

## Article

### Law at the End of War

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#### INTRODUCTION

The existence of war, variously defined, is the sine qua non condition for the lawful exercise of a wide range of statutory authorities that have supported the past decade of U.S. counterterrorism operations worldwide. Some of these laws are rela-

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tively low profile in their operation. Civilians may be subject to the U.S. military justice system (rather than the civilian judicial system) if “[i]n time of declared war or a contingency operation, [they are] persons serving with or accompanying an armed force in the field . . . .”<sup>1</sup> Private security contractors implicated in misconduct are immune from tort suits for a wide swath of activities if performed “during time of war.”<sup>2</sup> Other such statutes are of greater political salience. Under the Military Commissions Act of 2009 (MCA), offenses are triable by military commission “only if the offense is committed in the context of and associated with hostilities.”<sup>3</sup> The 2001 Authorization for Use of Military Force (AUMF),<sup>4</sup> as interpreted by the Supreme Court, authorizes the President to detain certain individuals “engaged in an armed conflict against the United States,” only “for the duration of these hostilities.”<sup>5</sup> This AUMF “armed conflict” also remains one of the central domestic legal justifications for targeted killing operations by the United States abroad.<sup>6</sup>

The question when such laws are triggered and for how long they remain in effect has rapidly become more than academic. The latest generation of military commission prosecutions, for example, features some of the highest profile terrorist suspects, including several charged for their role in attacking the American warship USS *Cole*, an attack attributed to Al

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1. 10 U.S.C. § 802(a)(10) (2012) (emphasis added).

2. Saleh v. Titan Corp., 580 F.3d 1, 6 (D.C. Cir. 2009) (emphasis added) (quoting 28 U.S.C. § 2680(j) (2006)).

3. 10 U.S.C. § 950p(c).

4. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001); see also National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011).

5. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (emphasis added); see also *id.* at 520 (“It is a clearly established principle of the law of war that detention may last no longer than active hostilities. See Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3406, T. I. A. S. No. 3364 [hereinafter Geneva III] (‘Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.’).”); Al-Bihani v. Obama, 590 F.3d 866, 878 (D.C. Cir. 2010).

6. John Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at the Efficacy and Ethics of U.S. Counterterrorism Strategy (Apr. 30, 2012), available at <http://www.wilsoncenter.org/event/the-eficacy-and-ethics-us-counterterrorism-strategy> (“In this armed conflict, individuals who are part of al-Qaida or its associated forces are legitimate military targets. We have the authority to target them with lethal force just as we target enemy leaders in past conflicts, such as Germans and Japanese commanders during World War II.”).

Qaeda that killed seventeen U.S. service members in October 2000.<sup>7</sup> That attack took place before the events of September 11, 2001, and before Congress passed the AUMF authorizing the use of military force against Al Qaeda. For purposes of establishing lawful military commission jurisdiction, was the United States already at war then?

The issue arises equally at the end of war, as, for example, with the President's announcement that the United States will conclude combat operations in Afghanistan by the end of 2014.<sup>8</sup> Indeed, a growing collection of policy makers and security experts agree that the hostilities authorized by the AUMF more broadly will at some point have run their course.<sup>9</sup> The 149 men still held at Guantanamo Bay are detained under the authority

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7. *Charge Sheet of Abd Al Rahim Hussayn Muhammad Al Nashiri*, OFFICE OF MILITARY COMM'NS (Sept. 15, 2011), available at [http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20\(Referred%20Charges\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(Referred%20Charges).pdf).

8. See, e.g., President Barack Obama, Address at the National Defense University (May 23, 2013) [hereinafter Obama NDU Speech], available at <http://www.nytimes.com/2013/05/24/us/politics/transcript-of-obamas-speech-on-drone-policy.html> ("Our systematic effort to dismantle terrorist organizations must continue. But this war, like all wars, must end."); President Barack Obama, Remarks on the Drawdown of Troops in Afghanistan (June 22, 2011), available at <http://abcnews.go.com/Politics/transcript-obama-afghanistan-troop-withdrawal-full-speech/story?id=13906420> ("After this initial reduction, our troops will continue coming home at a steady pace as Afghan Security forces move into the lead. . . . By 2014, . . . the Afghan people will be responsible for their own security.").

9. See, e.g., Karen DeYoung, *Afghan War's Approaching End Throws Legal Status of Guantanamo Detainees into Doubt*, WASH. POST, Oct. 18, 2013, [http://www.washingtonpost.com/world/national-security/afghan-wars-approaching-end-throws-legal-status-of-guantanamo-detainees-into-doubt/2013/10/18/758be516-2d0a-11e3-97a3-ff2758228523\\_story.html](http://www.washingtonpost.com/world/national-security/afghan-wars-approaching-end-throws-legal-status-of-guantanamo-detainees-into-doubt/2013/10/18/758be516-2d0a-11e3-97a3-ff2758228523_story.html); see also *Counterterrorism Policies and Priorities: Addressing the Evolving Threat: Hearing Before the Comm. on Foreign Relations, 113th Cong. 7* (2013) (statement of Hon. Michael E. Leiter, Senior Counselor, Palantir Technologies); Robert M. Chesney, *Beyond the Battlefield, Beyond Al Qaeda*, 112 MICH. L. REV. 163 (2013); Elisabeth Bumiller, *New Pentagon Chief Says Qaeda Defeat in Reach*, N.Y. TIMES, July 10, 2011, at A11 (quoting then-Defense Secretary Leon Panetta that the United States was "within reach of strategically defeating Al Qaeda"); Jeh Johnson, General Counsel, Defense Dep't, Speech to Oxford Union (Nov. 30, 2012), available at <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union> ("[O]n the present course, there will come . . . a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed."); Obama NDU Speech, *supra* note 8.

of the AUMF.<sup>10</sup> Do “hostilities” end when the United States leaves Afghanistan, such that the statutory authority for continued detention runs out?

Notwithstanding the frequency of such war-related conditions in key statutory authorities, legal scholars have largely assumed that the question of when war begins and ends is one the courts play little role in answering. Supreme Court decisions like the World War II-era case *Ludecke v. Watkins* and the Civil War-era *Prize Cases* have been read to suggest that the existence of armed conflict is a political question, beyond the competence and the jurisdiction of the judiciary to answer.<sup>11</sup> If anything, the argument goes, contemporary courts are more apt to rely on the political question doctrine among threshold jurisdictional hurdles that preclude review of subjects from targeting to rendition to torture.<sup>12</sup> It should thus be unsurprising to conclude, as Stephen Vladeck puts it directly: “[W]hen the war has ended is a political question.”<sup>13</sup>

But the non-justiciability of the question whether war exists for statutory purposes is far less certain than scholars have assumed. The political question assumption flows in part from a longstanding misreading of standard cases. Supreme Court decisions noting that the existence of war depends on a “political act” (that is, something political actors do in the world) are regularly, and wrongly, taken to stand for the distinct notion that war’s existence is a “political question” (that is, something

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10. See *Al-Bihani v. Obama*, 590 F.3d 866, 884 (D.C. Cir. 2010) (finding that the AUMF authorizes Guantánamo detention); *The Guantánamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo> (last visited October 17, 2014).

11. See, e.g., Stephen I. Vladeck, *Ludecke’s Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT’L SECURITY L. & POL’Y 53, 86 (2006) (citing *Ludecke v. Watkins*, 335 U.S. 160 (1948); *The Prize Cases*, 67 U.S. (2 Black) 635 (1863)); see also *Al-Bihani*, 590 F.3d at 874 (characterizing end of hostilities as a political question).

12. See, e.g., Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT’L SEC. J. 283 (2011) (citing *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010)).

13. Vladeck, *supra* note 11, at 94; see also, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2084 (2005) (noting that “courts often defer to the President’s determinations concerning the status of military conflicts.”). While political question doctrine has been subject to harsh scholarly criticism for decades, see, e.g., THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS* 128 (1992), it retains both scholarly and at least some doctrinal salience.

the courts lack jurisdiction to consider).<sup>14</sup> More, the political question assumption tends to discount or ignore the varied lines of cases over decades in which courts have been called upon to decide, and have decided, whether a statutory condition of war, variously defined, continues to hold.<sup>15</sup> More properly understood, the cases stand for the proposition that the existence of war is often justiciable, and that the answer to whether war exists depends centrally on the statutory reason why one is posing the question.<sup>16</sup>

In the present context—in particular with respect to the war-based statutory triggers contained in the MCA and AUMF—the existence of hostilities may well be determined with reference to ordinary principles of statutory interpretation. As the Supreme Court recently clarified, the applicability of the political question doctrine depends principally on whether the issue for decision has been textually committed by the Constitution to another branch of government, and whether there are judicially manageable standards for resolving it.<sup>17</sup> In neither statutory example examined here is it clear that the Constitution allocates sole power to another branch of government. More, both the MCA and AUMF require that the existence of “hostilities” be determined with respect to a standard established by the international law of armed conflict—a body

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14. See, e.g., Brief for the Defendant/Appellee, Al Nashiri v. MacDonald, No. 12-35475, 2012 WL 1642306 (W.D. Wash. 2012); Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendant's Motion To Dismiss, Al Aulqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-1469); John M. Hagan, *From the XYZ Affair to the War on Terror: The Justiciability of Time of War*, 61 WASH. & LEE L. REV. 1327 (2004); Vladeck, *supra* note 11, at 94.

15. See, e.g., *Koohi v. United States*, 976 F.2d 1328, 1333 (9th Cir. 1992) (finding that “time of war” within Federal Tort Claims Act exemption does not require express declaration of war, but applies when, as a result of deliberate decision by executive branch, U.S. armed forces engage in an organized series of hostile encounters on a significant scale with the military forces of another nation); *United States v. Sobell*, 314 F.2d 314, 325–32 (2d Cir. 1963) (determining when World War II ended for purposes of determining statutory sentence applicable “in time of war”); *New York Life Ins. Co. v. Durham*, 166 F.2d 874 (10th Cir. 1948) (interpreting terms of life insurance contract providing for a lower rate of payout if death occurred during “war”); see also *United States v. Proserpi*, 573 F. Supp. 2d 436, 454–55 (D. Mass. 2008) (interpreting meaning of “termination of hostilities” for purpose of tolling of statute of limitations under Wartime Suspension of Limitations Act).

