencement and the close of the war in

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Traditionally, "the treaty of peace abolishe[d] the subject of the war." Ware v. Hylton, 3 U.S. (3 Dall.) 199, 230 (1796). Thus, private grievances of the belligerents' nationals, if not made the subject of "an *express specification* in the treaty . . . [were] buried in oblivion." Id. (quoting 4 Emmerich de Vattel, The Law of Nations § 21 (1758)). In the context of the Civil War—which (in the Union view), as an *intra*state conflict, would not terminate with a formal treaty—Congress passed various wartime statutes granting private rights to loyal Southerners, Northerners with claims in Southern state courts, Union officers, and others. Claims brought under these statutes, in which Congress limited the availability of such rights to a certain period after the end of the rebellion, or to "time of peace," forced the Court to answer the question of *when* the war had ended. See infra Part I.A.1 (discussing post-Civil War cases). Such statutes proliferated in later conflicts, as waging modern war came to require government intervention in ever wider areas of society. See infra Parts I.A.2–3 (discussing post-World War I and post-World War II cases).

16. See infra notes 18–24, 54–60, and accompanying text (discussing The Protector, 79 U.S. (12 Wall.) 700 (1871), and Ludecke v. Watkins, 335 U.S. 160 (1948)).

17. See *Baker*, 369 U.S. at 214 (describing need, even in "private litigation which directly implicates no feature of separation of powers," for "reference to the political departments' determination of dates of hostilities' beginning and ending").

18. *The Protector*, 79 U.S. at 701–02.

19. Proclamation No. 4, 12 Stat. 1258, 1258–59 (Apr. 19, 1861) (noting "insurrection against the Government of the United States has broken out in the [Southern states]" and declaring naval blockade of Southern ports).

20. Proclamation No. 1, 14 Stat. 811, 812–13 (Apr. 2, 1866) ("I, Andrew Johnson . . . declare that the insurrection . . . is at an end [in all states except Texas], and is henceforth

[Alabama]," the state where the suit was filed.[21] In two other cases, *United States v. Anderson* and *McElrath v. United States*, which arose under wartime statutes that made private rights contingent upon the dates of hostilities, the Court cited a later proclamation of August 20, 1866[22] to fix the end date of the conflict.[23]

The Court grounded its refusal in *The Protector* to investigate the end-in-fact of active hostilities, and its reference instead to an act of the political branches, on the virtual impossibility of "say[ing] on what precise day [hostilities] began or terminated."[24] In the context of an irregular war, which would not terminate with a decisive treaty of peace, it was also unrealistic to expect that persons in whom wartime statutes vested rights would be able to discern, absent a clear public statement by an organ of the Government, on what date the war had officially ended.[25]

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to be so regarded."). Robert E. Lee's surrender to Gen. Grant at Appomattox, VA, had occurred nearly one year earlier in April 1865.

21. *The Protector*, 79 U.S. at 702. The question presented was whether the Judiciary Act's five year statute of limitations on the filing of writs of error had expired. The filing in May 1871 sought review of a decree entered in April, 1861. Id. at 701. In a previous case, the Supreme Court had "held that the statute of limitations did not run, during the rebellion, against citizens of States adhering to the national government having demands against citizens of the insurgent States." Id. The length of time during which the statute of limitations was tolled thus depended on the duration of hostilities as fixed by the Court. See also Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 504–05 (1870) (citing President Lincoln's proclamation of August 1861 "declar[ing] that . . . Louisiana . . . [was] in a state of insurrection against the United States" to fix commencement of time when Louisiana defendants in state law contract suit were "beyond the reach of legal process" because of "resistance of the laws," such that Louisiana defense of "prescription" was tolled by 1864 federal statute (quoting Act of June 11, 1864, ch. 118, 13 Stat. 123, 123)).

22. Proclamation No. 4, 14 Stat. 814, 817 (Aug. 20, 1866) (declaring insurrection to be at an end in Texas).

23. McElrath v. United States, 102 U.S. 426, 438 (1880) ("But when was the rebellion suppressed and peace inaugurated? Not until the [presidential proclamation of the] twentieth day of August, 1866 . . . ."); United States v. Anderson, 76 U.S. (9 Wall.) 56, 71 (1870) (pointing to proclamation of Aug. 20, 1866 to fix "the day the rebellion closed"); see also Vladeck, supra note 5, at 65 (noting *The Protector* and *Anderson* are "not in conflict" but instead together suggest "that the date on which a war ends . . . may turn both on the specific power at issue and on the place where the power is exercised").

24. *The Protector*, 79 U.S. at 702; see also id. at 701–02 ("Acts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and the close of the late civil war, that it would be difficult, if not impossible, to say on what precise day it began or terminated.").

25. See *Anderson*, 76 U.S. at 69–71 (rejecting argument that the moment "the last Confederate general surrendered to the National authority" established *legal* end of war for purposes of statute at issue). Justice Davis reasoned in *Anderson* that:

> The inherent difficulty of determining such a matter, renders it certain that Congress did not intend to impose on this class of [statutory beneficiaries] the necessity of deciding it for themselves. In a foreign war, a treaty of peace would be the evidence of the time when it closed, but in a domestic war, like the late one, some public proclamation or legislation would seem to be required to inform those whose private rights were affected by it, of the time when it terminated . . . .

b. *"Not limited to victories in the field."* — The second core principle that emerged from the post-Civil War cases is that conflicts do not necessarily end for legal purposes when the shooting stops.[26] The Court articulated this principle in the 1870 case of *Stewart v. Kahn*, in which it upheld the constitutionality of an 1864 federal statute[27] retroactively tolling statutes of limitations in Southern state courts during the insurrection.[28] Justice Swayne, writing for the Court, declared that:

> [T]he [war] power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.[29]

This formulation would later be recalled by World War I- and World War II-era courts considering the constitutionality of various exercises of the war powers of Congress and the President after the guns had fallen silent.

c. *"As regards the rights intended to be secured by this statute."* — The third, and least appreciated principle established by the Civil War cases is that conflict termination is not absolute, but *relative* to the legal right or authority at issue. The Court in *Anderson*, applying a statute permitting the filing of restitution claims within two years of the end of the war, sought to fix dates of the rebellion "as regards the rights intended to be secured by this statute" and "only in its relation to those persons who are within the protection of this law."[30] The task, as the Court saw it, was not to pinpoint the moment when "armed resistance to the United States ceased, the civil war was ended, and the rebellion suppressed, as [a] *mat-*

Id. at 70.

26. See Louis Henkin, Foreign Affairs and the United States Constitution 67 (2d ed. 1996) ("Legislative war powers . . . [do not] die with the coming of peace.").

27. Act of June 11, 1864, ch. 118, 13 Stat. 123, 123. The statute provided that "whenever, during the existence of the present rebellion, any action, civil or criminal, shall accrue against any person who . . . cannot be served with process . . . the time during which such person shall so be beyond the reach of legal process shall not be" considered for purposes of the statute of limitations. Id.

28. Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 506–07 (1870).

29. Id. at 507.

30. *Anderson*, 76 U.S. at 69. Anderson, a free black man residing in Charleston, had filed a claim on June 5, 1868 seeking compensation from the Treasury for the proceeds from the government's sale of some cotton confiscated during military operations in the South. Id. at 60–61. His claim arose under a statute authorizing Southern residents who had remained loyal to the Union to seek compensation in the Court of Claims, "at any time within two years after the suppression of the rebellion." Act of March 3, 1863, ch. 120, 12 Stat. 820, 820.

ter of fact,"[31] but rather "when, *in the sense of this law*, was the rebellion entirely suppressed."[32]

Anderson purported to reserve the question "whether the rebellion can be considered as suppressed for one purpose and not for another."[33] Nevertheless, the Court implicitly answered the question in the affirmative two years later in *The Protector*, when it identified an *earlier* presidential proclamation of April 2, 1866[34] as fixing the date when the rebellion was suppressed for purposes of determining whether the five year statute of limitations—which, under a prior decision, was tolled during the duration of the rebellion—had expired in that case.[35] Later, in the 1880 case of *McElrath v. United States*, the Court reverted back to the August 20, 1866 proclamation in interpreting a statutory prohibition on the dismissal without a court-martial of military officers "in time of peace."[36]

This principle that a conflict's date of legal termination is not only distinct from its termination-in-fact, but may be fixed relative to the particular persons or legal authorities concerned, arose in the context of the Civil War, an irregular conflict where no peace treaty would resolve the myriad legal questions it generated.[37] It is thus particularly relevant to the task of constructing a legal model of conflict termination for an irregular, open-ended war on terrorism.[38]

2. *World War I: Reaffirming the Civil War Precedents.* — After World War I, Congress confronted the novel challenge of "returning to a peacetime footing a complicated industrial society mobilized for war under a mass of regulatory legislation."[39] The absence of a peace treaty or formal

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31. *Anderson*, 76 U.S. at 62. The Government argued that the Court should find that the war ended upon the surrender of Confederate Gen. Kirby Smith on May 26, 1865. Under this reading, the two year statute of limitations would have expired over a year before Anderson filed his claim. Id. at 62–63.

32. Id. at 69 (emphasis added).

33. Id. It even stated, referring to another statute governing the pay of noncommissioned officers: "As Congress, in its legislation for the army, has determined that the rebellion closed on the 20th day of August, 1866, there is no reason why its declaration on this subject should not be received as settling the question wherever private rights are affected by it." Id. at 71.

34. See supra note 20 and accompanying text.

35. The Protector, 79 U.S. (12 Wall.) 700, 702 (1871); see also supra note 21 (explaining statute of limitations issue).

36. See McElrath v. United States, 102 U.S. 426, 438 (1880) ("But when was the rebellion suppressed . . . ? Not until the twentieth day of August, 1866, on which day the President announced, by proclamation, that the insurrection against the national authority was at an end . . . .").

37. See French, supra note 12, at 192 (noting that after the Civil War "there was so much doubt as to when acts of hostility had ceased that some public act was required to set the date"); cf. supra note 15 (discussing Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)).

38. See infra Part III.A (noting utility of this concept in crafting new legal model of conflict termination for war on terrorism).

39. Note, Judicial Determination, supra note 12, at 259.

declaration by the political branches of the end of hostilities[40] again raised the question of when courts would hold the war to have terminated in cases arising under (or challenging the validity of) wartime statutes.

Hamilton v. Kentucky Distilleries & Warehouse, Co., in which the Supreme Court heard oral argument on November 20, 1919—over one year after the end of active combat and nearly five months after the signing of the Treaty of Versailles—confirmed that the legal end of the conflict was distinct from the termination-in-fact of the fighting.[41] The Court held that the War-Time Prohibition Act, which banned the sale of "distilled spirits" in order to "conserv[e] the man power of the Nation"[42] and had become law ten days *after* the signing of the November 11, 1918 armistice, remained a valid exercise of the war power despite the greatly "changed circumstances" since its enactment.[43] That conclusion rested on the familiar principle from *Stewart v. Kahn* that the war power extends beyond "victories in the field" and includes the power to address residual problems created by the conflict.[44]

The Court also addressed the statutory question of whether the Act had expired by its own terms, which provided that it would continue in operation "until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States."[45] Writing for the Court, Justice Brandeis insisted that the term "'conclusion of the war' . . . be given its ordinary legal meaning"—that is, that "the period of war . . . extend[s] to the ratification of the treaty of peace or the proclamation of

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40. After the Senate refused to ratify the Treaty of Versailles, Congress passed a unilateral "Peace Resolution," which President Wilson unsurprisingly vetoed. 59 Cong. Rec. 7747 (1920). Wilson referred to the Resolution, and the failure of the United States to ratify the Treaty, as "an action which would place an ineffaceable stain upon the gallantry and honor of the United States." Id. at 7747–48.

In the Spanish-American War such confusion was avoided, as the belligerents had concluded the Treaty of Paris after the end of hostilities. In the 1904 case of *J. Ribas y Hijo v. United States*, Justice Harlan wrote that "[a] state of war did not *in law* cease until the ratification in April, 1899, of the treaty of peace." 194 U.S. 315, 323 (1904) (emphasis added). The Court held that the treaty's terms precluded a Spanish ship owner's restitution claim, which had arisen during the war (i.e., before the treaty). Id. at 323–24.

41. 251 U.S. 146, 161 (1919). Of course, the Senate had by that point declined to *ratify* the treaty, id. at 160, and never did.

42. Id. at 153 (quoting War-Time Prohibition Act, ch. 212, 40 Stat. 1045, 1046 (1918)).

43. Id. at 163. Not disputed was the validity of the Act under the war power at the time of its initial passage. Id. at 158–59. A subsequent case, *Jacob Ruppert v. Caffey*, upheld as a valid exercise of the war power a provision in the 1919 Volstead Act amending the War-Time Prohibition Act's standard for what constituted "beer, wine or other intoxicating malt or vinous liquors." 251 U.S. 264, 280 n.(a), 299–300 (1920) (quoting National Prohibition Act, tit. I, 41 Stat. 305, 305 (1919)).

44. *Hamilton*, 251 U.S. at 161 (quoting Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 507 (1870)).

45. Id. at 164–65 (quoting War-Time Prohibition Act, ch. 212, 40 Stat. at 1046).

peace."[46] As neither of these had occurred, wartime prohibition remained in force.[47] In March 1921, Congress finally passed a "Joint Resolution Declaring that certain Acts of Congress, joint resolutions, and proclamations shall be construed as if the war had ended and the present or existing emergency expired."[48]

The ultimate legacy of the post-World War I cases was not a new tradition of robust judicial review of invocations of the war power, but rather a confirmation of the principles established by the Civil War-era cases.[49] These principles would be stretched to their limits, yet once again reconfirmed, after World War II.

3. *World War II.* — The complex legal infrastructure underlying the war effort meant that many wartime statutes and executive exercises of the war power continued beyond V-J Day. Again, the lack of formal peace treaties left open the question of when the war would terminate for legal purposes.[50] Postwar invocations of the war power inevitably became the subject of litigation, as adversely affected parties challenged the validity of executive actions and, where applicable, the authorizing statutes.

Some of these cases were disposed of by a relatively straightforward application of the principles of *Hamilton* and its Civil War-era predecessors,[51] while others were more controversial. In *In re Yamashita*, a divided

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46. Id. at 165–66.

47. Id. at 167–68. A subsequent case, *Kahn v. Anderson*, revisited the issue from *McElrath v. United States*—namely, the temporal limits of a statute prohibiting the use of courts-martial for "murder or rape committed within the geographical limits of the [United States] *in time of peace.*" 255 U.S. 1, 9 (1921) (emphasis added) (quoting Articles of War, art. 92, 39 Stat. 650, 664 (1916)). The Court again held that "'in time of peace' . . . signifies peace in the complete sense, officially declared," for which the armistice of November 1918 did not suffice. Id. at 10.