16. See *infra* Part II.

17. *Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1427 (2012).

of law that offers detailed, even manageable, guidance on how to identify whether hostilities exist.<sup>18</sup>

Yet just as the detailed nature of the applicable law here helps ensure that the question of the existence of hostilities is susceptible of judicial resolution, it also demonstrates how possible it is that a court's answer, independently reached, might differ from that of the executive branch. In the military commission war crimes prosecution of Abd Al Rahim Hussayn Muhammad Al Nashiri for his role in the bombing of the USS *Cole*, the prosecution has maintained that the United States was not only at war in October 2000, it has been since 1996.<sup>19</sup> At the same time, the set of objective factors the relevant law demands be considered—including not only the warring parties' statements at the time, but also the factual evidence of war on the ground—make a more than colorable argument that war did not commence until the attacks of September 11, 2001.<sup>20</sup> Similarly, the President may wish to continue to detain some of the men held at Guantanamo after 2014 and thus maintain that hostilities continue. But it may by then be possible to make out a case that the "hostilities" authorized against Al Qaeda have come to an end (because, for example, hostilities are no longer sufficiently intense, or the core group Congress authorized the use of force against no longer exists).<sup>21</sup> If a court reaches this conclusion, must it then insist upon the detainees' release?

The instinctive strangeness of the notion that a court might determine whether or not the United States is at war for any purpose is undoubtedly part of what animates the assumption that war's existence is a political question. If the Constitution's promise of democratic governance means anything, then surely it means that the political branches should have fundamental control over whether we are or are not at war.<sup>22</sup> More, what could a court possibly add to the executive's own findings of the factual existence of war on the ground?

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18. See *infra* Part II.

19. Government Response to Defense Motion To Dismiss Because The Convening Authority Exceeded His Power in Referring This Case to a Military Commission, United States v. Al Nashiri, No. AE 104 (Military Comm'n Sept. 13, 2012).

20. See *infra* Part III.

21. See Johnson, *supra* note 9.

22. See Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797 (2012).

Such concerns have regularly been salient in understanding the role of the courts in statutory interpretation.<sup>23</sup> But they have been addressed less by the political question doctrine, and more by a range of interpretive practices commonly called judicial deference. Informed by the same separation-of-powers purposes underlying the political question doctrine—the maintenance of democratic accountability, the promotion of governmental effectiveness, the protection of individual liberty—judicial deference in principle enables courts to retain their formal role as independent checks on executive authority while still serving the functional goals of the separation of powers.<sup>24</sup> So long as the judicial branch retains enough power “to resist encroachments of the others,”<sup>25</sup> courts may in this sense cede some of their interpretive authority under Article III without threatening the formal constitutional scheme.<sup>26</sup>

To the extent judicial deference to the executive on questions of statutory interpretation serves these functional separation-of-powers interests, deference may play a useful role. But whether deference in fact advances separation-of-powers interests in construing the statutory existence-of-war conditions examined here is far from clear.<sup>27</sup> As this Article shows, determining whether hostilities exist within the meaning of the MCA and AUMF involves various types of inquiries. Some demand, for example, predictive or policy judgment; others depend on publicly demonstrable facts of which the courts have long taken judicial notice. Executive expertise matters centrally for some of these judgments; others are the bread-and-butter of judicial work. The constitutional value of political accountability may likewise be sometimes served better by judicial assertiveness than passivity. If the authority Congress has granted does not clearly afford the President the power he seeks to assert, the Court may best promote democratic deliberation by saying so—

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23. See *infra* Part IV.

24. See, e.g., Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549 (2009) (discussing judicial and scholarly accounts of the purposes of the separation of powers).

25. Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 496–97 (1989) (arguing that *Chevron* poses a challenge to the separation of powers).

26. For a detailed discussion of this idea, see Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783 (2011) (describing “dynamic equilibrium” theory of separation of powers).

27. See *infra* Part IV.

by applying canons of interpretation geared toward limiting excessively broad delegations of power, or by favoring interpretations that promote dialogue between the President and Congress and tailoring remedies to afford the branches time for political clarification before taking irrevocable judicial action. Without foreclosing policy options, active judicial participation in statutory interpretation may create incentives for congressional action that had previously been absent, making it harder for Congress to sit out of democratic debates in which the Constitution expects it to engage. Given the context-dependent nature of such interests, this Article contends that the degree of any deference accorded even in the war setting should depend on a determination whether deference in fact serves the Constitution's functional goals.

This Article proceeds as follows. Part I examines the reasons why scholars have tended to assume that the existence of hostilities poses a non-justiciable political question, and argues that the relevant case law reveals how this categorical assumption is misplaced. Part II explores how justiciability concerns might arise in the current examples of the MCA and AUMF, and concludes that they do not preclude judicial engagement in resolving the existence-of-hostilities questions at issue there. This part includes a detailed discussion of the applicability of the international law of armed conflict at the beginning and end of war. Part III then turns to the separation-of-powers interests that animate the political question doctrine and related mechanisms of deference the courts employ for negotiating inter-branch conflict. It considers how courts might approach existence-of-hostilities questions in this setting to attend to interests of expertise and accountability while fulfilling their Article III duties of judicial review.

### I. WHEN WAR IS NOT A POLITICAL QUESTION

Supreme Court decisions such as the *Prize Cases* and *Ludecke v. Watkins*,<sup>28</sup> as well as a handful of Vietnam-era lower court decisions turning away *constitutional* challenges to the President's use of force abroad,<sup>29</sup> have led several scholars to

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28. *Ludecke v. Watkins*, 335 U.S. 160 (1948); *The Prize Cases*, 67 U.S. (2 Black) 635 (1863).

29. See, e.g., *DaCosta v. Laird*, 471 F.2d 1146, 1157 (2d Cir. 1973) (finding that the Vietnam war was "constitutionally authorized by the mutual participation of Congress and the President," and that the judiciary lacked power to review such a determination); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1308–

conclude that questions regarding the existence and nature of war are matters for the political branches.<sup>30</sup> But the non-justiciability of such questions for *statutory* purposes is far less certain. On the contrary, while the Court has often looked closely at statements and actions by the President and Congress in interpreting statutes with war-related conditions, its examination has been in the service of an otherwise unremarkable assertion of judicial authority to interpret the meaning of the law, sometimes in ways directly contrary to the asserted position of the executive. As the first section below demonstrates, varied cases over decades have called on courts to decide when a legal condition of war exists.<sup>31</sup> In none of these cases did the Court hold that the statute itself was beyond its jurisdiction to interpret. Moreover, as Section B explains, while the political question doctrine generally survives, its application in the existence-of-hostilities context is far from clear.

#### A. THE EXISTENCE OF HOSTILITIES CASES

The Supreme Court began facing questions of war almost immediately after the country's founding, beginning with the quasi-war in which French privateers attacked U.S. ships trading goods with Britain. In that conflict, the Court was called to decide who counted as an "enemy" within the meaning of a 1799 federal statute, which provided for certain rights to salvage for American ships "re-taken from the enemy."<sup>32</sup> Rejecting plaintiff's argument that France could not really be considered an "enemy" under the statute, *Bas v. Tingy* made clear that, even in the absence of a declaration of war by Congress, the Court would interpret the law based on the world as the justices themselves perceived it. As Justice Moore put it:

[B]y what other word [can] the idea of the relative situation of America and France . . . be communicated, than by that of hostility, or war? And how can the characters of the parties engaged in hostility or war be otherwise described than by the denomination of enemies? It is for

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09 (2d Cir. 1973) (finding that a challenge to the ongoing bombing in Cambodia was a political question); *Luftig v. McNamara*, 373 F.2d 664 (D.C. Cir. 1967) (per curiam) (finding that the commander-in-chief's decision to send troops to Vietnam was a non-justiciable political question).

30. See, e.g., *Vladeck*, *supra* note 11, at 94; see also, e.g., *Bradley & Goldsmith*, *supra* note 13, at 2084 ("[C]ourts often defer to the President's determinations concerning the status of military conflicts.").

31. See *Koohi v. United States*, 976 F.2d 1328 (9th Cir. 1992); *United States v. Sobell*, 314 F.2d 314 (2d Cir. 1963); *New York Life Ins. Co. v. Durham*, 166 F.2d 874 (10th Cir. 1948).

32. *Bas v. Tingy*, 4 U.S. 37, 37 (1800).

the honour and dignity of both nations, therefore, that they should be called enemies; for, it is by that description alone, that either could justify or excuse, the scene of bloodshed, depredation and confiscation, which has unhappily occurred. . . .<sup>33</sup>

Justice Washington's opinion examined the interpretive problem in greater detail, finding significance in the facts that Congress had by then raised an army, suspended intercourse with France, dissolved a treaty between the nations, and authorized U.S. armed ships to attack France's ships (and defend our own against armed attack) on the high seas.<sup>34</sup> Neither Congress's failure to mention France in the statute by name, nor Congress's refusal to call its separate authorization to use force against France a "war," could overcome the reality that, in the Court's view, "[i]n fact and in law we are at war."<sup>35</sup>

The *Prize Cases*, though most commonly cited in support of a broad reading of presidential power under Article II of the Constitution,<sup>36</sup> in fact take a strikingly similar approach to resolving the existence-of-war question the cases presented. The Court there faced the question whether President Lincoln had a "right" to impose a naval blockade of southern ports following the Confederate attack on the federal base at Fort Sumter in 1861.<sup>37</sup> Notably, the key war-related question presented was not one of statutory interpretation, but of international law: whether war existed at the time the ships were captured such that the law of prize applied.<sup>38</sup> That the Court was in the first instance concerned with the meaning of international law is made clear not only in its statement of the question (as to whether "the President [had] a right to institute a blockade of ports in possession of persons in armed rebellion against the Government, on the principles of international law"), but also in its answer ("the opinion that the President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard").<sup>39</sup>

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33. *Id.* at 39.

34. *Id.* at 41.

35. *Id.* at 42.

36. See, e.g., Thomas H. Lee, *The Civil War in U.S. Foreign Relations Law: A Dress Rehearsal for Modern Transformations*, 53 ST. LOUIS U. L.J. 53, 68–70 (2008).

37. *The Prize Cases*, 67 U.S. (2 Black) 635, 648 (1863).

38. *Id.* at 666.

39. *Id.* at 665, 671; see also *id.* at 674 ("[Enemy] is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law."); *id.* at 671 ("The objection made to this act of ratification [by Congress], that it is *ex post facto*, and therefore unconstitu-

Rejecting the executive's vigorous arguments urging judicial abstention from any question regarding the President's actions,<sup>40</sup> the Court likewise rejected the notion that the existence of war within the meaning of international law required a congressional declaration. A civil war, between a state and an insurgent group, was something whose existence the Court was bound to notice, whether the governments of the warring parties had acknowledged or declared it legally or not.<sup>41</sup>

A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a *war*. . . . As a civil war is never publicly proclaimed, *eo nomine* against insurgents, its actual existence is a fact in our domestic history which the Court is bound to notice and to know [Petitioner] cannot ask a Court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race.<sup>42</sup>

Thus, “war may exist without a declaration on either side,” as it existed here, no matter what the warring governments might say.<sup>43</sup>

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tional and void, might possibly have some weight on the trial of an indictment in a criminal Court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.”)

40. *Id.* at 645 (“The counsel for the United States, speaking for the President . . . testifies, in well-considered rhetoric, his amazement that a judicial tribunal should be called upon to determine whether the political power was authorized to do what it has done.”).

41. For a version of this argument rejecting the reading of the *Prize Cases* as showing great deference to the President, see Deborah Pearlstein, *Contemporary Lessons from the Age-Old Prize Cases: A Comment on the Civil War in U.S. Foreign Relations Law*, 53 ST. LOUIS U. L.J. 73, 79–81 (2008).

42. *Prize Cases*, 67 U.S. (2 Black) at 666–67, 669; see also *Matthews v. McStea*, 91 U.S. 7 (1875) (recognizing that war may exist whether or not declared, and finding that “hostilities had commenced” and a state of war existed before presidential proclamation declaring blockade of South); *The Neustra Senora de la Caridad*, 17 U.S. 497, 502 (1819) (“War notoriously exists, and is recognized by our government to exist, between Spain and her colonies.” (emphasis added)).

43. *Prize Cases*, 67 U.S. (2 Black) at 668 (citations omitted); see also *id.* at 668–69 (“This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of *war*. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and *no name given to it by him or*

Despite this pronouncement, much has been made of the opinion's subsequent statement that the "Court must be governed by the decisions and acts of the political department of the Government" on the question of "what degree of force the crisis demands."<sup>44</sup> Yet the Court in this passage was concerned not with its stated question presented—whether war existed for purposes of triggering the law of prize—but rather, separately, with whether the President had the authority under Article II of the Constitution to respond to the southern attack without first going to Congress.

Whether the President in fulfilling his duties, as Commander in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by *him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.<sup>45</sup>

Put differently, in the Court's view, it was entirely up to the President to decide, having been attacked, whether or not to establish a blockade—in effect, whether or not to shoot back.<sup>46</sup> That decision was indeed within the President's constitutional power. It was likewise a matter of executive discretion under then prevailing international law whether or not to afford the opposing party "belligerent rights."<sup>47</sup> But once such po-

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*them* could change the fact." (second emphasis added)).

44. See Vladeck, *supra* note 11, at 62–63 (citing *Prize Cases*, 67 U.S. at 670); see also LOUIS FISHER, PRESIDENTIAL WAR POWER 6–7 (1995) (recounting acceptance at constitutional convention of power "to repel sudden attacks").

45. *Prize Cases*, 67 U.S. (2 Black) at 670.

46. One might well question under contemporary international law whether the Court was right that the President is entitled to complete discretion on the matter of what degree of force is appropriate in self-defense. See, e.g., U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.").

47. *Prize Cases*, 67 U.S. (2 Black) at 667 ("The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.").

litical actions were taken,<sup>48</sup> the Court would determine for itself whether war existed as a matter of law, no matter what Congress or the President called it.

This reading of the *Prize Cases* might be less persuasive were it not for the fact that the Court's confidence in its ability to recognize the existence of war would lead it to the opposite result just a few years later. The Court rejected the 1864 military trial of U.S. citizen Lamdin Milligan because there was no "actual war" in Indiana, despite the executive's insistence that war existed such that military trial was justified.<sup>49</sup> While perforce acknowledging that the Civil War was actively ongoing at the time of Milligan's arrest, the Court held that the state of Indiana, where the arrest occurred, was not part of it.

The necessities of the service, during the late Rebellion, required that the loyal states should be placed within the limits of certain military districts and commanders appointed in them; and, it is urged, that this, in a military sense, constituted them the theatre of military operations . . . . The conclusion does not follow from the premises. If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On *her* soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law . . . . If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, *where war really prevails*, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course . . . . Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of *actual war*.<sup>50</sup>

One might reasonably note that *Milligan* was decided in 1866, the year after the war had ended, and that it was thus politically easier for the Court to reach the conclusion it did.<sup>51</sup>

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48. The Court also noted that foreign sovereigns had reacted to the attack on Fort Sumter by declaring their neutrality. *See id.* at 669.

49. *Ex parte Milligan*, 71 U.S. 2, 84–85 (1866) (reporting the government's argument that "every specification upon which the petitioner was tried by the military commission" contained the averment that the relevant acts were committed in "a State within the military lines of the army of the United States, and the theatre of military operations, and which had been and was constantly threatened to be invaded by the enemy").

50. *Id.* at 126–27 (third and fourth emphases added).

51. The Court itself hints as much. *See id.* at 109 ("During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question . . . . Now that the public safety is assured, this question, as well as all

Yet the passage of a mere ten months (from the end of shooting to the issuance of the decision in *Milligan*) should not obscure the remarkable sweep of the Court's rejection of the government's argument. The record before the Court established that at the time of Milligan's arrest, the state "was a military district, was the theatre of military operations, had been actually invaded, and was constantly threatened with invasion."<sup>52</sup> As the concurring opinion pointed out, it also appeared that

a powerful secret association, composed of citizens and others, existed within the state, under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government.<sup>53</sup>

Yet the Court nonetheless concluded that not only was a military trial unnecessary under the circumstances, but also that the circumstances in Indiana did not amount to "actual war."<sup>54</sup>

The many other Civil War-era cases requiring the statutory construction of existence of hostilities provisions are indeed consistent with the reading that while political actions matter in the determination of war's existence, which actions matter most depends upon the statute, and in all events is a question that may be determined by the Court.<sup>55</sup> In 1869, *United States v. Anderson* required the Court to decide how to construe a statute giving property owners a cause of action in the Court of Claims for any proceeds from property abandoned or captured during the war—provided the claim was brought "within two years after the suppression of the rebellion."<sup>56</sup> In resolving the question when the rebellion was suppressed for purposes of the statute, the Court began by noting its expectation that the question of when the war ended would arise for any number of legal purposes. Disclaiming any suggestion that its opinion on the scope of the Captured and Abandoned Property Act (CAPA)

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others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.") (emphasis omitted).

52. *Id.* at 140 (Chase, C.J., concurring).

53. *Id.*

54. *Id.* at 127 (majority opinion).

55. See *The Protector*, 79 U.S. 700 (1871) (determining whether a writ of error was timely filed); *Stewart v. Kahn*, 78 U.S. 493 (1870) (construing a statute declaring that when an action accrues against a person "during existence of the present rebellion" the time during which they were unreachable would not be deemed part of "the time limited by law for the commencement of such an action").

56. *United States v. Anderson*, 76 U.S. 56, 58 (1869) (quoting statute).

at issue should bear on any other potentially applicable laws, the Court looked carefully to Congress's purpose in passing CAPA itself.<sup>57</sup> Here, the Court reasoned, Congress was especially concerned to aid residents of the South who had remained loyal to the federal government during the conflict. Especially as to that population, "Congress did not intend to impose . . . the necessity of deciding [when the rebellion ended] for themselves."<sup>58</sup> Rejecting, then, the southern party's suggestion that the rebellion ended upon the last surrender of a Confederate general (in May 1865), the Court instead concluded that it should prefer to look for clues to statutory meaning in pronouncements of the *federal* government in fixing a date when the conflict ended. Since Congress had determined in separate legislation setting the pay of members of the union army that the rebellion closed on August 20, 1866, the Court reasoned that the later date should hold as well for CAPA, aimed at claimants "whose interests [Congress] equally desired to protect."<sup>59</sup>

Indeed, a number of contemporaneous statutes required similar inquiries into the beginning and/or ending date of the war, and while the Court sometimes addressed the matter with little or no analysis, in no case did it appear to contemplate declining jurisdiction over the issue as the political question doctrine would require. In *Stewart v. Kahn*, for example, the Court was asked to decide whether a federal law passed near the end of the war in 1864 applied retroactively to provide for the war-time-long tolling of state statutes of limitation barring late-filed civil suits.<sup>60</sup> The federal law provided that statutes of limitation

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57. *Id.* at 69 ("The point, therefore, for determination is, when, *in the sense of this law*, was the rebellion entirely suppressed . . . . [T]he purposes of this suit do not require us to discuss the question . . . whether the rebellion can be considered as suppressed for one purpose and not for another, nor any of the kindred questions arising out of it, and we therefore express no opinion on the subject.") (emphasis added).

58. *Id.* at 70.

59. *Id.* at 71; *see also* *McElrath v. United States*, 102 U.S. 426, 438 (1880) (construing a statute prohibiting dismissal of officers except by court martial "in time of peace," finding "time of peace" determined by presidential proclamation of peace as subsequently recognized by separate act of Congress regulating soldiers' pay); *Lamar v. Browne*, 92 U.S. 187, 193 (1875) (finding property in Georgia still in "hostile possession" and therefore subject to federal capture because "territory within the limits of the State of Georgia [was] occupied by the national forces, and actually governed by means of that occupation") (citing *The Protector*, 79 U.S. at 702).