48. Joint Resolution of Mar. 3, 1921, ch. 136, 41 Stat. 1359 (1921). The Resolution excepted all or part of several wartime statutes from its application, including the Trading with the Enemy Act, the various Liberty Bond Acts, and the Food Control and District of Columbia Rents Act. Id. at 1360. In *Commercial Trust Co. of New Jersey v. Miller*, the Court upheld the continuation in force of the Trading with the Enemy Act. 262 U.S. 51, 57 (1923). This exception is interesting because it suggests that the formal act of the political branches upon which courts have generally relied to mark the legal end of the war does not per se terminate *all* war powers if that act expresses a contrary intent.

The formal state of war between the belligerents was finally terminated by another Joint Resolution in July of that year. Joint Resolution of July 2, 1921, ch. 40, 42 Stat. 105; see also Henkin, supra note 26, at 76 ("Ordinarily, wars are ended by treaty, but Congress declared an end to both World Wars by resolution.").

49. See supra Parts I.A.1.a–b (discussing principles (1) that legal end of conflict is not determined by end-in-fact of fighting, but is fixed by reference to a public act of the political branches, and (2) that the exercise of war powers is not limited to "victories in the field," but may continue after actual fighting has ceased).

50. Congress officially terminated the state of war between the United States and Germany in 1951 by Joint Resolution. Joint Resolution of Oct. 19, 1951, 65 Stat. 451. The 1951 Treaty of San Francisco finally officially ended the state of war between the United States and Japan. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169.

51. E.g., Woods v. Cloyd W. Miller Co., 333 U.S. 138, 141–42 (1948); Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 116 (1947). In *Fleming*, the Court cited

Court rejected Japanese General Tomoyuki Yamashita's argument that a military commission established to try him for war crimes "could [not] lawfully be convened after the cessation of hostilities between the armed forces of the United States and Japan,"[52] on the ground that "the authority sanctioned by Congress to administer the system of military justice recognized by the law of war . . . is without qualification . . . so long as a state of war exists—from its declaration until peace is proclaimed."[53]

Hamilton in upholding President Truman's December 1946 bureaucratic reorganization pursuant to a 1941 statute, which was to "expire[ ] six months after 'the termination of the war,'" granting the President broad powers to reorganize the federal bureaucracy for war-related purposes. Id. at 115–16. The Court observed that a December 31, 1946 presidential proclamation declaring the "cessation of hostilities" had explicitly noted that "a state of war still exists." Id. at 116 (quoting Proclamation No. 2714, 12 Fed. Reg. 1 (Dec. 31, 1946) ("Although *a state of war still exists*, it is at this time possible to declare . . . that hostilities have terminated." (emphasis added))).

Woods upheld a 1947 federal statute intended to "reliev[e] the acute shortage of housing" affecting demobilized veterans of World War II. Housing and Rent Act of 1947, Pub. L. No. 80-129, § 3, 61 Stat. 193, 193. Title II of the Act, the provision challenged in *Woods*, "recogniz[ing] that an emergency exists," imposed rent controls in "defense-rental areas." Id. § 201(b). Justice Douglas, writing for the Court, rejected the trial court's holding that Congress's power "to regulate rents by virtue of the war power ended with" President Truman's December 1946 proclamation of peace "since that proclamation inaugurated 'peace-in-fact' though it did not mark termination of the war." *Woods*, 333 U.S. at 140 (citation omitted). Citing *Hamilton*, *Fleming*, and *Stewart v. Kahn*, Justice Douglas held that "the war power sustains this legislation," noting the "broad[ ] sweep" of the postwar application of the war power. Id. at 141–42. In a forceful concurrence, Justice Jackson, though he agreed that "the war power is as valid a ground for federal rent control now as it has been at any time," insisted that, especially when "invoked to do things to the liberties of people . . . the constitutional basis [of post-hostilities exercises of the war power] should be scrutinized with care." Id. at 146–47 (Jackson, J., concurring).

52. 327 U.S. 1, 6 (1946). The case reached the Court on appeal from the denial of Yamashita's application for leave to petition for habeas corpus and prohibition. The Court also considered challenges to the convening of the commission based on the Geneva Convention of 1929 Relative to the Treatment of Prisoners of War, the Articles of War against Japan, and the Fifth Amendment. Id. This Note's brief account of the case focuses on issues related to the invocation of war powers to convene the commission after the cessation of hostilities.

53. Id. at 11–12 (citing Civil War cases discussed in Part I.A.1). Chief Justice Stone also offered a strong formulation of the supremacy of the Executive and Congress in their discretionary exercise of the war powers until the conclusion of a formal peace:

> The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government, and [while it] may itself be governed by the terms of an armistice or the treaty of peace . . . , peace has not been agreed upon or proclaimed.

Id. at 13.

Justices Rutledge and Murphy forcefully dissented from various aspects of the Court's decision. On the issue of when war powers became insufficient to convene the commission, Justice Rutledge contested that the nonexistence of a final treaty of peace meant that "all the power of the military effective during active hostilities in theatres of combat continues in full force unaffected by the events of August 14, 1945, and after." Id. at 46 (Rutledge, J., dissenting). While he admitted that there is "[a]mple power . . . to punish [enemy aliens, including belligerents] or others for crimes, whether under the laws

The preeminent World War II-era precedent on the continuation of wartime powers beyond the end-in-fact of the fighting was established by *Ludecke v. Watkins*[54] and a later case, *United States ex rel. Jaegeler v. Carusi*, which concerned the same statute.[55] Both cases arose under the Alien Enemies Act, a 1798 statute permitting the President, after issuing a proclamation, to constrain the liberties of citizens of enemy powers present in the United States during wartime.[56]

Ludecke, a German citizen, was arrested the day after Pearl Harbor and interned after a hearing before an Enemy Alien Hearing Board.[57] *Ludecke v. Watkins* arose out of Ludecke's habeas petition contesting the Attorney General's order to deport Ludecke pursuant to a 1945 presidential proclamation issued under the Alien Enemies Act.[58] While Ludecke challenged the deportation on several grounds, the most relevant aspect of the Court's holding was its treatment of Ludecke's argument that "while the President has summary power under the Act, it did not survive cessation of *actual* hostilities."[59] Writing for the Court, Justice Frankfurter echoed the Civil War-era precedents, noting that the war power "begins when war is declared but is not exhausted when the shooting stops," and that the termination of "[t]he state of war," whether by treaty, congressional joint resolution, or presidential proclamation, "is a political act."[60]

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of war during its course or later during occupation," he disputed that such postwar punishment could be meted out unencumbered by the "restricting effects" of "universal constitutional commands." Id. at 46–47; see also Note, Judicial Determination, supra note 12, at 265 ("In a more appealing civil liberties case than that of a Japanese general, [Justice Rutledge's] view might well prevail.").

54. 335 U.S. 160 (1948).

55. 342 U.S. 347 (1952).

56. 50 U.S.C. §§ 21–24 (2006). Other than a 1918 amendment striking language that had limited the provision's application to male alien enemies, Act of April 16, 1918, ch. 55, 40 Stat. 531, there has been no significant revision of the Act since the Adams Administration. The Act is sometimes referred to as the Enemy Aliens Act.

President Roosevelt immediately triggered the Act after Pearl Harbor by issuing three proclamations on December 8, 1941, see Proclamations Nos. 2525–2527, 6 Fed. Reg. 6321–25 (pertaining to Japanese, German, and Italian alien enemies), and "[w]ithin six weeks after the attack on Pearl Harbor, 3,138 alien enemies had been apprehended, including 1,309 Germans, 243 Italians, and 1,581 Japanese." Robert R. Wilson, Treatment of Civilian Alien Enemies, 37 Am. J. Int'l L. 30, 42 (1943). Thousands more were detained over the next few months. Of the approximately 9,000 enemy aliens detained in the post-Pearl Harbor sweeps, 4,132 were eventually interned after individualized review by Enemy Alien Hearing Boards. Geoffrey Stone, War and Liberty: An American Dilemma: 1790 to the Present 65–66 (2007); J. Gregory Sidak, War, Liberty, and Enemy Aliens, 67 N.Y.U. L. Rev. 1402, 1417 (1992); see also Gerald L. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961, 994 (1998) (citing cases considering "whether war has been declared" and other elements of detainability under Act).

57. *Ludecke*, 335 U.S. at 162–63.

58. Proclamation No. 2655, 10 Fed. Reg. 8947 (July 18, 1945).

59. *Ludecke*, 335 U.S. at 166 (emphasis added); see also id. at 166 n.10 (citing *Hamilton*, *Stewart v. Kahn*, and *Fleming*).

60. Id. at 167–69.

By 1952, in *Jaegeler*, the Court *was* finally willing to declare World War II, and the concomitant war powers, to be at an end.[61] Jaegeler's case was easily distinguished from *Ludecke*, since Congress had by then passed a joint resolution officially terminating the state of war between the United States and Germany.[62]

The principle of *Ludecke*—that, for legal purposes, "the 'war' does not end when the fighting stops," but rather when "the political branches have formally acknowledged as much"—remains an "authoritative precedent."[63] It is the confluence of *Ludecke* and the open-ended nature of a conflict against terrorism that gives rise to assertions, and fears, that under the AUMF "the President may continue to use many of his war powers . . . indefinitely."[64]

B. *Applying the Historical Precedents to the War on Terror: Academic Approaches*

> The September 18, 2001 AUMF authorized the President:
> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[65]

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61. United States ex rel. Jaegeler v. Carusi, 342 U.S. 347, 348 (1952).

62. Joint Resolution of Oct. 19, 1951, Pub. L. No. 82-181, 65 Stat. 451. Interestingly, the Resolution excepted from its effects "any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act," again demonstrating Congress's flexibility in demarcating the legal termination of conflicts. Id.; see also supra note 48 (noting same Act was exempted from 1921 Resolution terminating state of war between United States and Central Powers).

63. Vladeck, supra note 5, at 54–55.

64. Id. at 56.

65. AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001); see also Bradley & Goldsmith, supra note 1, at 2050 ("[T]his Authorization for the Use of Military Force . . . deserves to be a more central part of the analysis of the war on terrorism.").

In theory, the limiting feature of the AUMF is that it authorizes the use of force against a finite set of "nations, organizations, or persons" with some relation to the 9/11 attacks. AUMF, § 2(a). In contrast, some previous force authorizations have authorized the President to combat a "threat" or prevent some future occurrence. For example, the October 2002 Iraq War authorization empowered the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing *threat* posed by Iraq." Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a), 116 Stat. 1498, 1501 (emphasis added). The eventual post-Saddam counterinsurgency mission, the legal authority for which rested on the 2002 authorization, bore little relation to the threat of weapons of mass destruction (WMDs) at the heart of that legislation. See id. at 1498–1500 (recounting history of Iraq's acquisition and use of WMDs).

The August 1964 Gulf of Tonkin Resolution "approve[d] and support[ed]" the President's "determination . . . to *prevent further aggression.*" Joint Resolution of Aug. 10,

The AUMF by its terms contains no termination provision,[66] raising the question of when the authorization to use force ends. This section will briefly review several academic efforts to address this question.

A starting point for academics has been the conflict's "potentially indefinite length."[67] Curtis Bradley and Jack Goldsmith have noted that "[u]nlike some authorizations to use force, the AUMF does not purport to limit the time period in which the President can act."[68] They argue persuasively that the authorization's open-endedness was intentional, noting that Congress declined to include a sunset clause in the AUMF, while it did so in the USA PATRIOT Act of 2001 and the Terrorism Risk Insurance Act of 2002.[69] Finally, they allude to the possibility that, with regard to detention, "the end of the conflict should be viewed in individual rather than group-based terms"—suggesting, at least with respect to one aspect of the conflict, the possibility and promise of a more nuanced approach to conflict termination in the war on terrorism.[70]

Other scholars acknowledge the open-endedness of the AUMF but lament that it raises, in the words of Stephen Vladeck, "the disturbing

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1964, Pub. L. No. 88-408, § 1, 78 Stat. 384, 384 (emphasis added); see also Bradley & Goldsmith, supra note 1, at 2077 n.128 (describing argument that Gulf of Tonkin Resolution was unconstitutional war authorization because it failed to specify enemy or purpose). Both authorizations, intended to authorize relatively limited actions, ended up initiating much longer and broader wars than imagined at passage. See Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (repealing Gulf of Tonkin Resolution).

In practice, the amorphous and evolving nature and structure of al Qaeda render illusory the limiting effect of the "nations, organizations, or persons" language of the AUMF. Part II, infra, illustrates how these characteristics of al Qaeda confound efforts to apply the Supreme Court's historic end of war precedents to the war on terrorism.

66. See Michael Stokes Paulsen, The War Power, 33 Harv. J.L. & Pub. Pol'y 113, 122 (2010) (noting AUMF "has no time limit—no expiration date"). Since Congress has "enacted a specific authorization" for the use of force (the AUMF), the "termination" provision of the War Powers Resolution does not apply. 50 U.S.C. § 1544(b) (2006). However, "the reporting requirements [of 50 U.S.C. § 1543(b)–(c)] probably apply." Bradley & Goldsmith, supra note 1, at 2078 n.130.

67. Bradley & Goldsmith, supra note 1, at 2123; see also Robert Chesney & Jack Goldsmith, Terrorism and the Convergence of Criminal and Military Detention Models, 60 Stan. L. Rev. 1079, 1100 (2008) ("The war against al Qaeda and affiliates has an endless quality in the sense that there is little or no prospect for negotiations leading to an agreed end to hostilities or an unconditional surrender.").

68. Bradley & Goldsmith, supra note 1, at 2123; see also id. at 2076–77, 2123 n.332 (discussing three modern force authorizations—defense of Taiwan, 1955; Lebanon, 1983; Somalia, 1993—that included explicit time limitations); id. at 2075–76 (describing Gulf of Tonkin Resolution and Iraq War Authorization, two force authorizations without time limitations).

69. Id. at 2123 & n.334. They also note that "many members of Congress noted in the debates over the AUMF that the war against the perpetrators of the September 11 attacks might take a very long time, and none suggested an implicit time limitation on the authorization." Id. at 2123 (footnote omitted); see also id. at 2123 n.333 (quoting Members of Congress); cf. infra note 210 and accompanying text (discussing sunset provisions in USA PATRIOT Act).