60. *Stewart*, 78 U.S. at 505 (noting without discussion that Presidential proclamation established southern states were in rebellion as of April 1861).

be tolled during such time as a civil defendant (here, a Louisiana debtor) was “beyond the reach of legal process.”<sup>61</sup> Rejecting the argument that the statute was written to operate only prospectively, the Court again looked to Congress’s particular purpose in passing the law and insisted that Congress could not have intended a construction that would effectively deny relief to any northern claimant (here, a New York creditor) who had been unable to proceed against southern defendants throughout the war. Instead, the Court looked on this occasion to presidential proclamations of the existence of a southern rebellion to demonstrate the minimum time after which plaintiffs would have had no access to any Louisiana courts, and applied the statute retroactively to allow plaintiffs claim to proceed.

*The Protector*, a more well-known but even shorter squib of a case from the era, likewise involved a dispute over how long a statute of limitations (governing the time for seeking appeal of federal judgments) should be tolled to exclude the time of the Civil War.<sup>62</sup> Here, the Court did look squarely to the acts of the political branches—but not because it was discernibly concerned with its own jurisdictional limitations. Rather, because in the Court’s own estimation “[a]cts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance . . . that it would be difficult, if not impossible, to say on what precise day [the war] began or terminated,” it would be necessary “to refer to some public act of the political departments of the government to fix the dates.”<sup>63</sup> In this regard, the Court found statements of the executive most convenient to employ because Congress was in recess when hostilities began. Likewise, because the war began and ended at different times in different states (a finding the Court made entirely on its own, without reference to any statements or actions of the political branches), the executive’s proclamations declaring various ends of the war would be most helpful to use.

Critically, the *Protector* Court cautioned, it was relying on presidential proclamations to set the end date of the war only “[i]n the absence of more certain criteria, of equally general application.”<sup>64</sup> When, in a later conflict, the executive’s own statements on the existence of war were unclear, the Court

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61. *Id.* at 504.

62. *The Protector*, 79 U.S. at 701.

63. *Id.* at 702–03.

64. *Id.* at 702.

would take upon itself the task of “constru[ing]” what other evidence might exist to determine, “for example . . . whether the situation is such that statutes designed to assure American neutrality have become operative.”<sup>65</sup> And when more certain criteria were available—as happened, for example, thirty years later when the Court looked to the ratification of a peace treaty with Spain, rather than a presidential proclamation suspending hostilities—the Court would prove quite content to embrace them instead.<sup>66</sup>

World War I brought with it a new set of war-dependent laws, and with them, a new set of court challenges surrounding their application. Yet while the Court occasionally interpreted these laws to authorize the continued exercise of power beyond the occurrence of events, such as the actual end of hostilities, which might intuitively be assumed to constitute the end of the war, the cases reflect no obvious hesitation by the Court to assert its own interpretive power. They seem instead most easily read as classic exercises in employing the tools of statutory interpretation—which tools led them in the particular cases to other indicia of war’s end.<sup>67</sup> Consider *Hamilton v. Kentucky Distilleries*,<sup>68</sup> concerning whether the War-Time Prohibition Act, passed ten days after the signing of the armistice with Germany on November 11, 1918, could be construed to continue prohibiting the sale of distilled liquors a year later, when, according to the statute, prohibition was for the limited purpose of “conserving the man power of the Nation, and to increase efficiency in the production of arms” needed for the war effort.<sup>69</sup> The war effort was by now manifestly over, plaintiffs argued, and indeed, according to a series of statements by the President

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65. *Baker v. Carr*, 369 U.S. 186, 212–13 (1962) (citing *The Three Friends*, 166 U.S. 1, 63, 66 (1897)).

66. *J. Ribas y Hijo v. United States*, 194 U.S. 315 (1904) (determining whether a merchant ship captured by the United States was lawfully subject to wartime capture) (“The President had not the power to terminate the war by treaty without the advice or consent of the Senate of the United States.”).

67. See *Commercial Trust Co. of N.J. v. Miller*, 262 U.S. 51 (1923) (interpreting the Trading With the Enemy Act); *Kahn v. Anderson*, 255 U.S. 1 (1921) (interpreting the legality of a court martial convicting petitioners of murder); *Hamilton v. Ky. Distilleries Warehouse Co.*, 251 U.S. 146 (1919) (interpreting the War-Time Prohibition Act).

68. *Hamilton*, 251 U.S. at 146.

69. *Id.* at 153.

himself, the process of termination must now be understood as complete.<sup>70</sup>

Rejecting plaintiffs' argument that, in light of the statute's purpose, the "conclusion of war" should be construed to mean simply the end of hostilities, the Court relied on the express terms of the statutory text, fixing the end of the statutory authority as the statute provided, "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."<sup>71</sup> The event was thus to be fixed, the Court held, by "a phrase so definite as to leave no room for construction."<sup>72</sup> While the President had indeed spoken publicly on many occasions about the end of the war, while the Treaty of Versailles had been concluded, while the President had even mentioned, in a veto message to Congress, the "demobilization of the army and navy," such popular or passing references could not overcome the reality that the President had yet "refrained from issuing the proclamation declaring the termination of demobilization for which this act provides."<sup>73</sup>

It is not until 1923's *Commercial Trust Co. v. Miller* that the Court first engaged directly, if briefly, the question of the judicial role in recognizing war's end.<sup>74</sup> *Commercial Trust* involved the 1917 Trading with the Enemy Act (TWEA), which provided that "[i]f the President shall so require, any money or other property . . . held . . . for the benefit of an enemy" be conveyed to an Alien Property Custodian, who would hold all rights in the property unless and until any disputes involving the legitimate ownership of the property required its return.<sup>75</sup> Plaintiffs had argued that because the Act should be under-

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70. *Id.* at 159 (citing presidential statements announcing, inter alia, the end of the war and discontinuation of various wartime agencies, and referencing a resumption of trade with Germany, the signing of the Treaty of Versailles, and the demobilization of troops).

71. *Id.* at 153 (emphasis added).

72. *Id.* at 167.

73. *Id.* at 159–60; *see also* *Kahn v. Anderson*, 255 U.S. 1, 9–10 (1921) (citing related statutes in construing act providing that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace," as meaning "peace in the complete sense, officially declared"); *Hamilton*, 251 U.S. at 168 (noting that "in fact demobilization had not terminated at the time" of the President's veto message, or at the time the suit was brought, and, "for aught that appears, it has not yet terminated").

74. 262 U.S. 51, 57 (1923).

75. *Id.* at 53.

stood only as “a provision for the emergency of war,” its authority should be construed to expire at the end of the war—an event marked by a joint resolution of Congress, and presidential proclamation, declaring the war against Germany at an end.<sup>76</sup>

In the concluding paragraph of an otherwise terse opinion, the Court rejected plaintiffs’ suggestion that the legislation was no longer operative:

[T]he power which declared the necessity is the power to declare its cessation, and what the cessation requires. The power is legislative. A court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time, and that its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation of conflicts in the field.<sup>77</sup>

It is perhaps unsurprising that such sweeping language would come to be invoked as a general rejection of the idea that the Court could properly play any role in establishing the duration of statutory authority for any statute whose operation depended upon the existence of war, no matter what the statutory scheme provides. But such a reading would have the *Commercial Trust* Court making a striking break with the many earlier cases in which it had looked to the law’s text and purpose in helping it to identify sources that could establish war’s beginning or end—sources that included, variously, other acts of Congress, proclamations of the President, treaties, or the Court’s assessment of acts of hostilities themselves.<sup>78</sup> Yet the Court gave no indication that it intended to embrace any such shift in view. On the other hand, what did distinguish this case from its predecessors was the breadth of the interpretive leap plaintiffs were asking the Court to take in declaring the custodial authority of the act no longer in effect. Unlike the statute at issue in, for example, *Hamilton*, which provided that it was to be of limited duration (and indeed, expressly set the condition upon which its effectiveness would cease), TWEA contained no such limits, either in the text of the statute, or by implied reference to another body of law. Core provisions of TWEA were written with general regard to a “war” or an “enemy,” without reference to what the statute elsewhere called “the present war”;<sup>79</sup> key provisions of TWEA indeed remain in

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76. *Id.* at 57.

77. *Id.*

78. *See id.*

79. The statute defined “enemy” as a subject of any nation with which the

effect today.<sup>80</sup> *Commercial Trust* is thus better read for the proposition that, in the absence of any indication that the portion of TWEA was meant to be limited to one war in particular, the Court would unremarkably understand the authority given by the Act as it understood any Act of Congress—as continuing in effect unless and until repealed.

Subsequent World War I-era cases interpreting statutory conditions of war or emergency did nothing to support the view that *Commercial Trust* meant to turn away from the actively engaged role the Court had historically played. Rather, they did much to cement the notion that, as Justice Holmes put it for the Court the very next year: “[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared . . . .”<sup>81</sup> Thus, even when Congress had passed legislation declaring that the “emergency” necessary for the operation of its Washington, D.C. rent control statute remained in effect, the Court made clear that it would, for itself, “ascertain as it sees fit any fact that is merely a ground for laying down a rule of law.”<sup>82</sup> Based on facts that were judicially noticeable, and findings that would have to be assessed by the trial court on remand, the Court left no uncertainty that it was prepared to hold the rent control statute no longer applicable because the war emergency—updated congressional declaration notwithstanding—no longer existed as a matter of fact.<sup>83</sup>

Whatever remaining significance might be attributed to the *Commercial Trust* dictum (and perhaps not much, as the case has been cited by the Court not at all in the past nearly fifty years),<sup>84</sup> the case rightly pales in significance to *Ludecke v. Watkins* for advocates of the argument that the existence of

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United States is “at war,” without reference to the particular war in which the United States was then engaged, implying the law would be effective, without additional action required, during any wartime period now or in the future. *Commercial Trust*, 262 U.S. at 52–53.

80. 50 U.S.C.A. app. § 1 (West 1917).

81. *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547 (1924) (citing *Block v. Hirsh*, 256 U.S. 135, 154 (1921)).

82. *Id.* at 548.