70. Bradley & Goldsmith, supra note 1, at 2125; see also infra Part III.C (discussing individualized approach to duration of terrorist detention).

prospect of war without end."[71] Vladeck notes that, since "it stands to reason that neither political branch will be much inclined to declare the war 'over' any time soon, . . . [a] fair reading of *Ludecke* and its precursors suggests that the President may continue to use many of his war powers . . . indefinitely."[72] While accepting Bradley and Goldsmith's argument that the AUMF does not contain a temporal limitation (and that courts are unlikely to find one absent clear action by the political branches), Vladeck argues that an indefinite exercise of congressional and presidential war powers is not consistent with our constitutional system and that war authorizations should therefore contain mandatory reauthorization provisions ("sunsets").[73] He contends that sunsets would overcome the constitutional, political, and judicial obstacles that have impeded previous efforts to restrain exercises of the war powers, and would have the particular virtue of "triggering a debate about the need for and proper scope of reauthorization."[74]

Bruce Ackerman argues that the current conflict should not be characterized as a "war," but rather as a temporally limited "state of emergency"[75] that "allows short-term emergency measures but draws the line against permanent restrictions."[76] However, a state of emergency would raise even greater civil liberties concerns than a state of war.[77] Nor does the evidence suggest that al Qaeda intends to fight the United States on a timetable conducive to resolution during a "temporary state of emergency."[78]

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71. Vladeck, supra note 5, at 53.

72. Id. at 55–56; see also supra Part I.A (discussing *Ludecke* and precursor cases).

73. Vladeck, supra note 5, at 56–57.

74. Id. at 95–107.

75. Ackerman, Not a War, supra note 1, at 1873 (emphasis omitted).

76. Bruce Ackerman, The Emergency Constitution, 113 Yale L.J. 1029, 1030 (2003) [hereinafter Ackerman, Emergency Constitution]. This, he argues, would "prevent politicians from exploiting momentary panic to impose long-lasting limitations on liberty." Id. In a hypothetical post-attack presidential address, the President would "ask[ ] Congress to declare a temporary state of emergency that will enable us to take aggressive measures to prevent a second strike, and seek a speedy return to a normal life" but would avoid "war-talk" which will make it easier for presidents to initiate "old-fashioned wars against sovereign states." Ackerman, Not a War, supra note 1, at 1875–76. But see David Cole, The Priority of Morality: The Emergency Constitution's Blind Spot, 113 Yale L.J. 1753, 1755 (2004) (criticizing state of emergency proposal); Laurence H. Tribe & Patrick O. Gudridge, The Anti-Emergency Constitution, 113 Yale L.J. 1801, 1803 (2004) (same); Adrian Vermeule, Self-Defeating Proposals: Ackerman on Emergency Powers, 75 Fordham L. Rev. 631, 631 (2006) (calling Ackerman's proposals "self-defeating").

77. See Cole, supra note 76, at 1758 (criticizing Ackerman for focusing on process while "never address[ing] the fundamental normative question presented by his proposal," the challenge of "striking an appropriate . . . balance between liberty and security"); Tribe & Gudridge, supra note 76, at 1820 (criticizing "Ackerman's willingness to toss what might to a schoolchild seem like the most basic rights of all into the black hole of his 'emergency constitution'").

78. See Nat'l Comm'n on Terrorist Attacks upon the U.S., The 9/11 Commission Report 363 (2004) [hereinafter 9/11 Commission Report] (describing post-9/11 counterterrorism effort as "a generational challenge").

In sum, the prevailing legal view of conflict termination in the war on terrorism is that the war will end on some (at this juncture, difficult to imagine) future date when an act of the political branches declares the enemy to be defeated. Until then, war powers will remain in effect.[79] Behind this view rests an implicit assumption that the "end" of a conflict against a terrorist group is inherently so indeterminate and subjective that it is impossible to shape a more precise legal model of termination. In fact, counterterrorism scholars outside of the legal community have considered the question of when, and how, conflicts against terrorist groups end. Part II considers their insights together with the question of how differing views of the structure of the terrorist threat facing the United States undermine the prevailing model of termination for this conflict. Part III discusses how a "hybrid" model of the legal end of the war on terrorism better accommodates the multifaceted nature of the al Qaeda threat, and its prospects for termination.

II. Two Views of the Terrorist Threat and Their Challenges to the Prevailing Model of the Legal End of the War on Terror

The prevailing view of how the war on terrorism ends for legal purposes considers terrorism as a generalized archetype. In fact, there is a great deal of divergence among leading scholars in the counterterrorism community about the structure of the terrorist threat facing the United States. This Part employs this debate as a lens through which to assess how the multifaceted, evolving nature of the terrorist threat undermines the prevailing on/off model of conflict termination for the war on terrorism.

Part II.A briefly presents the contours of the two competing views of the structure of the al Qaeda threat in recent counterterrorism scholarship. Part II.B then considers each model's implications for two questions relevant to the legal end of the conflict: (1) the possibility of the conflict against al Qaeda reaching a single, discernable end, and (2) how to determine whether the conflict has ended with respect to an individual terrorist combatant. Part III then considers how these insights can inform a more nuanced, better fitting model of conflict termination for the war on terrorism.

A. *The Top-Down/Bottom-Up Debate as an Analytic Tool*

Matthew Waxman argues that the legal community has not engaged in sufficiently sophisticated analysis about the evolving structure of the terrorist threat.[80] Instead, it has relied on a "snapshot view" of terrorism, "focused on the degree to which transnational terrorism does or does not

79. See supra text accompanying note 60 (discussing holding of *Ludecke v. Watkins*).

80. Matthew Waxman, The Structure of Terrorism Threats and the Laws of War, 20 Duke J. Comp. & Int'l L. 429, 431 (2010).

resemble military and national security threats posed by state or localized guerrilla armies."[81] Waxman argues that a more nuanced, current portrait of the terrorist threat—informed by recent debates in the field—would affect the application of the laws of war to conflicts against non-state terrorist groups.[82] In order to do so, he considers the relevant legal questions in light of two roughly drawn, but nonetheless illustrative, views of the terrorist threat: a "top-down" view, in which the main terrorist enemy is centralized and hierarchical, and a "bottom-up" view, which posits a more or less "leaderless jihad" in which isolated cells share a common ideological inspiration but organize and act without guidance from a central leadership.[83]

Waxman's analytic approach is informed by a recent dispute in the counterterrorism community, which brought the top-down and bottom-up views of the al Qaeda threat into relief and informs the analytic framework adopted by this Part.[84] While neither of the views (as Waxman and other counterterrorism experts acknowledge) can claim exclusive descriptive validity, each does represent an important aspect of the overall terrorist threat facing the United States.[85] This bipartite framework provides a useful lens through which to evaluate the sufficiency of legal approaches to terrorism issues, since it forces legal analysis to accommodate each of these two important aspects of the terrorist threat. Most significantly for this Note, both aspects must be accounted for by an accurate

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81. Id. at 430–31.

82. Id. at 432.

83. Id. at 431–32.

84. See Elaine Sciolino & Eric Schmitt, A Not Very Private Feud over Terrorism, N.Y. Times, June 8, 2008, at WK1 (describing public dispute between counterterrorism experts Bruce Hoffman and Marc Sageman, beginning with Hoffman's critical review of Sageman's book, *Leaderless Jihad*). The dispute, between "two of America's leading theorists on terrorism and how to fight it," Bruce Hoffman and Marc Sageman, concerns the fundamental nature of the Islamist terrorist threat to the United States and the West. Id.

Succinctly (and roughly), Hoffman and his supporters argue that the main terrorist threat to the United States is posed by traditional al Qaeda and affiliated hierarchically organized terrorist organizations operating out of geographic safe havens, including areas of Pakistan, Somalia, and Yemen. See infra Part II.B.1 (discussing top-down view). Sageman argues that this threat has been superseded by the threat of a bottom-up "leaderless jihad," in which the primary threat emanates from residents of Western countries who are radicalized and acquire terrorist know-how primarily through the Internet, and who conceive and execute attacks more or less autonomously rather than as agents of a hierarchical terrorist organization with centralized leadership. See infra Part II.B.2 (discussing bottom-up view).

85. See Waxman, supra note 80, at 431 ("While the broad consensus is that both phenomena are of great concern and not neatly separable, each view of the main terrorism threat to Western developed states poses a different set of challenges to current [legal] models."). However, even experts who acknowledge the relevance of both aspects of the threat may maintain that one or the other is of greater importance. See, e.g., Lydia Khalil, Op-Ed., The Threat of Homegrown Terrorism, Bos. Globe, Oct. 27, 2009, at A11 (acknowledging seriousness of threat of homegrown terrorism but arguing that since such radicals "aren't able to carry out . . . sophisticated, coordinated attacks," al Qaeda "and its affiliate organizations remain the greatest terrorism threat to the United States").

model of when the conflict against the amorphous terrorist enemy should terminate under law.[86]

B. *Two Views of the Terrorist Threat*

1. *The Top-Down al Qaeda Threat.* — One view of the threat, most prominently identified with Bruce Hoffman of Georgetown University,[87] argues that the foremost terrorist threat to the United States is still posed by "core" al Qaeda—i.e., the hierarchical, centralized al Qaeda organization headed by Osama bin Laden and Ayman al Zawahiri, operating from its geographic safe haven in the Federally Administered Tribal Areas (FATA) of northwest Pakistan.[88] This category may also be seen to encompass al Qaeda "franchises" like al Qaeda in the Arabian Peninsula and al Qaeda in the Islamic Maghreb, which are an increasingly impor-

86. See AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (describing enemy as "those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons").

87. See Bruce Hoffman, Al-Qaeda Dangerous as Ever, Nat'l Interest, Sept. 10, 2008, available at http://nationalinterest.org/article/al-qaeda-dangerous-as-ever-2859 (on file with the *Columbia Law Review*) (stressing al Qaeda's "remarkable ability to survive" and "reconstitute[d] . . . global terrorist reach"); Bruce Hoffman, The Myth of Grass-Roots Terrorism: Why Osama bin Laden Still Matters, Foreign Aff., May/June 2008, at 133, 138 (asserting al Qaeda remains predominant threat and urging United States and allies to "refocus their attention on Afghanistan and Pakistan, where al Qaeda began to collapse after 9/11 but has now regrouped"). But see Marc Sageman, Leaderless Jihad: Terror Networks in the Twenty-First Century 126–33 (2008) [hereinafter Sageman, Leaderless Jihad] (expressing skepticism at "the claim of a resurgent al Qaeda Central" for which evidence is "anecdotal").

88. See Eight Years After 9/11: Confronting the Terrorist Threat to the Homeland: Hearing Before the S. Homeland Sec. and Governmental Affairs Comm. 2 (Sept. 30, 2009) [hereinafter Leiter, Eight Years After 9/11] (prepared statement of Michael Leiter, Director, National Counterterrorism Center), available at http://www.nctc.gov/press_room/speeches/hbshsgac_8years_9-30-29.pdf (on file with the *Columbia Law Review*) ("[A]l-Qa'ida's core in Pakistan represent[s] the most dangerous component of the larger al-Qa'ida network."); Peter Bergen, Op-Ed., Al-Qaeda at 20 . . . Dead or Alive?, Wash. Post, Aug. 17, 2008, at B1 (noting training from "al Qaeda central" greatly increases lethality of attacks of which "homegrown wannabes" are capable).

Analysts favoring this view emphasize two features of such terrorist organizations as essential to their survival and lethality. The first is a geographic safe haven, which provides them with physical safety from counterterrorism operations, locations for training camps for aspiring operatives, and breathing room in which to develop and plan complex catastrophic attacks. See Peter Bergen, Does Osama bin Laden Still Matter?, Time, July 2, 2008, at http://www.time.com/time/world/article/0,8599,1819903,00.html (on file with the *Columbia Law Review*) (noting importance of training would-be terrorists receive in camps in Pakistan). The second, more relevant for this Note, is centralized organization and leadership, which greatly enhance the material and experiential sophistication available for planning and executing attacks. See Khalil, supra note 85 (arguing centralized al Qaeda "and its affiliate organizations," which can execute "sophisticated, coordinated attacks," remain "the greatest terrorism threat to the United States").

tant element of the overall al Qaeda threat.[89] Recent events provide considerable support for the assertion that the threat from core al Qaeda and its affiliates—hierarchical, centralized terrorist organizations operating out of geographic safe havens—remains grave. Umar Farouk Abdulmutallab, the Nigerian who attempted on December 25, 2009 to detonate an improvised explosive device aboard a Northwest Airlines flight from Amsterdam to Detroit, was guided by operatives of al Qaeda in the Arabian Peninsula.[90] In its salient details, this attempt bears a strong resemblance to 9/11: It was planned and facilitated by experienced al Qaeda operatives and carried out by a radicalized recruit in possession of a U.S. visa.[91] Moreover, highly regarded counterterrorism experts warn that despite the initial post-9/11 successes in degrading the leadership and organizational structure of core al Qaeda, its command structure has reconstituted itself in its sanctuary in the Pakistani tribal belt.[92]

2. *The Bottom-Up al Qaeda Threat.* — A competing view of the al Qaeda threat argues that the al Qaeda that perpetrated 9/11—hierarchical, with centralized command and control, reliant on physical training camps in geographic safe havens—was substantially weakened and is still

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89. See Eric Schmitt & Scott Shane, Christmas Bombing Try Is Hailed by bin Laden, N.Y. Times, Jan. 25, 2010, at A5 (quoting bin Laden's praise for would-be bomber Abdul Farouk Abdulmutallab); Eric Schmitt, Jetliner Plot Demonstrates Growing Ability of Qaeda Affiliates to Stage Attacks, N.Y. Times, Dec. 31, 2009, at A12 [hereinafter Schmitt, Jetliner Plot] (discussing al Qaeda in Arabian Peninsula's role in Christmas Day bombing attempt on Northwest Flight 253 and its increasing capabilities); Andrew Hansen & Lauren Vriens, Council on Foreign Relations Backgrounder: Al-Qaeda in the Islamic Maghreb (July 21, 2009), at http://www.cfr.org/publication/12717 (on file with the *Columbia Law Review*) (describing group's "widening ambitions" and "more global, sophisticated, and better-financed direction").

90. Michael D. Shear, Spencer S. Hsu & Sudarsan Raghavan, Officials: Terror Suspect May Have Ties to Al-Qaeda Network in Yemen, Wash. Post, Dec. 26, 2009, at http://www.washingtonpost.com/wp-dyn/content/article/2009/12/26/AR2009122601311.html (on file with the *Columbia Law Review*); Mohamed Sudam, Qaeda Group Claims U.S. Jet Plot, Vows More Attacks, Reuters, Dec. 28, 2009, available at http://www.reuters.com/article/idUSTRE5BR31020091228 (on file with the *Columbia Law Review*); see also Schmitt, Jetliner Plot, supra note 89 (discussing growing concern about organizational sophistication and capabilities of al Qaeda in the Arabian Peninsula). But see Sageman, Leaderless Jihad, supra note 87, at 129 (disparaging al Qaeda in the Islamic Maghreb and other franchises as "little 'al Qaedas'" which "are just . . . trying to acquire the reputation of al Qaeda by using its name").

91. Anna Fifield, U.S. Investigates Security Flaws, Fin. Times, Dec. 31, 2009, at http://www.ft.com/cms/s/0/dfa51452-f624-11de-bf49-00144feab49a.html (on file with the *Columbia Law Review*).