83. *Id.* at 547–48 (“A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed.”).

84. Indeed, the paradigmatic political question case, *Baker v. Carr*, 369 U.S. 186 (1962), later makes clear this “cessation of hostilities” language from *Commercial Trust* was rather an overstatement. See *infra* Part I.B for a more detailed discussion of *Baker*.

war poses a political question.<sup>85</sup> Decided three years after the United States publicly celebrated its victory in World War II, *Ludecke* called on the Court to interpret the Alien Enemy Act (AEA), first passed in 1798, providing for the deportation of foreign nationals from countries with which the United States is at war. By its terms, the AEA applies upon presidential proclamation of a “declared war between the United States and any foreign nation or government, or [upon] any invasion or predatory incursion . . . perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government . . . .”<sup>86</sup>

Petitioner Kurt Ludecke, a German national ordered to be removed in 1946, challenged the Act’s applicability, arguing that whatever power Congress had intended to delegate the President in the AEA, that power did not “survive cessation of actual hostilities” following World War II.<sup>87</sup> The Court rejected the argument, over dissents that focused their primary criticism against the Act’s disturbing lack of provision for notice, hearing or judicial review. As for the effect of the war, the Court held, the power granted by the AEA “is a process which begins when war is declared but is not exhausted when the shooting stops.”<sup>88</sup> It then added in a footnote, “when the life of a statute is defined by the existence of a war, Congress leaves the determination of when a war is concluded to the usual political agencies of the Government.”<sup>89</sup> Where, as here, “[t]he political branch of the Government has not brought the war with Germany to an end,” and indeed, the President had issued a proclamation that “a state of war still exists,” judges having “neither technical competence nor official responsibility” would not question the judgment that those deportable at the height of hostilities would still be deported “during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come.”<sup>90</sup>

It is not difficult to see why such language would lead some to conclude that *Ludecke* imposes sharp limits on the Court’s

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85. See, e.g., Vladeck, *supra* note 11, at 77–78 (citing *Ludecke v. Watkins*, 335 U.S. 160, 167–70 (1948) (finding that a state of war continued following Germany’s surrender in World War II)).

86. *Ludecke*, 335 U.S. at 161–62 (quoting 50 U.S.C. § 21).

87. *Id.* at 166.

88. *Id.* at 167.

89. *Id.* at 169 n.13.

90. *Id.* at 170.

role in recognizing the end of a war. But it is important to understand what this language does not do. First and foremost, as the Court is elsewhere in its opinion at pains to point out, there is a difference between the position, which it takes, that the end of war depends, for purposes of the statute, on some kind of political *act*, and the view, which it avoids, that war's existence *vel non* is a non-justiciable political *question*.

"The state of war' may be terminated by treaty or legislation or Presidential proclamation. Whatever the mode, its termination is a political act. Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.<sup>91</sup>

The question was not compelled in *Ludecke*. A self-described Nazi, Mr. Ludecke had been arrested in the United States on December 8, 1941, and detained throughout the lengthy administrative process that ultimately resulted in a final order of removal by the Attorney General in January 1946.<sup>92</sup> The Court's passing statement about its own incompetence in such matters came only after it had conducted a fairly pedestrian exercise in statutory interpretation, rejecting Ludecke's "reading of the statutory phrase 'declared war' to mean 'state of actual hostilities,'" and instead reading the statute to require an inquiry into what had actually been declared.<sup>93</sup> Among other factors persuading the Court that its reading of the statute was right, Ludecke's proposal that the power to deport under the Act "did not survive cessation of actual hostilities" would "effect[lively] nullif[y] the power to deport alien enemies, for such deportations are hardly practicable during the pendency of what is colloquially known as the shooting war."<sup>94</sup>

Further testing the Court's insistence upon its own incompetence, its passing modesty came only after it devoted a lengthy set of paragraphs to analyzing in detail the factual and political state of affairs surrounding Ludecke's final order of removal in 1948: the country still had "armies abroad exercising our war power," no treaty of peace had been concluded with our enemies, the President had issued a proclamation providing that, while hostilities had ended, "a state of war still exists," the President had recently addressed Congress recommending

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91. *Id.* at 168–69 (citation omitted).

92. *Id.* at 162–63.

93. *Id.* at 166 n.11.

94. *Id.* at 166.

the reenactment of selective service legislation (among other things), and had even more recently issued an executive order asserting his authority “in time of war” to assume control of transportation systems.<sup>95</sup> Such a fact-intensive analysis is not what one would expect of a case concluding the matter of war was nonjusticiable; it is rather the analysis one finds in a case, as in *Ludecke*, in which the Court asserts its jurisdiction and interprets and applies a statute for itself. Much in the same way the Court did four years later when, in interpreting the 1951 Joint Resolution of Congress providing that the “state of war declared to exist between the United States and the Government of Germany . . . is hereby terminated,” German citizens subject to removal under the Alien Enemy Act could no longer be removed.<sup>96</sup>

If there were any doubt of the lasting impact of *Ludecke*’s dictum on judicial competence on these questions, the military justice cases of the era—involving laws tying the authority of various military trial regimes to the existence of war, decided both before and after *Ludecke*—make clear the Court’s determination to treat end-of-war authority triggers as standard questions of statutory interpretation. *In re Yamashita*, for instance, involved a challenge to the legality of a U.S. military commission trial of a Japanese general following the end of hostilities between the United States and Japan.<sup>97</sup> Among the questions presented was whether the executive’s authority to conduct the commission trial continued after the cessation of hostilities. In reaching its answer, the Court looked first to the statutory Articles of War that it read as authorizing military commissions.<sup>98</sup> But both Article 15 of the statute, and the relevant international law of the time, were silent on the question

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95. *Id.* at 169–71 (citations omitted).

96. *United States ex rel. Jaeger v. Carusi*, 342 U.S. 347, 348 n.2 (1952) (per curiam); *see also* *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 540 n.1 (1950) (holding that special procedures for the exclusion of aliens applicable “[w]hen the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941” continued to apply in 1948 in light of a 1947 presidential proclamation declaring the national emergency continues to exist); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 115–16 (1947) (rejecting a construction of the War Powers Act provision providing for the expiration of certain powers six months after “the termination of the war” as synonymous with the termination of “hostilities”).

97. 327 U.S. 1 (1946).

98. *Id.* at 7. *But cf.* *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding that 10 U.S.C. § 821 grants no authority for military commission trials where trials fail to comply with the law of nations).

of the duration of the authority to conduct such trials.<sup>99</sup> As the Court put it: “We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government.”<sup>100</sup> In the absence of any limit in federal or international law on the President’s Article 15 authority to conduct military trials, the power to prosecute violations of the law of war would be understood, as with all prosecutions, to remain at the discretion of the prosecutor/executive.

Perhaps most important, the corollary proposition would again prove true: a war-based condition in a statute or in a relevant treaty could be interpreted to *constrain* the power granted—even in the face of executive branch opposition. This was the Court’s conclusion a decade later in *Lee v. Madigan*,<sup>101</sup> a case involving the scope of the statutory power to try American soldiers before courts martial. U.S. soldier John Lee was tried by court martial for his involvement in a murder committed at Camp Cooke, California in June 1949. Article of War 92 (the statute applicable before the adoption of the modern Uniform Code of Military Justice) provided “that no person shall be tried by court-martial for murder or rape committed within the geographical limits of [the United States] *in time of peace*.”<sup>102</sup> Recalling that “the Nation may be ‘at war’ for one [statutory] purpose, and ‘at peace’ for another,”<sup>103</sup> the Court construed “time of peace” for court martial purposes to preclude the court martial of a soldier accused of conspiring to commit murder at his Army base in June 1949. Applying a canon of constitutional avoid-

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99. Articles of War, ch. 2, § 2c, 41 Stat. 790 (1920). As of 1916, Article 15 provided that any provisions “conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals.” The Court also noted that it could find no authority for or against such trials in international law, and no prohibition on post-war trials for war crimes committed during the war.

100. *In re Yamashita*, 327 U.S. at 12. Indeed, the Court reasoned, it seemed practically impossible to conduct such a trial while active hostilities were still underway.

101. 358 U.S. 228 (1959) (holding that terms such as war and peace “must be construed in light of the precise facts of each case and the impact of the particular statute involved”).

102. *Id.* at 228 (emphasis added).

103. *Id.* at 231.

ance to favor a narrow construction of statutes permitting military trial in particular, the Court rejected the executive's arguments otherwise.<sup>104</sup>

The rule that emerges from these cases—that the existence of “war” depends on the legal context in which it arises, and that context and meaning are generally susceptible to judicial identification—has guided the courts through multiple subsequent conflicts in which the nature of available criminal sanctions has regularly depended on the existence or absence of “war.”<sup>105</sup> It has likewise prevailed in judicial efforts to understand the scope of U.S. sovereign immunity from tort suits, an immunity preserved under the Federal Tort Claims Act (FTCA) for “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”<sup>106</sup> Here, too, the courts have applied “normal tools of our trade—reason and judgment” in statutory interpretation, finding that, for example, U.S. military involvement in the Gulf during the Iran-Iraq war would count as “time of war” for FTCA purposes, as would any instance “when, as a result of a deliberate decision by the executive branch, United States armed forces engage in an organized series of hostile encounters on a significant scale with the military forces of another nation.”<sup>107</sup> And the courts have engaged in similar inquiries in

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104. *Id.* at 236 (“[W]e cannot readily assume that the earlier Congress used ‘in time of peace’ in Article 92 to deny soldiers or civilians the benefit of jury trials for capital offenses four years after all hostilities had ceased. To hold otherwise would be to make substantial rights turn on a fiction. . . . The meaning attributed to them is at war with common sense, destructive of civil rights, and unnecessary for realization of the balanced scheme promulgated by the Articles of War.”).

105. *See also, e.g.,* *Broussard v. Patton*, 466 F.2d 816 (9th Cir. 1972) (holding that an airman’s desertion, occurring after the Gulf of Tonkin Resolution but before general ground fighting in Vietnam, was “in time of war” within the UCMJ provision allowing for prosecution without regard to the otherwise applicable statute of limitation, stating “for purposes of [this statute], ‘time of war’ refers to *de facto* war and does not require a formal Congressional declaration”); *United States v. Anderson*, 38 C.M.R. 386 (C.M.A. 1968) (determining that the Vietnam conflict counted as a “time of war” such that soldier could be prosecuted for absence without leave without regard to the otherwise applicable statute of limitation); *United States v. Sobell*, 314 F.2d 314 (2d Cir. 1963) (determining when World War II ended for purposes of setting the statutory sentence applicable “in time of war”).

106. 28 U.S.C. § 2680j (2012).

107. *Koochi v. United States*, 976 F.2d 1328 (9th Cir. 1992) (*cert. denied*, 508 U.S. 960 (1993)); *see also* *Minns v. United States*, 974 F. Supp. 500 (D. Md. 1997) (finding that the Persian Gulf War was a “time of war” under the FTCA notwithstanding the lack of a formal declaration of war), *aff’d*, 155 F.3d

interpreting the applicability of the Wartime Suspension of Limitations Act (WSLA), the federal law suspending statutes of limitations otherwise applicable in federal fraud cases for so long as the United States is “at war.”<sup>108</sup> As the federal court recently tasked with sorting out fraud claims arising out of Boston’s “big dig” construction project explained, “not every shot fired or every armed skirmish is of sufficient magnitude to stop the running of the statute of limitations.” Accordingly, the court looked to legislative history, case law, historical practice, and “common sense” to identify a set of factors relevant to determining whether the United States was “at war” for purposes of that Act. In that instance, the factors included:

- (1) [T]he extent of the authorization given by Congress to the President to act; (2) whether the conflict is deemed a ‘war’ under accepted definitions of the term and the rules of international law; (3) the size and scope of the conflict (including the cost of the related procurement effort); and (4) the diversion of resources that might have been expended on investigating frauds against the government.<sup>109</sup>

Applying these factors to both the post-9/11 conflicts in Afghanistan and Iraq, the court found the United States was “at war” from the authorizations for use of military force passed by Congress in each case, until the formal recognition of the Karzai government in the case of Afghanistan, and until the President’s address declaring “major combat operations” over in the case of Iraq.<sup>110</sup> While other courts have construed the WSLA “at

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445 (4th Cir. 1998) (*cert. denied*, 525 U.S. 1106 (1999)); *Vogelaar v. United States*, 665 F. Supp. 1295 (E. D. Mich. 1987) (holding that the combat activities exception to the FTCA bars claims against the United States based on an alleged failure to identify the remains of a service member killed in Vietnam, to the extent that the alleged omission occurred before the end of the Vietnam War); *Rotko v. Abrams*, 338 F. Supp. 46 (D. Conn. 1971) (holding that the Vietnam conflict is a “time of war” for purposes of the FTCA even though no formal declaration of war exists), *aff’d*, 455 F.2d 992 (1972); *Williams v. United States*, 115 F. Supp. 386 (N. D. Fla. 1953) (stating that the “time of war” exception to the FTCA is inapplicable to cases involving military aircraft explosions occurring in the United States), *aff’d*, 218 F.2d 473 (5th Cir. 1955); *cf. Saleh v. Titan*, 580 F.3d 1, 9 (D. C. Cir. 2009) (discussing 28 U.S.C. § 2680j and concluding that “[d]uring wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor’s engagement in such activities shall be preempted”).

108. *United States v. Smith*, 342 U.S. 225 (1952); *see also United States v. Proserpi*, 573 F. Supp. 2d 436 (D. Mass. 2008) (construing 18 U.S.C. § 3287).

109. *Proserpi*, 573 F. Supp. 2d at 436.

110. *Id.* at 455.

war” trigger to turn on other events,<sup>111</sup> none to date has suggested the term was beyond standard methods of statutory interpretation.

#### B. WHERE THE POLITICAL QUESTION DOCTRINE SURVIVES

If the cases most directly requiring the Court to construe provisions pegging statutory authority to the existence of war-time reveal no categorical refusal to adjudicate the question, what of political question doctrine more broadly? Whether or not the Court found the war-condition questions before it justiciable in those particular cases, it is possible that a non-justiciability principle should be understood to apply in other statutory settings. Where, for example, the nature of the conflict in which the United States is engaged is unusual, and where the existence of hostilities underlies a vast array of federal government powers exercised worldwide. As the Court has often explained, political question doctrine is “primarily a function of the separation of powers.”<sup>112</sup> While “it is error” to assume every case touching on foreign relations is “beyond judicial cognizance,” some cases more than others implicate the prerogatives of the other branches.<sup>113</sup>

The Court’s most comprehensive effort to define the parameters of political question doctrine came in a case far removed from matters of war or its duration, and in which the Court concluded that the dispute before it did *not* present a political question.<sup>114</sup> Yet despite the dicta-twice-removed nature of 1962’s *Baker v. Carr*, its frequent invocation in political question debates makes it a necessary starting point here. Following a detailed review of the Court’s political question jurisprudence to that point, the *Baker* Court famously identified six elements common to the cases it had found nonjusticiable:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable

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111. See, e.g., *United States v. Pfluger*, 685 F.3d 481 (5th Cir. 2012); *United States v. Western Titanium, Inc.*, No. 08-CR-4229-JLS, 2010 WL 2650224 (S. D. Cal. 2010) (holding that “extensive post-hoc factual determinations required by *Prosperi* render its application too ambiguous and uncertain in the context of a criminal statute of limitation,” thus the “at war” clause must be narrowly construed to include only wars formally declared by Congress).

112. *Baker v. Carr*, 369 U.S. 186 (1962). See *infra* Part IV for separation of powers considerations more broadly.

113. *Baker*, 369 U.S. at 211.

114. *Id.* at 237 (holding a constitutional challenge to a state legislative reapportionment did not present a political question).

and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>115</sup>

In its review of prior foreign relations cases, the *Baker* Court emphasized two factors especially: “the lack of satisfactory criteria for a judicial determination,” and the need to “attribut[e] finality to the action of the political departments.”<sup>116</sup> While the decision to recognize a foreign government was, in these respects, the kind of discretionary decision without “judicially discoverable standards” the Court thought not susceptible of judicial evaluation,<sup>117</sup> the existence of hostilities was another matter:

Though it has been stated broadly that “the power which declared the necessity is the power to declare its cessation, and what the cessation requires,” here too analysis reveals 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. Dominant is the need for finality in the political determination, for emergency's nature demands “[A] prompt and unhesitating obedience.” . . . But deference rests on reason, not habit. The question in a particular case may not seriously implicate considerations of finality—e.g., a public program of importance (rent control) yet not central to the emergency effort. Further, clearly definable criteria for decision may be available. In such cases the political question barrier falls away: “[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . [It can] inquire whether the exigency still existed upon which the continued operation of the law depended.” On the other hand, even in private litigation which directly implicates no feature of separation of powers, lack of judicially discoverable standards and the drive for even-handed application may impel reference to the political departments' determination of dates of hostilities' beginning and ending.<sup>118</sup>

Both factors the *Baker* Court identifies as central to its analysis—the availability of “judicially discoverable standards” and a need for finality in the political determination, particu-

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115. *Id.* at 217.

116. *Id.* at 210.

117. *See, e.g.,* *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) (quoting *Jones v. United States*, 137 U.S. 202, 212 (1890)).

118. *Baker v. Carr*, 369 U.S. 186, 213–14 (1962) (alterations to third quote in original) (emphasis omitted) (citations omitted) (footnotes omitted).

larly (or perhaps solely) in an emergency—have benefited from some subsequent explication.

The existence of “definable criteria” by which a legal decision may be made remains a determinant of overriding importance in assessing justiciability. Indeed, rather than invariably reciting *Baker v. Carr*’s full six-factor test, the Court has, in its handful of political-question cases since, emphasized this as one of few determinants still relevant in identifying the existence of a political question.<sup>119</sup> *Zivotofsky v. Clinton* most recently took this approach to determine whether the case before it had triggered the “narrow” political-question exception to the general rule that “the Judiciary has a responsibility to decide cases properly before it.”<sup>120</sup> *Zivotofsky*, whose son was born in Jerusalem, had sued under the federal statute providing a cause of action for aggrieved parents to challenge the Secretary of State’s refusal to list Israel, rather than Jerusalem, as a child’s place of birth on his passport.<sup>121</sup> Rejecting the argument embraced by the lower courts, that deciding *Zivotofsky*’s claim would have the courts impermissibly interfering with an exercise of constitutional power committed to the executive alone, the Court emphasized that “[t]he existence of a statutory right . . . is certainly relevant to the Judiciary’s power” to decide the case. As the majority reasoned:

The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts’ own unmoored determination of what United States policy toward Jerusalem should be. Instead, *Zivotofsky* requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if *Zivotofsky*’s interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.<sup>122</sup>

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119. See, e.g., *Nixon v. United States*, 506 U.S. 224 (1993).

120. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (identifying also the “textually demonstrable constitutional commitment of the issue to a coordinate political department”).

121. *Id.* State Department guidelines had required passport officials to record Jerusalem as the place of birth when requested by American parents for their child born in the country. *Id.* at 1424–25. When Congress passed a law requiring the Secretary of State to record Israel as the place of birth at a citizen’s request—providing aggrieved plaintiffs with a statutory cause of action to enforce that right—the President challenged Congress’s authority, arguing that the statute impermissibly interfered with the President’s authority to conduct foreign affairs, and that plaintiffs’ case (challenging the Secretary’s refusal to record Israel as their son’s place of birth) presented a political question. *Id.* at 1425.

122. *Id.* at 1427.