92. See Current and Projected National Security Threats to the United States: Hearing Before the S. Select Comm. on Intelligence, 111th Cong. 14 (Feb. 12, 2009) (prepared statement of Admiral Dennis C. Blair, Director of National Intelligence), available at http://www.fas.org/irp/congress/2009_hr/threat.pdf (on file with the *Columbia Law Review*) ("Sustained pressure against al-Qa'ida in [Pakistan's tribal areas] has the potential to further degrade its organizational cohesion and diminish the threat it poses."); see also Leiter, Eight Years After 9/11, supra note 88, at 2 ("[A]l-Qa'ida's core in Pakistan represent[s] the most dangerous component of the larger al-Qa'ida network.").

"contained operationally."[93] Therefore, it no longer represents the primary jihadist threat to the United States going forward.[94] Advocates of this view, most forcefully represented by the analyst Marc Sageman, argue that the gravest terrorist threat to Western countries arises from homegrown, "spontaneously self-organizing groups of friends" living in the West: a "leaderless jihad" consisting of radicalized "bunches of guys" who may derive inspiration from bin Laden or other international figures but plan and carry out operations autonomously.[95] Analysts taking this view focus on the process of radicalization, which Sageman argues now occurs in a decentralized fashion, facilitated, or even primarily driven by, the Internet.[96] In their view, the relationship between core al Qaeda and those who carry out attacks is one of inspiration rather than command and control, with the Internet facilitating remote radicalization and transmission of terrorist tradecraft.[97] The primary Islamist terrorist threat to

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93. Marc Sageman, Does Osama Still Call the Shots?, Foreign Aff., July/Aug. 2008, at 163, 163 (quoting Sageman, Leaderless Jihad, supra note 87, at 132).

94. See Confronting al-Qaeda: Understanding the Threat in Afghanistan and Beyond: Hearing Before the S. Foreign Relations Comm. 6–7 (Oct. 7, 2009) [hereinafter Sageman, Confronting al-Qaeda], (prepared statement of Marc Sageman, Senior Fellow, Foreign Policy Research Institute), available at http://www.fpri.org/transcripts/20091007.Sageman.ConfrontingalQaeda.pdf (on file with the *Columbia Law Review*) (comparing number of attacks in the West perpetrated by core al Qaeda to number perpetrated by "al Qaeda inspired" groups of homegrown radicals). Sageman finds that:

> 78% of all global neo-jihadi terrorist plots in the West in the past five years came from autonomous homegrown groups without any connection, direction or control from al Qaeda Core or its allies. The "resurgent al Qaeda in the West" argument has no empirical foundation. The paucity of actual al Qaeda and other transnational terrorist organization plots compared to the number of autonomous plots refutes the claims by some heads of the Intelligence Community that all Islamist plots in the West can be traced back to the Afghan Pakistani border.

Id. (citation omitted).

95. See Sageman, Leaderless Jihad, supra note 87, at 69 ("The global Islamist terrorist social movement forms through the spontaneous self-organization of informal 'bunches of guys,' trusted friends, from the bottom up."); see also Sageman, Confronting al-Qaeda, supra note 94, at 6 (describing such radicalized cells as "autonomous homegrown groups"). Sageman also emphasizes the "link between a diaspora [i.e., living in a country in which one did not grow up, or being the child of Muslim immigrants in the West] and terrorism." Sageman, Leaderless Jihad, supra note 87, at 65.

96. See Sageman, Leaderless Jihad, supra note 87, at 134 ("The concept of homegrown indicates that the members of these mainly Muslim diaspora groups in the West were born and radicalized in the host country."); id. at 109–23 (discussing importance of Internet to decentralized global jihadist movement).

97. See id. at 144 ("Without the Internet, a leaderless terrorist social movement would scatter all over the political space without any direction. The Internet makes the existence of a leaderless jihad possible."). Since al Qaeda's ideology is so extreme, and its political goals so utopian, it naturally appeals to a very small segment of the population. As with music and movies that appeal to very narrow audiences:

> [N]ew media have popularized the means of production, shrunk the distribution costs, and improved the connection of supply and demand for extreme political, religious, or ideological positions—thus making niche-terrorism viable. The

the West today, on this view, emanates from this dispersed "social movement" rather than a hierarchical organization.[98]

The troubling events of 2009 and 2010 have lent credence to the view that "homegrown terrorism" presents a grave and growing threat to the United States.[99] For example, in light of the revelations about the process of radicalization that preceded Major Nidal Hasan's attack, there is increasing agreement that the November 2009 Fort Hood shooting is an example of this phenomenon.[100] Several other homegrown terrorist plots were disrupted last year by counterterrorism authorities.[101] Even more worrying are the cases of Najibullah Zazi[102] and Tarek Mehanna,[103] homegrown radicals who sought contact with the al Qaeda network to

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> critical mass of people necessary to pass the threshold to a viable terrorist movement has shrunk.

Thomas Rid & Marc Hecker, The Terror Fringe, Pol'y Rev., Dec. 2009, at 3, 10, available at http://www.hoover.org/publications/policy-review/article/5619 (on file with the *Columbia Law Review*). Technology thus allows extremist ideologues to inspire "relatively small numbers of highly-motivated, partly self-recruited, entrepreneurial, geographically dispersed, and diverse radicals, all subscribing to a set of extreme causes without broader popular appeal." Id.; see also Bruce Hoffman, Inside Terrorism 95 (1998) [hereinafter Hoffman, Inside Terrorism] (noting religious terrorists, as opposed to secular terrorists, "seek to appeal to no other constituency than themselves").

98. See Sageman, Leaderless Jihad, supra note 87, at 31 ("[A]l Qaeda Central has receded in importance. In its place . . . is a looser social movement with its own strengths and vulnerabilities.").

99. See Sebastian Rotella, A U.S. Strain of Extremism May Be Rising; the Number and Scale of Cases Indicate More Radicalization Among American Muslims, Anti-Terror Experts Say, L.A. Times, Dec. 7, 2009, at A1 (quoting Homeland Security Secretary Janet Napolitano referring to concern about "[h]ome-based terrorism").

100. See Mark Thompson, Fort Hood Highlights a Threat of Homegrown Jihad, Time, Nov. 11, 2009, at http://www.time.com/time/nation/article/0,8599,19 37912,00. html (on file with the *Columbia Law Review*) ("[H]omegrown, lone-wolf terrorism is not only harder to detect; it is likely to grow . . . .").

101. For example, four men were arrested in May 2009 for plotting bomb attacks against Jewish sites and an Air National Guard base in New York. See Ghosh, Riverdale, supra note 2 (describing Riverdale plot and role of FBI informant); see also supra note 2 and accompanying text (noting other attempted acts of homegrown terrorism in 2009). While autonomous homegrown radicals acting without support from international networks may not be able to muster the lethality of centralized terror networks, the phenomenon of homegrown terrorism is an element of the worldwide threat that any legal model of conflict termination must accommodate.

102. See The Evolving Terrorist Threat to the U.S. Homeland: Hearing Before the Subcomm. on Intelligence, Info. Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Sec. 2 (Nov. 19, 2009) (prepared statement of Paul R. Pillar, Director of Graduate Studies, Center For Peace and Security Studies, Georgetown University), available at http://homeland.house.gov/SiteDocuments/20091119111309-98263.pdf (on file with the *Columbia Law Review*) (noting Zazi's radicalization occurred "during his days selling coffee and pastries from a cart in lower Manhattan . . . before, not after, he reportedly spent time at a training camp in Pakistan"); David Von Drehle & Bobby Ghosh, An Enemy Within, Time, Oct. 12, 2009, at 24, 26–28 (describing radicalization of Zazi in United States and his subsequent terrorist training in Pakistan).

103. See Abby Goodnough & Liz Robbins, Massachusetts Man Is Held on Charges of Plotting Attacks, Including One at a Mall, N.Y. Times, Oct. 22, 2009, at A21 (describing

facilitate their attacks,[104] and Faisal Shahzad, the naturalized American citizen of Pakistani birth who attempted to detonate a car bomb in Times Square after learning bombmaking techniques in a terrorist training camp in Pakistan.[105]

C. *The Two Models and Conflict Termination*

The AUMF authorizes the President to use his war powers against both "organizations" and "persons."[106] This section examines what insights recent counterterrorism scholarship can offer on the possibility of the end of the conflict (1) with respect to al Qaeda as an organization or movement, and (2) with respect to individual detained terrorists. In each case, it considers the question with respect to both the top-down and bottom-up models of the al Qaeda enemy.

1. *The Two Models and the End of al Qaeda.*

a. *The Top-Down Model and the End of al Qaeda.* — This subsection examines what insights counterterrorism scholarship offers about the prospect that al Qaeda might, at some discernable point, end as an organization.[107] A threshold insight supplied by counterterrorism experts is that many terrorist groups and movements do, in fact, come to a relatively unambiguous and discernable end.[108] This scholarship contravenes a widely accepted premise of the prevailing legal view of conflict termination in the war on terrorism: that counterterrorism efforts, unlike conventional wars, inherently lack discernable endpoints.[109]

Recent studies have analyzed the demise of a broad spectrum of terrorist groups, considering both the ways in which they end and the organizational characteristics that correlate to the unambiguous defeat of a terrorist network.[110] While they provide an invaluable empirical portrait

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arrest of Massachusetts pharmacist Tarek Mehanna, alleged to have unsuccessfully plotted attack on mall with coconspirators).

104. Another example is Shirwa Ahmed, a Somali American radicalized in the United States, who in 2008 carried out a suicide bombing on behalf of the al Qaeda-affiliated al Shabaab movement in Somalia. Spencer S. Hsu & Carrie Johnson, Somali Americans Recruited by Extremists; U.S. Cites Case of Minnesotan Killed in Suicide Blast in Africa, Wash. Post, Mar. 11, 2009, at A1; see also Daniel Byman, Op-Ed., Homeland Insecurity, Wall St. J., Dec. 12, 2009, at W1 (finding demographics of Somali community in the United States more similar to "Algerians in the banlieues in Paris than the affluent Arab Muslim community of the U.S.").

105. Elliott, supra note 2.

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

107. Insofar as only the top-down view assigns much relevance to organizational structure, this research is of great significance only if one adopts this view of the al Qaeda threat. See supra notes 87–92.

108. See infra note 110.

109. See, e.g., Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008) (stating conventional wars, unlike war on terrorism, are of "limited duration").

110. E.g., Seth G. Jones & Martin C. Libicki, How Terrorist Groups End: Lessons for Countering al Qa'ida (2008); Gaga Gvineria, How Does Terrorism End?, *in* Social Science for Counterterrorism: Putting the Pieces Together 257 (Paul K. Davis & Kim Cragin eds.,

of how terrorist groups have declined or been successfully defeated, their conclusions also demonstrate the limited utility of fixing a single endpoint of a terrorist movement for use in *legal* analysis.

Audrey Kurth Cronin identifies seven "broad explanations for, or critical elements in, the decline and ending of terrorist groups in the modern era."[111] While three of these—failure to transition to the next generation, undermining of popular support, and transition from terrorism to crime or traditional insurgency—are incremental processes unlikely to provide any legally discernable endpoint, others at least offer the prospect of a clear termination of the conflict.[112] These include the elimination of a leader, transition to a legitimate political process, achievement of the group's aims, and repression (i.e., defeat by force).[113] For example, the 2009 defeat of the Liberation Tigers of Tamil Eelam (Tamil Tigers) by Sri Lankan military forces was marked by the killing of the Tigers' charismatic leader Vellupillai Prabhakaran and a statement of unconditional surrender by the Tigers.[114] However, while a decisive military defeat may supply a clear termination point, it "has rarely been the primary reason that terrorist groups end."[115]

South Africa's African National Congress and the Jewish Irgun in Palestine—of which future Prime Minister Menachem Begin was a member—ceased armed hostilities upon achieving their political aims (the end of apartheid in South Africa and the British presence in Palestine, respectively). In both cases, the end of hostilities was marked by a formal political transition.[116] Incorporation into a peaceful political process ended the terrorist status of both the Provisional Irish Republican Army (PIRA) and the Palestine Liberation Organization (PLO).[117]

2009); Audrey Kurth Cronin, How al-Qaida Ends: The Decline and Demise of Terrorist Groups, Int'l Security, Summer 2006, at 7. For a brief, more general commentary, see generally U.S. Inst. of Peace, How Terrorism Ends (1999), available at http://www.usip.org/files/resources/sr990525.pdf (on file with the *Columbia Law Review*).

111. Cronin, supra note 110, at 17–18. Jones and Libicki list "policing, military force, splintering, politics, or victory" as ways that terrorist groups end. Jones & Libicki, supra note 110, at 10. Gvineria lists eight similar "modes of decline": (1) substantial success; (2) partial success; (3) direct state action, including repression; (4) disintegration through burnout; (5) loss of terrorist leaders; (6) unsuccessful generational transition; (7) loss of popular support; and (8) emergence of new alternatives (to terrorist violence). Gvineria, supra note 110, at 258–59.

112. Cronin, supra note 110, at 17–18.

113. Id.

114. C. Bryson Hull & Ranga Sirilal, Sri Lanka's Long War Reaches Climax, Tigers Concede, Reuters, May 17, 2009, at http://www.reuters.com/article/idUSTRE54D1GR20090517 (on file with the *Columbia Law Review*).

115. Jones & Libicki, supra note 110, at 9.

116. See Cronin, supra note 110, at 24 (noting "last ANC attack occurred in 1989, and the organization became a legal political actor in 1990, having achieved its objective of ending the apartheid regime" and that "Irgun disbanded with the creation of the state of Israel").

117. Id. at 25 (noting PIRA's participation in talks leading to 1998 Good Friday agreement and PLO's entry into "a peace process with Israel during the 1990s").

The degree to which similar indicia of defeat would be relevant and useful in fixing the legal termination of the conflict with al Qaeda depends on the degree to which al Qaeda shares, or does not share, relevant organizational characteristics with these other groups. To the extent that al Qaeda possesses the characteristics of coherence, hierarchical organization, and an effective principal-agent relationship between leaders and members, it may be possible to look to these other examples to identify useful indicia of the termination of a conflict against a terrorist group. However, there are reasons to be wary of relying on comparable events as legally dispositive indications of the end of the overall conflict against al Qaeda.[118] First, elimination of Osama bin Laden and Ayman al Zawahiri will not cripple al Qaeda, despite bin Laden's "astonishing popularity," since its message and appeal do not rely on a cult of personality centered on the personae of charismatic leaders.[119] Nor can al Qaeda foreseeably achieve its aims; "most terrorist groups that end because of politics seek narrow policy goals,"[120] while al Qaeda's "could not be achieved without overturning an international political and economic system characterized by globalization and predominant U.S. power."[121] A convincingly clear military defeat, even if it might have been within reach in 2002, seems less likely today given al Qaeda's renewed safe haven in Pakistan.[122] Moreover, when a terrorist group breaks apart or is de-

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118. Cf. Bobbitt, supra note 1, at 213 (arguing victory "[i]n the warfare of the twenty-first century" increasingly means "preclusive victory," in which "winning amounts to not losing," by preventing and preempting attacks).

119. Cronin, supra note 110, at 39–40. Cronin observes that:

> [A]l-Qaida is not driven by a cult of personality; despite his astonishing personality, bin Laden has deliberately avoided allowing the movement to revolve around his own persona, preferring instead to keep his personal habits private, to talk of the insignificance of his own fate, and to project the image of a humble man eager to die for his beliefs.

Id. at 40. She also notes that "bin Laden has often spoken openly of a succession plan" and that capturing or killing bin Laden might lead to "the creation of a powerful martyr." Id.; see also Bobbitt, supra note 1, at 213 ("'[P]reclusive victory' . . . requires us to begin again each day, without the prospect that, once al Qaeda has disintegrated and bin Laden found the martyrdom he seeks, warfare will cease.").

120. Jones & Libicki, supra note 110, at xiii. Jones and Libicki also note that religiously motivated terrorist groups have rarely achieved their objectives, finding that "[n]o religious group that has ended achieved victory since 1968." Id. at xiv. "Narrow" policy goals do not imply that a group's goals are not ambitious, but rather that it seeks specific, limited, and realistically achievable political changes (e.g., the departure of British forces from Mandate-era Palestine or the end of apartheid government in South Africa), as opposed to far-fetched utopian scenarios. See also Gvineria, supra note 110, at 261 (noting "narrow, clearly defined, and attainable goals" are a factor critical to a terrorist group's ability to achieve "substantial success").

121. Cronin, supra note 110, at 41; see also Rohan Gunaratna, Inside Al Qaeda: Global Network of Terror 87 (2002) ("Osama never interpreted Islam to assist a given political goal. Islam is his political goal . . . ."); cf. Sageman, Leaderless Jihad, supra note 87, at 144 ("[Leaderless jihad's] strength is that it is all things to all people, who can project their . . . fantasies onto the movement.").

122. See supra note 92 and accompanying text.

feated, "[m]embers [may] remain committed to terrorism but choose to continue fighting for other groups."[123] The end of a particular group may be a discernable event, but not necessarily a dispositive one.

Even if the convincing defeat of the core al Qaeda hierarchy in Afghanistan and Pakistan's tribal belt would not signal the end of al Qaeda[124] or the end of the war on terrorism, it would at least be relevant to the continuing need for certain legal authorities (e.g., the authority to use military force in those geographic areas). Disaggregating the overall threat into component elements that might *individually* come to identifiable ends—rather than waiting in vain for a total, decisive victory whose occurrence might never be discernable—is the first step toward the challenge, addressed in Part III, of constructing a more nuanced legal model of how the war on terrorism might end.

b. *The Bottom-Up View and the End of al Qaeda.* — An initial and clear implication of the bottom-up model of the jihadist threat is that even the crushing military defeat or abject surrender of the central al Qaeda organization[125] would not constitute a meaningful end to the conflict.[126]

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123. Jones & Libicki, supra note 110, at 13. Jones and Libicki reviewed the histories of 648 terrorist groups that were active between 1968 and 2006. Of the 404 that ended during that period, 136 (28%) ended by splintering, suggesting that this is a major concern. Id. at 20 n.34; see also infra text accompanying notes 150– 151 (discussing splintering in context of challenges to assumptions underlying law of war detention).

124. See Cronin, supra note 110, at 7 (noting al Qaeda is "a moving target, with experts arguing that it has changed structure and form numerous times"). The nature of al Qaeda is not temporally static: After the damage inflicted by post-9/11 military operations on the al Qaeda organization, many analysts concluded that al Qaeda had shifted to being a decentralized, web-based phenomenon without hierarchical command and control. Recently, this theory has been eclipsed by concerns about the renewal of centralized al Qaeda and its regional affiliates—more traditionally structured organizations operating out of terrorist safe havens. Compare Gunaratna, supra note 121, at 10 ("Since the U.S. intervention in Afghanistan . . . Al Qaeda has lost its main base for planning and preparing terrorist operations. Hence the Al Qaeda leadership is relying on its wider network to plan and execute new operations with the support of its associate groups."), and Steve Coll & Susan B. Glasser, Terrorists Turn to the Web as Base of Operations, Wash. Post, Aug. 7, 2005, at A1 (recounting how events of 2005 "led Western intelligence agencies and outside terrorism specialists to conclude that the 'global jihad movement,' . . . has become a 'Web-directed' phenomenon"), with Schmitt, Jetliner Plot, supra note 89 (noting latest focal points of counterterrorism concern about al Qaeda capabilities are core al Qaeda in Afghan-Pakistan border region and regional al Qaeda affiliate organizations in North Africa, Yemen, and Somalia). Nor is al Qaeda either centralized or decentralized: The terrorist threat to the United States simultaneously encompasses both centralized and decentralized elements. See Crenshaw, supra note 3, at 1 ("Its complex organizational structure is something between a centralized hierarchy and a decentralized flat network. It is a flexible and adaptable organization that has survived well beyond the lifespan of most other terrorist organizations.").

125. See supra notes 112–115 and accompanying text.

126. Gvineria notes, "[i]t is now widely believed that the distributed terrorist network, such as the one practicing 'leaderless resistance,' is less susceptible to disruption through removal of leaders," but adds the caveat that "[n]ot all nodes of a network are equal and a network's ability to replace a lost node depends on what that node contributed." Gvineria, supra note 110, at 269–70. She continues: "[A] charismatic or intellectual leader might be

That core leadership is, under this view, a source of inspiration rather than the locus of the primary threat.[127] Nor does it exercise command and control over the radicalized individuals and self-guided "local network[s]" who plan and attempt terrorist attacks in the West.[128]

Of the seven ways described by Audrey Kurth Cronin in which conflicts against terrorist groups terminate, only the undermining of popular support seems applicable to an amorphous, geographically dispersed social movement linked more by ideology than organizational structure.[129] The diminution of popular support may be driven by positive government efforts to win over popular sentiment, public exhaustion after long periods of counterterrorist activity, developments rendering the cause anachronistic, or revulsion among the group's intended constituency.[130] Each of these represents a plausible scenario for the petering out of the type of Internet and alienation-driven radicalization observed by those who postulate a bottom-up model of the terrorist threat.[131] Even a leaderless jihad composed of self-organizing groups of radical individuals

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essential to the coherence and motivation of the organization, even though he had little direct administrative or operational control," though "[a] distinction[ ] should be made between simply removing 'the' leader and removing most of the entire upper echelon of an organization." Id. at 270.

The existence of an essential of an "upper echelon" or even an "organization" would, however, seem to run counter to the shape of the movement as postulated by Sageman. See supra note 98 and accompanying text. Moreover, while the loss of valuable "nodes" might harm a decentralized network, it would not have the devastating decapitating effect that the loss of leaders had on groups centered on charismatic leaders, like Peru's Shining Path or Japan's Aum Shinrikyo cult. See Gvineria, supra note 110, at 260 (listing historical examples of groups that declined because of loss of leaders).

127. See Sageman, Leaderless Jihad, supra note 87, at 31 ("There is no doubt that this social movement, which might be more properly called global Islamist terrorism, is heavily influenced by the organization al Qaeda Central.").

128. Id. at 144. Sageman writes:

> The third wave of global Islamist terrorism has degraded into a leaderless jihad. Each local network carries out its attacks without coordination from above. But while this campaign of terror attacks lacks a firm overarching strategy, it still has an agenda set by general guidelines found on the Internet . . . .

Id. (footnote omitted).

129. See supra notes 111–117 and accompanying text. Among the similar "modes of decline" proposed by Gvineria, only the erosion of popular support and the emergence of alternative means of achieving political objectives (including transition to a "mass-based protest movement") would seem to apply to a dispersed, bottom-up social movement with no hierarchical organizational structure. Gvineria, supra note 110, at 258–59. The former is discussed infra at note 132; the latter seems a remote prospect with respect to violent jihadism. Nor is there any reason to believe that a transition to mass protest would yield a sufficiently discernable endpoint for legal analysis.

130. Cronin, supra note 110, at 27–28. For examples of the last, see infra note 148 (discussing disgust among Iraqis and residents of Pakistani tribal areas at al Qaeda and Taliban brutality, respectively).

131. See Sageman, Leaderless Jihad, supra note 87, at 145 ("To survive, [the movement] requires a constant stream of new violent actions to hold the interest of potential newcomers to [it], create the impression of visible progress toward a goal, and give potential recruits a vicarious experience before they take the initiative to engage in

relies on the type of "passive support" threatened by the loss of popular sympathy.[132] According to Cronin, passive support "is more diffuse and includes actions such as ignoring obvious signs of terrorist group activity, declining to cooperate with police investigations, sending money to organizations that act as fronts for the group, and expressing support for the [radicals'] objectives."[133] Thus, it is at least plausible that bottom-up al Qaeda-inspired jihadism is not an endless phenomenon, even if it will not end in a climactic shootout like the Tamil Tigers.[134] Still, despite the conceptual *possibility* of an end, it is difficult to imagine that the gradual ebbing of popular support for jihadism would yield a sufficiently unambiguous and discernable endpoint to supply an answer to legal questions hinging on the end of hostilities.[135] In this light, the prospect of a *legal* state of "[w]ar [w]ithout [e]nd"[136] seems inevitable as long as the termination of counterterrorism authorities must await a single, identifiable "end" to the conflict. The disaggregation of the conflict proposed in Part III is in large part an attempt to supply a more satisfactory answer to the troubling questions raised here by the bottom-up model.

2. *The Two Models and the Assumptions Underlying Detention*

a. *The Top-Down Model of al Qaeda, Principal-Agent Relationships, and the Assumptions Underlying Detention.* — Whether one accepts a "top-down" or "bottom-up" view of the terrorist threat has powerful implications for determining the length of, and legal regime that should govern, noncriminal terrorist detention authority.[137] With respect to the relation between detention and one's legal model of conflict termination, two concerns arise: the prospect of indefinite detention (i.e., the concern that detention will continue too long), and the breakdown of the principal-agent relationship that justifies limiting the duration of an individual's detention to the length of hostilities against a group (i.e., the concern that detention will not continue long enough).[138]

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their own terrorist activities."); id. at 146 ("A leaderless jihad . . . is vulnerable to whatever may diminish its appeal among the young.").

132. See Gvineria, supra note 110, at 273–74 (noting "[a] number of developments can lead to diminished popular support," including "[s]trategic miscalculations," "[g]overnment repression that raises costs of tolerating terrorists," "[p]olitical and socioeconomic reforms targeting the underlying grievances of passive and active supporters," and "[a] better security environment").

133. Cronin, supra note 110, at 27.

134. See supra text accompanying note 114 (describing Tigers' demise).

135. See Sageman, Leaderless Jihad, supra note 87, at 146 ("The leaderless jihad will probably fade away . . . .").

136. Vladeck, supra note 5, at 53.

137. This subsection and Part II.C.2.b, which considers this question in view of the "leaderless jihad" theory of the terrorist threat, do not consider criminal incarceration, whose length does not depend on the continued existence of any condition of hostilities. A policy choice to rely exclusively on the criminal justice system to detain captured terrorists would thus obviate the need for this inquiry.

138. Many legal scholars have noted the difficulty of determining *who* is an enemy combatant, a challenge beyond the scope of this Note, which focuses on the length of

Concerns about indefinite detention arise out of the fact that "[t]he war against al Qaeda and affiliates has an endless quality in the sense that there is little or no prospect for . . . an agreed end to hostilities or an unconditional surrender."[139] Such concerns were acknowledged by the Supreme Court in *Hamdi v. Rumsfeld*.[140] In considering the applicability of the law of war detention model, the Court stated that the understanding that the AUMF "include[s] the authority to detain for the duration of the relevant conflict" depends on the degree to which the conflict resembles a traditional war against a state adversary.[141] Thus, the question whether it is possible to identify the end "of the relevant conflict" is central to determining whether the law of war rule permitting detention until the "cessation of hostilities"[142] can be applied.[143]

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detention. See, e.g., Chesney & Goldsmith, supra note 67, at 1099–100 ("The traditional model's emphasis on associational status as a detention trigger is difficult to apply to an amorphous clandestine network such as al Qaeda."). Chesney and Goldsmith note the difficulty of determining "what degree of association with al Qaeda suffices to warrant status-based detention." Id. at 1099. They also highlight the risk of erroneous detentions, which is low in state-state conflicts, where captured soldiers "w[ear] uniforms and [are] usually keen to obtain [the protections of] POW status." Id.

139. Id. at 1100.

140. 542 U.S. 507 (2004) (plurality opinion). The Court held, "based on longstanding law-of-war principles," that the AUMF authorizes detention "for the duration of the relevant conflict," and that authority to detain Taliban fighters captured in Afghanistan continued given "[a]ctive combat operations against Taliban fighters . . . ongoing in Afghanistan." Id. at 521.

141. See id. ("If 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.").

142. See Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 3406, 75 U.N.T.S. 135, 224 [hereinafter Third Geneva Convention] ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."); see also Al-Bihani v. Obama, 590 F.3d 866, 874 (D.C. Cir. 2010) ("The Conventions, in short, codify what common sense tells us must be true: release is only required when the fighting stops."), reh'g en banc denied, 2010 WL 3398392, at *1 (D.C. Cir. Aug. 31, 2010) (denying rehearing but stating panel's discussion of "the role of international law-of-war principles in interpreting the AUMF" was "not necessary to the disposition of the merits").