To determine whether judicially “definable criteria” could be found, the Court canvassed what scant constitutional text, structure, and history exists on whether the executive or Congress was given constitutional primacy over the birthplace designation on passports. Relying on such guidance as the President’s Article II power to “receive Ambassadors and other public Ministers,” the Court concluded that there were ample “definable criteria” even in this constitutional realm to provide sufficient guidance for resolving the legal question of power.<sup>123</sup>

Given the modern Court’s willingness to find adequate judicial guidance in even broad structural terms of the Constitution,<sup>124</sup> it should be unsurprising that it has never found insufficient guidance for deciding questions of statutory interpretation. “As *Baker* plainly held . . . the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts.”<sup>125</sup> Thus, even where the interpretation of a federal statute would compel

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123. See *id.* at 1428, 1430 (citing as relevant text the President’s Article II power to “receive Ambassadors and other public Ministers,” and Congress’s Article I powers over naturalization and foreign commerce). *Zivotofsky’s* conclusion in this regard is notably different from that of the Rehnquist plurality in *Goldwater v. Carter*, 444 U.S. 996, 1002–03 (1979) (Rehnquist, J., concurring). Rehnquist had reasoned that although the Constitution provided clear guidance on how a treaty was to be *made*, its silence on the question how a treaty could be *terminated* meant there was insufficient legal guidance for a court to settle the dispute about whether the termination power was the President’s alone. *Id.* The *Zivotofsky* Court, with arguably less textual guidance on the passport question, seemed untroubled by its analogous task of constitutional interpretation.

124. More recently, a plurality of the Court found insufficiently manageable standards for resolving a constitutional challenge to a congressional-redistricting scheme. In *Vieth v. Jubelirer*, Justice Scalia explained that the Article III “judicial power” is “the power to act in the manner traditional for English and American courts.” 541 U.S. 267, 278 (2004) (“Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.”). While the plurality despaired of finding a rational constitutional standard, Justice Kennedy concurred separately to emphasize that while “[t]he failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper[,] [i]f workable standards do emerge to measure these burdens, however, courts should be prepared to order relief.” *Id.* at 317 (Kennedy, J., concurring).

125. *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986); accord *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 856 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (“The Supreme Court has never applied the political question doctrine in a case involving alleged statutory violations. Never.” (emphasis omitted)).

the Secretary of Commerce to certify that Japan was not complying with its treaty obligations—undermining the President’s recently concluded negotiations with Japan resolving the nations’ whaling dispute, “a decision which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below”—was squarely within the Court’s power.<sup>126</sup>

The Court in *Japan Whaling Association v. American Cetacean Society* went on to side with the Secretary’s interpretation of the statute, holding that the statute did not compel certification. But it reached its conclusion under the familiar administrative law test of *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.<sup>127</sup> While interpretive deference is another mechanism by which the Court might mediate separation-of-powers conflicts with the political branches—a point to which this Article returns in Part III below—it is quite a different approach than that required by political-question doctrine—namely, foregoing the exercise of jurisdiction entirely.<sup>128</sup>

In some contrast, the scope of the *Baker* factor regarding emergency-related interests in finality is rather less clear. To the extent the idea is that courts should hesitate to “interven[e] in exigent disputes,” judicial caution in such settings no doubt continues to prevail.<sup>129</sup> Yet to the extent the factor is about an

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126. *Japan Whaling*, 478 U.S. at 230 (“We are cognizant of the interplay between these [statutory] Amendments and the conduct of this Nation’s foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.”).

127. *Id.* at 233; see *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984) (providing that if a statute is silent or ambiguous as to its meaning in the instant situation, the Court would defer to any reasonable construction of the statute by the agency).

128. As John Hart Ely explained in the wake of the *Japan Whaling* decision, “[i]t is sometimes said that a question is ‘political’ if there is ‘a lack of judicially discoverable and manageable standards for resolving it.’ The Court has come generally to recognize, however, that if the issue is otherwise properly before it . . . its first duty is to try to fashion manageable standards.” JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 55–56 (1993) (emphasis omitted) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

129. See *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1432 (2012) (Sotomayor, J., concurring); see also *Luther v. Borden*, 48 U.S. 1, 43 (1849) (“Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? . . . If the judicial power extends so far, the guarantee

“unusual need for unquestioning adherence to a political decision already made,”<sup>130</sup> such that judicial review is inappropriate even after the exigency is passed, its continued salience is less certain. In the single security-related case post-*Baker* that the Supreme Court declined to adjudicate on political-question grounds, its ruling turned not on issues of exigency, but on the near-certain mootness of the question presented and on the textual commitment of the relevant power to the political branches.<sup>131</sup> Most recently, the *Zivotofsky* majority made no mention of the “finality” factor.<sup>132</sup> In an illuminating concurrence, Justice Sotomayor emphasized that it is among the *Baker* factors that courts “should be particularly cautious” in invoking “before foregoing adjudication of a dispute.”<sup>133</sup> As Sotomayor’s concurrence explains, many of the concerns that might drive an “unusual need for unquestioning adherence to a political decision already made” may be better handled through abstention doctrines, “under which considerations of justiciability or comity lead courts to abstain from deciding questions whose *initial* resolution is better suited to another time.”<sup>134</sup>

The Court’s post-9/11 approach to statutory interpretation in security-related cases seems broadly in keeping with that more limited view of the relative unimportance of finality. In holding that a battlefield-captured U.S. citizen was entitled to due process to test the legality of his detention, the Court in *Hamdi v. Rumsfeld* emphasized in its ruling that a detainee’s

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contained in the Constitution of the United States is a guarantee of anarchy, not of order.”).

130 *Baker v. Carr*, 369 U.S. 186, 217 (1962).

131. *See Gilligan v. Morgan*, 413 U.S. 1, 10–11 (1973) (declining to assert jurisdiction over plaintiffs’ due-process request for continuing judicial monitoring of rules and training of Ohio National Guard on the grounds that, now that the Guard had already changed its rules and training to the requirements plaintiffs preferred, any judicial decree would be essentially advisory in nature); *see also id.* at 6 (noting the power to “provide for organizing, arming and disciplining the Militia” was expressly allocated to Congress (citing U.S. CONST. art. I, § 8)).

132. *Zivotofsky* is consistent with earlier Supreme Court cases suggesting that textual commitment and judicially discoverable standards were the most important of the *Baker* factors. *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion) (“These tests are probably listed in descending order of both importance and certainty.”); *Nixon v. United States*, 506 U.S. 224, 228 (1993) (highlighting the first two *Baker* factors).

133. *Zivotofsky*, 132 S. Ct. at 1432–33 (Sotomayor, J., concurring).

134. *Id.* at 1432 (Sotomayor, J., concurring) (emphasis added); *see id.* at 1434 (“The doctrines of mootness, ripeness, and political question all originate in Article III’s ‘case’ or ‘controversy’ language.”) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)).

process rights did not attach immediately upon capture in the throes of battle.<sup>135</sup> Nonetheless, once the government had decided the detainee should *continue* to be held, the Court was willing to engage so far as insisting that due process was required.<sup>136</sup> Once the exigency had passed, so too the justification for judicial abstention. Likewise in 2006's *Hamdan v. Rumsfeld*, involving a challenge to the legality of the original military-commission trial system, the Supreme Court (with the lower courts) brushed aside vigorous government arguments that it should abstain from deciding the case, at least until Mr. Hamdan's commission prosecution had concluded.<sup>137</sup>

Yet despite the apparent narrowing of the *Baker* criteria for determining the applicability of the political-question doctrine to a more manageable two—the existence of “judicially manageable standards” for adjudication, and (*Zivotofsky* reminds us) the absence of a textual commitment of the issue to another branch—there is a final case in the Court's post-9/11 jurisprudence necessary to examine in this context. In 2008's *Munaf v. Geren*, U.S. citizen habeas petitioners had raised the prospect that a federal statute prohibiting transfer to foreign

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135. *Hamdi v. Rumsfeld*, 542 U.S. 507, 531–32 (2004) (recognizing the government's concern that additional process for detainees would mean soldiers “engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away”).

136. *Id.* at 534–35 (“The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to continue to hold those who have been seized. . . . [A]rguments that military officers ought not have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant's acts. This focus meddles little, if at all, in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States.” (emphasis omitted)). *But cf.* *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (denying plaintiff injunction against military targeting of U.S. citizen abroad absent finding of “imminent” threat, to be enforced “through an after-the-fact contempt motion or an after-the-fact damages action”); *see id.* at 48 (“It is not the role of judges to second-guess, with the benefit of hindsight, another branch's determination that the interests of the United States call for military action.’ Such military determinations are textually committed to the political branches. Moreover, any post hoc judicial assessment as to the propriety of the Executive's decision to employ military force abroad ‘would be anathema to . . . separation of powers’ principles. . . . [A]ny after-the-fact judicial review of the Executive's decision to employ military force abroad would reveal a ‘lack of respect due coordinate branches of government’ and create ‘the potentiality of embarrassment of multifarious pronouncements by various departments on one question.’” (first alteration in original) (citations omitted)).

137. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

custody where there was a likelihood of torture would bar their transfer from U.S. to Iraqi custody to face criminal prosecution.<sup>138</sup> In a per curiam opinion, the Court refused to inquire beyond the executive's determination that the detainees were not likely to face torture.<sup>139</sup>

The Solicitor General explains that such determinations are based on "the Executive's assessment of the foreign country's legal system and . . . the Executive[s] . . . ability to obtain foreign assurances it considers reliable." The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area. In contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is.<sup>140</sup>

It is not entirely clear what to make of the *Munaf* Court's refusal to consider the validity of the Executive's determination of the likelihood of torture. The Court indicated that because the issue had not been especially litigated on certiorari, it would refuse to consider the question on its merits.<sup>141</sup> And the Court does not mention political-question doctrine per se, much less cite *Baker* or its progeny. Yet the concerns the *Munaf* Court raises plainly echo some of the less favored *Baker* criteria—"the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."<sup>142</sup> And the concerns recall non-jurisdictional instances in which the Court has ceased its interpretive inquiry in favor of the executive's statutory interpretation on similar grounds.<sup>143</sup> At a minimum, it seems wise to leave open the possibility that considerations of embarrassment may yet inform the Court's evaluation of statutory claims.

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138. 553 U.S. 674 (2008).

139. *Id.*

140. *Id.* at 702–03 (citations omitted) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations." (citing THE FEDERALIST NO. 42, at 279 (James Madison) (J. Cooke ed., 1961))).

141. *Id.* at 703.

142. *Baker v. Carr*, 369 U.S. 186, 186 (1962).