143. The *Hamdi* Court held that since the conflict in Afghanistan was such a traditional conflict, and still ongoing, that "understanding" held. See *Hamdi*, 542 U.S. at 521 ("If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF."); see also *Al-Bihani*, 590 F.3d at 875 ("In the absence of a determination by the political branches that hostilities in Afghanistan have ceased, Al-Bihani's continued detention is justified."); cf. Al-Marri v. Pucciarelli, 534 F.3d 213, 252 (4th Cir. 2008) (en banc) (Motz, J., concurring) ("Unlike detention for the duration of a traditional armed conflict between nations, detention for the length of a 'war on terror' has no bounds."), vacated as moot sub nom. Al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (mem.); C. Michael Hurley, The 9/11 Commission Report and Public Discourse Project, *in* Enemy Combatants, Terrorism, and Armed Conflict Law: A Guide to the Issues 92, 97 (David K. Linnan ed., 2008) ("[T]he enemy in the fight against terrorism cannot be identified by citizenship *and cannot be determined geographically* . . . ." (emphasis added));

A second, less recognized, yet more fundamentally debilitating concern is that the principal-agent assumption underlying the law of war link between the end of detention and the cessation of hostilities breaks down with respect to al Qaeda. The power to detain under the law of war is philosophically rooted in, and limited by, the assumption that an enemy soldier is an agent of his sovereign—that he is "bound by an allegiance which commits him to lose no opportunity to forward the cause of [the] enemy."[144] Detention during the duration of hostilities is a measure "to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign."[145] Since this duty ceases once the enemy sovereign has declared an end to hostilities, the imputation to the individual combatant of intent to commit hostile acts no longer holds beyond that point. The end of the conflict for the sovereign is the end of the conflict for the soldier. Thus, "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities."[146]

The assumption that a functioning principal-agent relationship exists between leader and soldier with regard to the commencement and cessation of hostilities does not hold in the case of terrorist groups. While the state possesses the sovereign power to compel the soldier to fight *and* to issue an enforceable order to stand down, terrorist groups do not.[147] Admittedly, some terrorist groups may exercise such control over a particular territory where they exercise quasi-sovereign authority; however, attempts to compel obedience from the local population by violence may come at the cost of the group's own tenuous legitimacy.[148] More importantly, since jihadism has become a globe-spanning movement, jihadists can travel to find a satisfactory outlet for their antipathies.[149] While an

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infra note 224 (questioning whether walling off conflict in Afghanistan from larger war on terrorism necessarily makes sense, given transnational ideology of international jihadists).

144. Johnson v. Eisentrager, 339 U.S. 763, 772–73 (1950).

145. Id. at 773.

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

147. See Hoffman, Inside Terrorism, supra note 97, at 41 ("Terrorists . . . rarely exercise any direct control or sovereignty either over territory or population.").

148. Id. at 162. Hoffman writes:

> "[T]raitors," informants, and other collaborators among their own brethren are regularly targeted; but here the terrorist group must be careful to strike [a] balance between salutary, if sporadic, "lessons" that effectively intimidate and compel compliance from their own communities and more frequent and heavy-handed episodes that alienate popular support, encourage cooperation with the security forces and therefore prove counterproductive.

Id.; see also Jones & Libicki, supra note 110, at 83 (recounting how al Qaeda in Iraq's growing unpopularity among residents of al Anbar province, caused by its "overly aggressive stance" there, facilitated U.S. counterinsurgency efforts from 2006 to 2008); Scott Shane, C.I.A. Drone Use Is Set to Expand Inside Pakistan, N.Y. Times, Dec. 4, 2009, at A1 (noting majority support among residents of Pakistani tribal areas, "who bitterly resent the militants' brutal rule," for U.S. drone strikes against al Qaeda and Taliban militants, despite civilian casualties).

149. See, e.g., 9/11 Commission Report, supra note 78, at 160 (discussing 1999 arrival of "Hamburg Contingent," including Mohamed Atta, at al Qaeda's headquarters in

ordinary soldier is anchored by an allegiance to his or her home state, Islamist terrorists' attachments to particular leaders and organizations are likely to be motivated by an ideology that transcends both, and are thus transferrable.[150] As Jones and Libicki note, because of the possibility of groups "splintering," "the end of a group does not signal the end of terrorism by its members. Members [may] remain committed to terrorism but choose to continue fighting for other groups."[151] The assumption that foot soldiers will cease hostilities when their commanders do, which underlies the law of war's link between cessation of hostilities and end of detention, fails even in the case of hierarchical, centralized terrorist groups.

b. *The Bottom-Up Model and the Assumptions Underlying Detention.* — Like the top-down view, the bottom-up model seriously—perhaps fatally—calls into question the logic of applying the prevailing on/off model of conflict termination to the duration of terrorist detention. In light of the unlikelihood of identifying a decisive endpoint,[152] concerns about indefinite detention under the law of war detention model seem especially valid here.[153] The principal-agent assumption, which justifies the law of war link between the end of detention and the cessation of hostilities against an enemy sovereign,[154] is even more clearly inappropriate in the context of "autonomous homegrown groups without any connection, direction or control from al Qaeda Core or its allies"[155] from whom the primary threat (in this view) emanates. If the al Qaeda threat is primarily a bottom-up leaderless jihad, "the practical circumstances of [the] conflict *are* . . . unlike those of the conflicts that informed the development of the law of war."[156]

Kandahar, Afghanistan seeking to participate in jihad); Hosenball et al., supra note 2, at 37 (noting Flight 523 bomber Umar Farouk Abdulmutallab traveled to Yemen in order to participate in jihad).

150. See Benjamin Wittes, Law and the Long War: The Future of Justice in the Age of Terror 161 (2008) ("[An] international jihadi captured in Afghanistan . . . is part of a global struggle against the United States and . . . may well move on to the next combat arena when the fight against the Taliban winds down.").

151. Jones & Libicki, supra note 110, at 13; see Cronin, supra note 110, at 21 (discussing 1997 split of Real Irish Republican Army (RIRA) from PIRA, after latter agreed to participate in Northern Ireland peace process); see also Gvineria, supra note 110, at 261 (discussing history of splintering in Irish republican militancy since 1919). Even though the RIRA's imprisoned leader Michael McKevitt later "declared that further armed resistance was futile and that the RIRA was 'at an end,'" Cronin, supra note 110, at 21, the RIRA continues to carry out attacks, including the 2009 shooting of two unarmed British Army engineers at a base in Northern Ireland. Real IRA Was Behind Army Attack, BBC News, Mar. 8, 2009, at http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/7930995.stm (on file with the *Columbia Law Review*).

152. See supra Part II.C.2.a.

153. See supra notes 139–141 and accompanying text.

154. See supra notes 144–146 and accompanying text.

155. Sageman, Confronting al-Qaeda, supra note 94, at 6.

156. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion) (emphasis added).

How then might one more aptly conceptualize the end of a dispersed, leaderless terrorist threat for purposes of detention? First, in the context of a leaderless jihad, the end of the threat is not usefully linked to the continued existence or viability of any organization. In an interesting comparison, Sageman notes: "Far from being directed by a Comintern, global neo-jihadi terrorism is evolving to the structure of anarchist terrorism that prevailed over a century ago, when no such global coordinating committee was ever found despite contemporaneous belief in its existence."[157]

If the threat posed by a detained individual does not derive from his connection to any "coordinating committee" or other external organization, there is not a plausible basis for linking the length of his or her detention to the duration of the conflict against such an organization. Many detainees at Guantanamo openly acknowledge being trained terrorist fighters, yet deny that (or claim not to know whether) they are al Qaeda members.[158] As Benjamin Wittes notes, the most vexing detention problems arise with respect to this

> subset of detainees[,] for whom application of the norms of warfare permits the government at once too much latitude [i.e., to detain until the end of a war whose termination may be impossible to pinpoint] and too little . . . for whom release at the termination of hostilities is something of a fiction.[159]

The threat emanating from an "international jihadi" who "is part of a global struggle against the United States" and may move from conflict to conflict as the theater of battle and the belligerent parties shift—or from a violent radicalized individual not affiliated with any group—derives not from his capacity "as an arm of a particular military force but [from him] *in his individual capacity*."[160] This group of detainees, for whom the terrorist threat emanates not from organizational ties but from their individual characteristics, may "require[ ] new law . . . severed from the laws of war"[161]—or at least a definition of the "end" of the conflict tied not to the demise of some organization but to the end or diminution of the characteristics that render the individual a threat.[162] Part III.C considers the

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157. Sageman, Confronting al-Qaeda, supra note 94, at 8.

158. Wittes, supra note 150, at 159. For example, Bashir Nasir Al-Marwalah (also known as Bashir Nasir Ali al Marwalah) acknowledged before a Combatant Status Review Tribunal at Guantanamo that he had attended an al Qaeda training camp and learned sniper skills there. When asked if he was an al Qaeda member, he responded, "I don't know. I know I am an Arab fighter." Id. at 158. As of September 3, 2010, Marwalah remains detained at Guantanamo. The Guantánamo Docket: Bashir Nasir Ali al Marwalah, N.Y. Times, at http://projects.nytimes.com/guantanamo/detainees/837-bashir-nasir-ali-al-marwalah (on file with the *Columbia Law Review*) (last visited Sept. 10, 2010).

159. Wittes, supra note 150, at 161.

160. Id.

161. Id. at 162.

162. See Bradley & Goldsmith, supra note 1, at 2125 (suggesting relevant characteristics).

policy implications of this conclusion and how it fits into an overall legal framework for conflict termination in the war on terror.

III. Toward a Hybrid Model of Conflict Termination

This Part suggests principles for constructing a more nuanced and apt model for when the war on terrorism ends under law. It argues that the complexities raised in Part II cannot be accommodated by a termination model that links the duration of an array of legal authorities, including the power to detain individual combatants, to a "one size fits all" termination date. This is true whether that date exists hypothetically, awaiting a future affirmative act of the political branches, or whether it is a date certain fixed by a sunsetting AUMF. Instead, this Part proposes a more nuanced, "hybrid" model of conflict termination. Under this model, statutory provisions for the termination of counterterrorism authorities, including detention, could be crafted to reflect an analysis of how the aspect of the terrorist threat each power seeks to address might terminate in fact, and whether such termination would appropriately be fixed by a political or adjudicative determination.

Part III.A argues that the primary lesson of Part II is the inaptitude of a single legally determinative end date for the war on terrorism. It therefore concludes that a sunsetting AUMF is not a sufficient response to the complexities of the threat. Instead, the threat must be disaggregated into its constituent elements, since these, as Part II illustrated, are unlikely to share the same end-in-fact. The duration of specific counterterrorism authorities should logically be tied not to a generalized "end of the conflict," but rather to a plausible termination scenario for the aspect of the threat each seeks to address. Part III.B argues that the traditional doctrine, relying on a "public act of the political departments,"[163] is usefully applied to the top-down aspects of the threat, and suggests how past examples of congressional incorporation of termination provisions in wartime statutes can guide current practice. Part III.C then considers the challenge of incorporating the bottom-up aspects of the terrorist threat into an overall legal model of conflict termination, focusing on the duration of the detention of individual captured terrorists. It argues that since, in contrast to traditional wars against states, the end of the conflict with respect to captured enemy combatants is *not* amenable to an overarching determination by the political branches (or at least an accurate one),[164] it must be adjudicated individually rather than determined collectively.

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163. The Protector, 79 U.S. (12 Wall.) 700, 702 (1871); see supra Part I.A.1.a (discussing provenance of this principle in Civil War-era cases).

164. See supra Part II.C.2.

A. *Disaggregating the Threat*

As illustrated by Part II, whether one holds a top-down or bottom-up view of the nature of the terrorist threat has significant implications for several questions under the aegis of when the war on terrorism might end. First, is an end to the threat likely to be sufficiently discernable to provide a usable input for legal determinations?[165] Second, what is the relevant unit for determining when the threat has ended: an organization and its leadership, or an individual fighter?[166] These two questions implicate a secondary, yet inextricably linked consideration: Who is the appropriate governmental actor to determine when a given element of the threat has terminated? The debate in the counterterrorism community over the fundamental nature of the threat[167] demonstrates that this conflict is too complex and multifaceted for any of these questions to yield a single, definitive answer.

The on/off switch view of conflict termination described in Part I is therefore unable to accommodate the varied elements of the threat. Tying the conflict's legal duration to the continued existence of a specific terrorist organization makes little sense when a major element of the threat is unorganized and not subject to centralized command and control.[168] Tying the end of the power to detain an individual to the "cessation of hostilities" against an organization makes little sense when the threat emanates not from individuals in their capacity as members of a military force, but from the personal characteristics of radicalized individuals themselves.[169] A binary "conflict on/conflict off" choice simply does not reflect the realities of combating an amorphous, multifaceted threat like al Qaeda.

For this reason, a sunsetting AUMF—that is, a use of force authorization containing a mandatory expiration date, beyond which the war powers dependent on the authorization would terminate unless Congress passes a reauthorization—is an inapt solution to the problem of legal conflict termination in the war on terrorism.[170] For example, as the preceding analysis of terrorist detention illustrates, in the conflict against Islamist terrorism it is a non sequitur to link the duration of detention of individual combatants to the demise of a particular organizational struc-

165. See supra text accompanying notes 107–110, 118–126, 135–136.

166. See supra text accompanying notes 157–162.

167. See supra Part II.A–B.

168. See supra Part II.C.1.

169. See supra Part II.C.2.

170. But see Vladeck, supra note 5, at 95 (proposing sunsetting AUMF as answer to problem of "[t]he abstraction of the 'end of the war'"). See generally Chris Mooney, A Short History of Sunsets, Legal Aff., Jan./Feb. 2004, at 67, 68 ("By setting a termination date on a particular law, a sunset provision is supposed to shift the burden of proof onto those seeking its extension."); id. at 67 (arguing statutory sunsetting, once "a weapon for good-government reformers . . . has been reduced to a spoonful of sugar that helps controversial legislation go down").

ture, such as al Qaeda in the Pakistani tribal areas.[171] A sunsetting AUMF would require the power to detain individual combatants to expire on the same day as legal authorities (such as the authorization to use military force against al Qaeda fighters) targeting the organization as a whole, even though the demise of a terrorist organization does not necessarily mean the end of terrorism by its members.[172] Sunsets may be a useful means of providing for the periodic reconsideration of especially troubling counterterrorism authorities,[173] but as an answer to the indeterminacy of the end of the war on terrorism, a sunsetting AUMF is suboptimal at best.

Nonetheless, the counterterrorism scholarship discussed in Part II should also counsel that it is not necessarily fallacious to conceive of a terrorist phenomenon, or an aspect thereof,[174] reaching a determinable end. The extent to which this is possible depends on whether it possesses the traits of centralization (i.e., centralized command and control) and coherence (i.e., it is conceptually possible to delineate clearly who belongs to the group, and who does not) that make it possible to declare a meaningful end. Only certain top-down elements of the threat as described in Part II possess these traits. In order to construct a more apt model of conflict termination, it is thus essential to separate the elements that do possess these traits from those that do not.

Kenneth Culp Davis's distinction between legislative and adjudicative facts, formulated in the context of his analysis of judicial notice, provides an analytically useful analogy.[175] "Legislative facts are those which help

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171. See supra Part II.C.2.

172. See supra note 151 and accompanying text (discussing terrorist groups that end in "splintering").

173. See infra notes 208–218 and accompanying text (suggesting limited role for statutory sunsets).

174. See supra notes 85–86 (noting general consensus that both core al Qaeda organization and decentralized movement described by Sageman and others are relevant aspects of overall al Qaeda threat).

175. Kenneth Culp Davis, Judicial Notice, 55 Colum. L. Rev. 945, 952 (1955) [hereinafter Davis, Judicial Notice]; see also Fed. R. Evid. 201 advisory committee's note (recalling Davis's contribution and discussing distinction between legislative and adjudicative facts); Kenneth Culp Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364, 404–06 (1942) (discussing notice of adjudicative and legislative facts in administrative context). But see Peter L. Strauss et al., Gellhorn & Byse's Administrative Law: Cases and Comments 365 (10th ed. 2003) (suggesting "[c]lear distinctions like Professor Davis's" may be "misleading" in administrative context). The authors suggest a third, intermediate category: "general" facts. General facts are not party-specific, but may turn on "professional judgment as well as deep technical knowledge," rendering them not "well suited to resolution by legislative vote." Id. at 366. An example of a question of general fact is the effect of "nuclear radiation . . . on the tensile strength of steel." Id. While the categories "legislative" and "adjudicative" do not exhaust the universe of facts that may be relevant in political, administrative, and adjudicative decisionmaking, the type of determinations called for in Part III.B (political determinations of the necessity for the continuation of specific counterterrorism powers) and Part III.C (judicial adjudications of individual eligibility for

the tribunal to determine the content of law and policy . . . . [They] are ordinarily general and do not concern the immediate parties."[176] For example, whether the al Qaeda organization continues to pose a threat to the United States possesses the characteristics of a legislative fact. Adjudicative facts, on the other hand, are case-specific determinations: They "relate to the parties"—"who did what, where, when, how, and with what motive or intent."[177] The key practical difference between them is that "findings or assumptions of legislative facts need not, frequently are not, and sometimes cannot be supported by evidence."[178]

This Part argues for a hybrid model of conflict termination that disaggregates the overall threat into those elements whose terminations can be characterized as legislative facts, and those whose ends resemble adjudicative facts. The former generally correspond to the top-down, organizational aspects of the terrorist threat; their termination is, this Note argues, amenable to political, rather than judicial determination. The latter generally correspond to the bottom-up, individual aspects of the terrorist threat; their termination is amenable to judicial (or quasi-judicial), rather than political, determination. Part III.B considers how the hybrid model of conflict termination can best accommodate top-down aspects of the threat, while Part III.C addresses how it should accommodate bottom-up, individualized aspects.

B. *Top-Down Aspects of the Terrorist Threat: Legislative Facts and Public Acts of the Political Branches*

An initial, uncontroversial proposition is that some aspects of the terrorist threat covered by the AUMF are not entirely "unlike those of the conflicts"[179] that informed the development of the doctrines described in Part I.A. These tend to correspond to the top-down model of the al Qaeda threat described in Part II.A. Examples of such aspects are the continued threat posed by the "organization[ ]" (i.e., al Qaeda) that "planned" and "committed" the 9/11 attacks, and the continued need to use military force "in order to prevent any future acts of international terrorism against the United States."[180]

These general, policy-imbued determinations are analogous to Davis's category of legislative facts and present questions that are amenable to political, rather than judicial resolution. Judicial finding of legislative facts may result in "an uneven mixture of *a priori* conjectures and partially informed guesses, with occasional factual investigations of vary-

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preventive detention) do seem to correspond, respectively, to those two categories of facts, rather than to determinations of "general fact."

176. Davis, Judicial Notice, supra note 175, at 952.

177. Id.

178. Id. at 952–53.

179. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion).

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

ing depth."[181] Given the inaptness of judicial mechanisms, determinations like the continued existence of the al Qaeda organization (or the date of its demise) are most appropriately resolved, following the traditional rule,[182] by reference to "some public act of the political departments."[183] The Supreme Court in *Baker v. Carr* noted "isolable reasons . . . underlying this Court's refusal to review the political departments' determination of when or whether a war has ended."[184] These reasons include "the need for finality in the political determination" and the lack of "clearly definable criteria for decision."[185] Both apply to the type of general, policy-implicating determinations discussed above.

However, acknowledging the need to rely on an act of the political branches to fix the end dates of these top-down aspects of the threat does not end the inquiry.[186] Even setting aside the bottom-up "leaderless jihad" conception discussed in Part II.B, the terrorist threat encompasses too great a diversity of phenomena for a single termination date to be accurate or meaningful.[187] The principle of the Civil War-era case *United States v. Anderson*, that conflict termination can be defined relative to particular legal rights or authorities, supplies the answer to this conundrum.[188] The *Anderson* Court noted that its task was not to determine when "armed resistance to the authority of the United States ceased . . . as [a] *matter of fact*,"[189] but rather "when, *in the sense of [the statute at issue]*, was the rebellion entirely suppressed."[190] The Court, applying a different statute in the later case of *The Protector*, fixed the date of the conflict as April 2, 1866.[191] In *Anderson*, it had chosen August 20, 1866[192]—demonstrating the possibility of disaggregating the legal construct of "the end of the war."

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181. Davis, Judicial Notice, supra note 175, at 953.

182. See supra Part I.A.1.a.

183. The Protector, 79 U.S. (12 Wall.) 700, 702 (1871).

184. 369 U.S. 186, 213 (1962).

185. Id. at 213–14. But see Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008) ("Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.").

186. A sunsetting AUMF is, after all, also a means of forcing a periodic political determination. See supra text accompanying note 173.

187. That is, unless the conflict is, under law, to continue in full effect until the last vestige of al Qaeda is extirpated—the very prospect that is the source of concerns about "war without end." Vladeck, supra note 5, at 53.

188. 76 U.S. (9 Wall.) 56 (1869).

189. Id. at 62 (recounting government's presentation at oral argument).

190. Id. at 69 (emphasis added).

191. The Protector, 79 U.S. (12 Wall.) 700, 702 (1871); see also French, supra note 12, at 191 ("The Civil War was held to have ended at different times and at different places according to government proclamations . . . .").

192. *Anderson*, 76 U.S. at 71.

Past wartime Congresses reflected the malleability of the legal end of the war in their drafting of wartime statutes.[193] Wartime laws passed by World War I-era Congresses included a variety of termination provisions.[194] Some defined termination as the conclusion of a treaty of peace,[195] while others provided that the date of termination should be determined and proclaimed by the President.[196] Still others contained sunset provisions, or provided for termination upon a specific presidential finding that the operation of the statute was no longer necessary.[197] World War II-era Congresses passed dozens of statutes intended to have wartime effect, with an equally dizzying array of provisions "expressly prescrib[ing] the events which would for statutory purposes mark the termination of the" conflict.[198] A September 1, 1945 letter from then-Attorney General Thomas Clark to President Truman attempted to parse various vaguely formulated duration and termination clauses, including "in time of war," "for the duration of the war," and "the cessation of hostilities."[199] Importantly, Congress had in other statutes gone beyond such

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193. See Ludecke v. Watkins, 335 U.S. 160, 169 n.13 (1948) ("Congress can . . . provide either by a day certain or a defined event for the expiration of a statute."). Alternately, by defining the life of a wartime statute merely "by the existence of a war," Congress can elect to leave "the determination of when a war is concluded to the usual political agencies of the Government." Id.; see also Henkin, supra note 26, at 76 ("Congress can decide when war should end by imposing a time limit on its duration when it authorizes war, or by defining the purposes of the war in terms that imply that it shall end when those purposes are achieved.").

194. See Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 165 n.1 (1919) (describing "provisions fixing the date of expiration of the several war acts").

195. For example, the Trading with the Enemy Act of October 6, 1917 provided that:

> The words 'end of the war' as used herein, shall be deemed to mean the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the 'end of the war' within the meaning of this Act.

Id. at 166 n.1 (quoting ch. 106, 40 Stat. 411, 412).

196. Section 24 of the Food Control Act of August 10, 1917 provided:

> That the provisions of this Act shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President.

Id. at 165–66 n.1 (quoting ch. 53, 40 Stat. 276, 283).

197. The Wheat Price Guarantee Act of March 4, 1919 (enacted *after* the November 1918 armistice) included both, providing:

> That the provisions of this Act shall cease to be in effect whenever the President shall find that the emergency growing out of the war with Germany has passed and that the further execution of the provisions of this Act is no longer necessary for its purposes, the date of which termination shall be ascertained and proclaimed by the President; but the date when this Act shall cease to be in effect shall not be later than the first day of June, nineteen hundred and twenty.

Id. at 166 n.1 (quoting ch. 125, § 11, 40 Stat. 1348, 1353).

198. *Ludecke*, 335 U.S. at 176 (Black, J., dissenting).

199. Outline of Plans Made for the Reconversion Period, H.R. Doc. No. 79-282, at 50 (1945). According to Clark, "statutes made effective only 'in time of war,' or 'during the

vaguely worded formulations—which, as the Attorney General noted, had the practical effect of relegating termination utterly to the President's discretion. Some statutes were set to sunset on fixed dates,[200] while others included sunsets but also provided for earlier termination by the President or Congress.[201] Some were linked to the end of particular national emergencies declared by the President earlier in the war,[202] while others would remain active during "any" national emergency.[203] The diversity of these provisions reflects those Congresses' versatility in delineating the duration of their conveyances of wartime powers, as well as the flexibility of the concept of the legal end of the war.

These historical precedents suggest an alternative to the blunt instrument of a sunsetting AUMF,[204] should Congress choose to revise the legal framework for its post-9/11 authorization for the presidential exercise of war powers to combat al Qaeda.[205] The AUMF's broad and indefinite grant of global war powers[206] could, with regard to those powers where

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present war,' or 'for the duration of the war' . . . should be considered as effective until a formal state of peace has been restored, unless some earlier termination date is made effective by appropriate governmental action." Id. Statutes that referred to "the cessation of hostilities, as proclaimed by the President," noted Clark, should be considered as terminating only upon "a formal proclamation," since a "less formal action on [the President's] part would not . . . be given by the courts the legal effect of terminating a wartime statute, in the absence of proof in the document itself that it was [the President's] intention to do so." Id. at 49 (citing *Hamilton*). Attorney General Clark's advice highlights the interaction between the World War I-era judicial precedents (themselves based on the Civil War-era precedents) and executive branch practice after World War II.

200. Id. at 91–95. The termination dates ranged from December 31, 1945 (six statutes) to April 5, 1949 (one).

201. Id. at 98–99. Four fixed-date statutes permitted early termination by the President alone, while one important statute, the Lend-Lease Act, expired on "June 30, 1946, or [upon] the passage of a concurrent resolution by the two Houses" before that date. Id. at 99. Today this arrangement would presumably be held to violate the Presentment Clause. See INS v. Chadha, 462 U.S. 919, 954–55 (1983) (stating "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked" by "bicameral passage followed by presentment to the President").

202. H.R. Doc. 79-282, supra note 199, at 100–04. For example, an Act of June 26, 1940 permitted the President to employ persons "of outstanding experience and ability" as "dollar a year men" until the termination of the national emergency declared on September 8, 1939 after the outbreak of war in Europe. Id. at 100–01. The Act of November 17, 1941, providing for the "[a]rming of American merchant vessels," was to continue in force during the "national emergency proclaimed by the President on May 27, 1941"—as was a less grave bill approving the "[u]se of butter substitute at St. Elizabeths Hospital" in Washington, D.C. Id. at 102–03.

203. Id. at 105–07.

204. See supra notes 170–172 and accompanying text (describing shortcomings of proposal for sunsetting AUMF).

205. See Henkin, supra note 26, at 76 (stating Congress's constitutional power "'of determining on peace and war' surely implies also a corollary power to decide that war should end"); id. at 103 ("The power of Congress to declare war is the power to decide for war or peace, and should imply the power to unmake war as well as to make it.").

206. See Bradley & Goldsmith, supra note 1, at 2083 (noting *Hamdi* plurality interpreted the AUMF "as including the power to take actions involving the 'fundamental

there exists concern about indefinite duration, be supplanted by a variety of narrower authorizations equipped with customized termination provisions.[207] These would fall into two general categories: (1) authority-specific sunsets,[208] and (2) clauses providing that a given authority will terminate upon a presidential finding that a specified contingency has occurred, that a particular condition no longer exists, or that the statute's operation is no longer necessary.[209] Congress has already employed

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incident[s] of waging war'" (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) (plurality opinion)); id. at 2091 ("*[A]bsent other indicia of statutory meaning*, Congress intended to authorize the President to take at least those actions permitted by the laws of war." (emphasis added)).

207. Justice Souter expressed skepticism in oral argument in *Hamdi* about the sufficiency of the AUMF, stretching indefinitely into the future, without further, more specific, congressional enactments. Specifically, he asked Deputy Solicitor General Paul Clement:

> Is it reasonable to think that the . . . authorization was sufficient at the time that it was passed, but that at some point, it is a Congressional responsibility, and ultimately a constitutional right on this person's part, for Congress to assess the situation and either pass a more specific continuing authorization or at least to come up with the conclusion that its prior authorization was good enough. Doesn't Congress at some point have a responsibility to do more than pass that resolution?
>
> . . . .
>
> And it may very well be that the . . . constitutional obligation . . . is that the political branch . . . make a further assessment and a more specific one.

Transcript of Oral Argument at 32–33, *Hamdi*, 542 U.S. 507 (No. 03-6696); see also Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800) (opinion of Chase, J.) ("[C]ongress may wage a limited war; limited in place, in objects, and *in time*." (emphasis added)). But cf. William H. Rehnquist, The Constitutional Issues—Administration Position, 45 N.Y.U. L. Rev. 628, 636–37 (1970) (arguing, based on United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936), that the nondelegation doctrine "does not apply in the field of external affairs").

208. See supra notes 197, 200–201, and accompanying text (providing examples of World War I- and World War II-era statutes conveying specific wartime authorities that included sunset provisions).

209. See Note, Judicial Determination, supra note 12, at 261 (noting, in 1947, that "[u]nder the terms of many [World War II-era] statutes, the president may, by proclamation, declare that the event which terminates them has occurred"); supra notes 195–197, 201–202 (giving examples of World War I- and World War II-era statutes conveying specific wartime authorities that would terminate upon specific finding by President). Henkin notes that it is a matter of constitutional uncertainty whether "the President might [terminate the overall state of war] by proclamation on his own authority." Henkin, supra note 26, at 385 n.48. However, the lesser proposition that Congress may empower the President, in the context of a given statutory scheme, to "toggle" national security powers on or off upon a presidential proclamation that a specific contingency has occurred, is not disputed. See, e.g., *Curtiss-Wright*, 299 U.S. at 312, 329 (upholding statutory scheme permitting President to ban arms sales to belligerents in Chaco War upon finding and proclamation that such embargo "may contribute to the reëstablishment of peace between those countries"). That scheme also permitted the President to unilaterally terminate the embargo. See id. at 312 (noting statute provided for continuation of embargo, once declared, "until otherwise ordered by the President or by Congress"); see also International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701–1707 (2006) (permitting President, after declaring "national emergency," to impose various financial sanctions for national security purposes); Exec. Order No. 13,224, 66 Fed. Reg.

authority-specific sunsets for law enforcement and intelligence authorities in the USA PATRIOT Act of 2001.[210] Such provisions would have the virtue of requiring regular public reconsideration of the continuing need for the relevant authority and an affirmative act of Congress and the President authorizing its continuance, both of which enhance political accountability.[211] The second option is more deferential to the prerogatives of the Executive,[212] but might create limited political pressure upon the President to publicly defend his decision not to invoke the termination provision where the specified contingency has clearly, or even debatably, come to pass. Which type of termination provision is appropriate might depend on Congress's level of concern about the indefinite exercise of particularly sensitive authorities[213] and its desire to cabin executive discretion,[214] balanced against the importance of executive freedom

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49,079 (Sept. 25, 2001) (invoking IEEPA for purpose of "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism"); Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 25, 1995) (invoking IEEPA for purpose of "Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process").

210. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 224, 115 Stat. 272, 295 (providing that various authorities granted by the Act expire on December 31, 2005).

211. See Vladeck, supra note 5, at 95 (noting value of "requir[ing] Congress and the President to re-ante every so often"); id. at 103 ("[S]unsets would, in time, require a measure of deliberation otherwise lacking in the political process when statutes are enacted in great haste."); see also Ackerman, Emergency Constitution, supra note 76, at 1047 ("The need for repeated renewal at short intervals serves as a first line of defense against a dangerous normalization of the state of emergency.").

212. See *Curtiss-Wright*, 299 U.S. at 320 ("[C]ongressional legislation which is to be made effective . . . within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.").

213. See supra note 210 (discussing USA PATRIOT Act's sunset for various intelligence and law enforcement powers conveyed in Act).

214. Executive discretion would be limited either by the blunt instrument of the wholesale sunset of the authorizing statute, or, informally, by establishing a specified contingency upon which the President is to trigger the termination provision by proclamation. The latter would cabin executive discretion only to the extent that the President's decision not to proclaim that the specified contingency had occurred might be subject to public and congressional pressure. On the issue of Congress's power to regulate by statute the President's exercise of war powers, see Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 644 (1952) (Jackson, J., concurring) ("[The President] has no monopoly of 'war powers,' whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command."); Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804) (holding executive orders to military cannot "legalize an act which without those instructions would have been" contrary to Act of Congress authorizing seizure of shipping bound for French ports); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801) ("[C]ongress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed."); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800) (opinion of Chase, J.) ("Congress is empowered to declare a general war, or [C]ongress may wage a limited war; limited in

of action and concerns about premature expiration caused by political gridlock. Overall, this approach would allow Congress to better control its authorization of war powers, while avoiding the inaccuracy of tying a vast array of legal authorities for the war on terrorism to a single termination date—whether fixed by a hypothetical "act of the political departments"[215] at some point in the distant future after "the shooting stops,"[216] or a single, all-encompassing sunset. Finally, it bears emphasizing that such termination provisions imply a modest judicial role, limited to determining the occurrence of the political act (or omission, in the case of sunsets) called for by the statute—a role that reflects the limitations noted by the Supreme Court in *Baker v. Carr*.[217] Taking notice of such political determinations, or the absence thereof, is fully within the competence of the courts, as the historical examples in Part I.A demonstrate.[218] Some federal criminal statutes also designate as elements similar statutorily authorized determinations by the executive branch.[219]

Nonetheless, even this flexible approach, reliant as it is upon generalized determinations by the political branches, cannot encompass the bottom-up, individualized aspects of the terrorist threat, and the resulting

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place, in objects, and in time. . . . [I]f a partial war is waged, its extent and operation depend on our municipal laws."); cf. Henry P. Monaghan, Presidential War-Making, 50 B.U. L. Rev. 19, 24 (1970) ("[E]ven if one were inclined to accept Mr. Justice Black's view [in the *Steel Seizure* case] that presidential action within the United States must be grounded in a statute, there is no basis for applying such a rigid concept of separation of powers past our shorelines."); Cass R. Sunstein, Administrative Law Goes to War, 118 Harv. L. Rev. 2663, 2671 (2005) ("[S]tatutory enactments involving core executive authority should be construed hospitably to the President . . . ."). But see Monaghan, supra, at 25 ("*Absent congressional action*, the president has (to use a conclusory term) 'inherent' constitutional power in the conduct of our foreign affairs." (emphasis added)).

215. The Protector, 79 U.S. (12 Wall.) 700, 702 (1871).

216. Ludecke v. Watkins, 335 U.S. 160, 167–69 (1948).

217. See supra text accompanying notes 184–185 (discussing *Baker* Court's identification of "isolable reasons . . . underlying this Court's refusal to review the political departments' determination of when or whether a war has ended").

218. E.g., United States ex rel. Jaegeler v. Carusi, 342 U.S. 347, 348 (1952) (holding presidential authority to deport Jaegeler under Alien Enemies Act expired upon passage of joint resolution terminating state of war with Germany); Commercial Trust Co. v. Miller, 262 U.S. 51, 57 (1923) (upholding continued operation in force of Trading with the Enemy Act of 1917, which had been explicitly exempted from joint resolution terminating wartime statutes); see also Note, Judicial Determination, supra note 12, at 255 (stating even though "[t]he power to declare that this state of war has ended . . . is a political and not a judicial function . . . the courts may be called upon to determine whether a formal declaration has been made and, if so, its effect upon particular controversies").

219. For example, the material support statute applies to persons who "knowingly provide[ ] material support or resources to a foreign terrorist organization." 18 U.S.C. § 2339B(a)(1) (2006). The term "terrorist organization" in the statute refers to a specific designation by the Secretary of State pursuant to section 219 of the Immigration and Nationality Act. See id. § 2339B(g)(6) ("[T]he term 'terrorist organization' means an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act."); see also 8 U.S.C. § 1189 (2006) (providing definition of and procedures for designation of "foreign terrorist organizations").

question of when to terminate detention. Part III.C discusses how the hybrid model of conflict termination accommodates the problem of detention in a conflict where, to a great extent, the threat emanates not from organizations, but from individuals.

C. *Conflict Termination in a Bottom-Up War: The Problem of Detention*

In a traditional state-state military conflict, and even in a war against a rigidly hierarchical, quasi-sovereign nonstate actor like the Tamil Tigers,[220] the threat posed by an individual combatant is presumed to emanate from his or her status as an agent of the enemy sovereign or commanding authority. Such a combatant is "bound by an allegiance which commits him," as long as the conflict continues, "to lose no opportunity to forward the cause of [the] enemy."[221] Thus, detention may continue during hostilities but must end upon their cessation, since the combatant's hostile intent is presumed to expire with that of the sovereign.[222]

In a conflict against a terrorist threat, this principal-agent assumption and its implications for the length of detention are undercut. As noted by Benjamin Wittes, the threat from a convinced Islamist militant in American custody at Guantanamo emanates not from an organizational tie to the al Qaeda hierarchy, but from the militant "in his individual capacity."[223] Once the principal-agent assumption underlying the traditional law of war rule has broken down, the logical link between the "cessation of hostilities" against the enemy organization and the length of detention of an individual combatant evaporates.

Instead, "with respect to the power to detain terrorist combatants outside the conflict in Afghanistan, the end of the conflict should be viewed in individual rather than group-based terms."[224] As Curtis Bradley and Jack Goldsmith have argued: "[T]he question is not whether hostili-

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220. See supra text accompanying note 114 (discussing statement of surrender of Tamil Tigers); see also Hoffman, Inside Terrorism, supra note 97, at 41 (distinguishing terrorists from more organized guerrillas).

221. Johnson v. Eisentrager, 339 U.S. 763, 772 (1950).

222. See Third Geneva Convention, supra note 142, at art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."); Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion) (holding AUMF authorizes detention "for the duration of the relevant conflict, . . . based on longstanding law-of-war principles"); *Eisentrager*, 339 U.S. at 772–73 ("[T]he United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign.").

223. Wittes, supra note 150, at 161.

224. Bradley & Goldsmith, supra note 1, at 2125; cf. *Hamdi*, 542 U.S. at 521 ("If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF."). Even this limited application of the customary law of war "duration of hostilities" standard to persons captured during the conflict in Afghanistan may be vulnerable to criticism. There is no principal-agent relationship justifying the assumption that the "international jihadi" captured fighting with

ties have ceased with al Qaeda and related terrorist organizations, but rather whether hostilities have, in essence, ceased with the individual because he no longer poses a substantial danger of rejoining hostilities."[225] In Davis's rubric, these determinations rest largely on adjudicative facts, which "relate to [individual] parties" and turn on case-specific questions such as "who did what, where, when, how, and with what motive or intent."[226] Thus, in contrast to fixing the endpoint of detention in traditional wars, which may be accomplished by reference to a clear political act, the type of determination envisioned by Bradley and Goldsmith requires individual adjudication.[227] For example, one proposal for a "Model Law for Terrorist Incapacitation" would require the government to convince a federal judge, under a "rigorous set of procedural and evidentiary rules," that the detainee meets the statute's substantive criteria (being an agent of a "foreign power" covered by the AUMF and posing, in that capacity, a "danger both to any person and to the interests of the United States") before authorizing extended detention.[228] While this is an anomalous paradigm for the detention of combatants in terms of the international law of armed conflict,[229] it resembles various preventive de-

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the Taliban on the Afghan battlefield automatically ceases to be an enemy of the United States when U.S. military operations in Afghanistan end.

225. Bradley & Goldsmith, supra note 1, at 2125.

226. Davis, Judicial Notice, supra note 175, at 952.

227. See Bradley & Goldsmith, supra note 1, at 2126 (discussing Bush Administration's initial efforts to implement mechanisms to conduct such adjudications).

228. Benjamin Wittes & Colleen A. Peppard, Designing Detention: A Model Law for Terrorist Incapacitation 16, 31 (2009). The grounds for detention must then be religitated every six months in order for it to continue. Id. at 20; see also Bobbitt, supra note 1, at 420 (proposing "statutory rules for preventive detention," with long-term preventive detention limited to *pretrial* period of two years); Chesney & Goldsmith, supra note 67, at 1120–32 (discussing "non-trial preventive detention" regime).

229. See Bradley & Goldsmith, supra note 1, at 2126 ("We do not claim that our proposed individualized approach to determining the end of hostilities in this context is a settled requirement of the customary laws of war."); Wittes & Peppard, supra note 228, at 5 (noting their proposed preventive detention statute would create a *new* detention authority "supplemental to [that] provided by the laws of war" (emphasis omitted)); cf. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 41–42, 132–33, Aug. 12, 1949, 6 U.S.T. 3516, 3544, 3606–08, 75 U.N.T.S. 287, 314, 376–78 (permitting internment of enemy *civilians* "only if the security of the Detaining Power makes it absolutely necessary"). Internment may continue as long "as the reasons which necessitated [the] internment . . . exist," but must cease "as soon as possible after the close of hostilities." Id. The authoritative International Committee of the Red Cross (ICRC) Commentary to the Convention states that this requires an individualized determination of dangerousness. 4 The Geneva Conventions of 12 August 1949: Commentary 258 (Jean Pictet ed., 1958).

It is also worth noting that a preventive detention statute along the lines of that proposed by Wittes and Peppard, see supra note 228, would shift the statutory ground for those detentions under its auspices away from the current basis, espoused by the Obama Administration in a filing in Guantanamo litigation in the District Court for the District of Columbia, based on the AUMF and the law of armed conflict. See Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, In re Guantanamo Bay Detainee Litig., No. 08-442 (D.D.C.

tention authorities that already exist in American law.[230] Thus, the judicial role envisioned by such a statute would be well in keeping with the type of "dangerousness" determinations already made by federal judges on a regular basis. For example, under the Bail Reform Act of 1984, federal judges determining criminal defendants' eligibility for pretrial detention must ascertain, based on several statutory factors, whether "there are conditions of release that will reasonably assure" the defendant's appearance at trial "and the safety of any other person and the community."[231] Most importantly, such a regime avoids the two undesirable consequences of tying the detention of captured Islamist militants to a single overarching termination date: On that day, the legal authority to detain some still-dangerous terrorists would expire, while others might have been detained in accordance with law long after their individual dangerousness or hostile intent ceased.

CONCLUSION

A hybrid legal framework for conflict termination in the war on terrorism admittedly lacks the superficially satisfying clarity of the traditional

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Mar. 13, 2009) ("The United States bases its detention authority as to such persons on the Authorization for the Use of Military Force . . . . The detention authority conferred by the AUMF is necessarily informed by principles of the laws of war." (citing *Hamdi*, 542 U.S. at 521)).

230. See David Cole, Out of the Shadows: Preventive Detention, Suspected Terrorists, and War, 97 Calif. L. Rev. 693, 700 (2009) (discussing existing statutory authorities for preventive detention, including, inter alia, pretrial detention and immigration detention); see also Bobbitt, supra note 1, at 420 ("The U.S. Supreme Court has approved preventive detention for persons deemed a threat to society—the insane, pedophiles, persons with infectious diseases—who are not guilty of having committed crimes.").

231. 18 U.S.C. § 3142(e)–(g) (2006). The statutory factors include: "the nature and circumstances of the offense charged"; "the weight of the evidence"; the person's "history and characteristics," including "character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history[,] . . . record concerning appearance at court proceedings," and parole or probation status; and "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." Id. § 3142(g)(1)–(4); cf. Bradley & Goldsmith, supra note 1, at 2125 (suggesting criteria for individualized determinations with respect to captured terrorists, including "the detainee's past conduct, level of authority within al Qaeda, statements and actions during confinement, age and health, and psychological profile"); Wittes & Peppard, supra note 228, at 31 (proposing as detention criteria that the "individual is an agent of a foreign power . . . against which the use of military force was authorized under the Authorization for the Use of Military Force" and that "the actions of the covered individual in his capacity as an agent of the foreign power . . . pose a danger both to any person and to the interests of the United States"). To some extent, both of these sets of terrorist detention criteria, with their inclusion of "level of authority within al Qaeda" and an agency relationship with al Qaeda, respectively, incorporate the assumptions of organizational coherence and a principal-agent command relationship characteristic of the top-down model described in Part II.B.1. Such criteria, referring to hierarchical organization or agency relationships, are not inherently necessary in a preventive detention regime for captured terrorists.

on/off model of conflict termination. While the hybrid approach's potential complexity may be frustrating, it is also suggestive of its accuracy. In a war against an enemy with "no physical territory to conquer, no clear leadership structure to topple, no Reichstag over which to fly a foreign flag,"[232] when one decisive end-in-fact will be difficult to identify, it would be anomalous if the legal end of the conflict could be pegged to a single moment. The hybrid model of conflict termination better accommodates the multifaceted, complex nature of the terrorist threat while avoiding the anomalous results that the on/off model, relying on a single overarching termination date, would yield.

232. Vladeck, supra note 5, at 53; see also Bobbitt, supra note 1, at 212 ("A redefinition of what winning means is not unprecedented in the history of states. The evolution of ideas about what constitutes victory has paralleled the evolution of warfare and the constitutional order of the State."); French, supra note 12, at 201 (arguing "diminution and continuance of [exercise of war powers] should not be dependent on an artificial concept of the termination of war").