143. *See, e.g., United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

## II. THE MANY WORDS FOR WAR

While the previous Part demonstrates that there is no categorical political-question bar to judicial interpretation of statutory existence-of-hostilities triggers, it leaves open the possibility that the determination whether we are at war may yet present a political question in certain statutory settings—where the law lacks judicially manageable standards for interpretation, or where the issue has been textually committed by the Constitution to another branch of government.<sup>144</sup> This Part thus examines whether the doctrine precludes judicial resolution of the war conditions applicable in two contemporary statutes: the Military Commissions Act of 2009 (MCA) and the Authorization for Use of Military Force of 2001 (AUMF).<sup>145</sup>

The MCA provides that offenses are triable by military commission “only if the offense is committed in the context of and *associated with hostilities*.”<sup>146</sup> Courts now face, for example, the question whether commission defendants charged with acts committed before the attacks of 9/11 acted “in the context of and associated with hostilities.”<sup>147</sup> Separately, the AUMF has been a central font of authority for the conduct of U.S. counterterrorism operations, including the power to detain and lethally target individuals who are “part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.”<sup>148</sup> As interpreted by the Supreme Court, the AUMF delegates to the President the power to use force only “for the duration of *these hostilities*.”<sup>149</sup> With the planned withdrawal of U.S. combat forc-

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144. See *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

145. 10 U.S.C. § 950p(c) (2012); Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

146. 10 U.S.C. § 950p(c) (emphasis added).

147. See, e.g., *Hamdan v. United States*, 696 F.3d 1238, 1245 (D.C. Cir. 2012) (*Hamdan II*), *overruled on other grounds by* *Al Bahlul v. United States*, No. 11-1324, 2014 WL 3437458 (D.C. Cir. 2014); *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1278 (C.M.C.R. 2011), *overruled by Hamdan II*, 696 F.3d at 1238; see also *Al-Nashiri v. MacDonald*, No. 11-5907, 2012 WL 1642306 (W.D. Wash. 2012), *aff'd*, 741 F.3d 1002 (9th Cir. 2013).

148. *Al-Bihani v. Obama*, 590 F.3d 866, 870, 872, 878 (D.C. Cir. 2010), *reh'g denied en banc*, 619 F.3d 1 (2010).

149. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (emphasis added); see also *id.* at 520 (“It is a clearly established principle of the law of war that detention may last no longer than active hostilities. See Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S. T. 3316, 3406, T. I. A. S. No. 3364 (‘Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.’).”).

es from Afghanistan, those still detained by the United States pursuant to the AUMF may thus present habeas courts with arguments that “these hostilities” have come to an end.<sup>150</sup>

In both statutory contexts, the term “hostilities” is defined with reference to the meaning of that term under the international law of war, also known as international humanitarian law or the Law of Armed Conflict (LOAC). Under the MCA, the meaning of “hostilities” is set forth in a definitions section at the outset of the statute as “any conflict subject to the laws of war.”<sup>151</sup> In interpreting the AUMF, the Supreme Court likewise relied on LOAC in noting that “detention may last no longer than active hostilities,”<sup>152</sup> and Congress has since affirmed the President’s authority to detain under the AUMF is “pending disposition under the law of war.”<sup>153</sup> Understanding the relevant provisions of LOAC is thus essential to determining whether there are judicially manageable standards for interpreting the statutes. Below, LOAC is primarily addressed in the MCA discussion that is first to follow; to the extent the application of LOAC differs or needs elaboration with respect to the AUMF, it is addressed again in the discussion of that statute. A final section then considers whether the Constitution must be read to commit the determination of the existence of hostilities to one of the political branches. Throughout, it is useful to keep in mind that the answer to the question of when war ends under international law is in key respects the same as the answer to that question under domestic law: it depends why, in relation to what power, one wants to know.

#### A. THE MILITARY COMMISSIONS ACT

The question of the existence of hostilities arises in prosecutions under the MCA in two ways. First, the statute provides that the war crimes offenses it enumerates are triable by mili-

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150. See, e.g., *Al-Bihani*, 590 F.3d at 878. Indeed, the first such petition in the latest generation of Guantanamo habeas litigation has now been filed. See Motion of Petitioner for Judgment on His Petition for Writ of Habeas Corpus, *Idris v. Obama*, No. 05-1555 (D.D.C. June 28, 2013).

151. 10 U.S.C. § 948a(9) (2012).

152. *Hamdi*, 542 U.S. at 520 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”) (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3406, 75 U.N.T.S. 135); *Al-Bihani*, 590 F.3d at 878.

153. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011) [hereinafter 2012 NDAA]; Ike Skelton National Defense Authorization Act for Fiscal Year 2011, H.R. 6523, 111th Cong. § 1032 (enacted) [hereinafter 2011 NDAA].

tary commission “only if the offense is committed in the context of and associated with hostilities.”<sup>154</sup> It is thus necessary to prove the existence of hostilities as an element of each charging offense. Abd Al Rahim Hussayn Muhammad Al Nashiri, for example, has been charged with a set of military commission offenses for his alleged involvement in the 2000 bombing of the USS *Cole*. Among Al Nashiri’s defenses: the conduct of which he has been accused occurred before the attacks of September 11, 2001, and was thus not committed “in the context of and associated with hostilities.”<sup>155</sup>

The existence of hostilities is also, separately, relevant in establishing the military commission’s jurisdiction at the outset. Commission jurisdiction extends only to persons subject to trial under the MCA, namely “alien unprivileged enemy belligerents,” a term defined by the statute to include three types of defendant. The first two include defendants who “engaged in hostilities against the United States or its coalition partners,” or who have “purposefully and materially supported hostilities against the United States or its coalition partners.”<sup>156</sup> In cases involving such defendants, unless the defendant is alleged to have engaged in or supported “hostilities” as defined by the law of war, the commissions lack jurisdiction to proceed. The third category of defendant over whom the military commission may have jurisdiction—an individual who was “a part of Al Qaeda” when the alleged offense was committed—does not by its terms require a finding of hostilities.<sup>157</sup> But even where the existence of hostilities is not part of the *statutory* requirement for jurisdiction, commission jurisdiction remains subject to limits imposed by the U.S. Constitution. As the Supreme Court has noted, absent martial law or military occupation, military commissions may substitute for civilian trials or traditional military justice processes to prosecute only those acts “incident

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154. 10 U.S.C. § 950p(c). The term “hostilities” is defined as “any conflict subject to the laws of war.” 10 U.S.C. § 948a(9). As the D.C. Circuit recognized, the law of war “has long been understood to mean the international law of war.” *Hamdan II*, 696 F.3d 1238, 1245 (D.C. Cir. 2012) (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 603, 610 (2006) (plurality opinion)); *id.* at 641 (Kennedy, J., concurring); *accord Ex Parte Quirin v. Cox*, 317 U.S. 1, 27–30, 35–36 (1942).

155. See Memorandum of Law in Support of Petitioner’s Motion for a Preliminary Injunction at 8, *Al Nashiri v. Obama*, No. 08-Civ-1207 (D.D.C. May 1, 2014), available at <https://docs.google.com/file/d/0B0Q2o8mqTlrzbWt5cXBR T21RMWs>.

156. *Id.*

157. 10 U.S.C. § 948a.

to the conduct of war,” for events occurring “*within the period of the war*.”<sup>158</sup> In this setting, commissions are only constitutionally permissible when the offense alleged was “committed . . . during, not before, the relevant conflict.”<sup>159</sup> The need to consider the existence of war in some fashion is thus unavoidable in establishing commission jurisdiction.

The different contexts in which the issue arises highlight the complexity of understanding which decision-making actor is best suited to the determination. The question of the commission’s jurisdiction—either as a statutory or constitutional matter—seems manifestly a question of law, presumably resolvable with reliance on ordinary tools of statutory interpretation (including any applicable canons of deference). Yet the MCA also makes “hostilities” an element of each offense; the U.S. Constitution requires that elements of criminal offenses be proven by the prosecution to commission members (the commission equivalent of a jury) beyond a reasonable doubt.<sup>160</sup> Could the presiding officer (the commission equivalent of a judge) determine “hostilities” or “the relevant conflict” were sufficient to establish its jurisdiction, and the members then conclude after trial that the prosecution had not succeeded in proving the existence of hostilities as an element of the offense? In principle, yes.<sup>161</sup> For present purposes, the following analysis treats the

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158. *Hamdan*, 548 U.S. at 595–97 (Stevens, Souter, Ginsburg, & Breyer, JJ., concurring) (emphasis added) (quoting *Ex Parte Quirin*, 317 U.S. at 28–29; WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 837 (2d ed. 1920)); see also *id.* at 597 (quoting WINTRHOP, *supra*) (“No jurisdiction exists to try offenses ‘committed either before or after the war.’”).

159. *Id.* at 600; see also Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT’L SECURITY L. & POL’Y 295 (2010).

160. See *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)) (also citing *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *In re Winship*, 397 U.S. 385, 364 (1970) (affirming that the defendant was entitled to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt” and noting that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”). This is indeed how the question was treated when it arose in the prosecution of Salim Hamdan for material support to Al Qaeda. *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1278 (U.S. Ct. Mil. Comm’n Rev. 2011) (en banc), *rev’d*, *Hamdan II*, 696 F.3d 1238 (D.C. Cir. 2012), *overruled on other grounds by* *Al Bahlul v. United States*, No. 11-1324, 2014 WL 3437485 (D.C. Cir. July 14, 2014).

161. The resolution to this question turns in part on a host of issues beyond the scope of this Article, including continued uncertainty about the extent to which the U.S. Constitution applies in commission proceedings at Guantana-

existence-of-hostilities question as one for the court—both because the jurisdictional test requires it, and because, even if the determination ultimately requires a finding of fact, the presiding officer must in all events provide members with a jury instruction of what “hostilities” means as a matter of law.<sup>162</sup>

Deciding whether Al Nashiri is guilty of a war crime then requires the court to determine whether his alleged conduct was committed “in the context of and associated with hostilities”—that is, “any conflict subject to the laws of war.”<sup>163</sup> Before discussing the meaning of “hostilities” within that body of law, a brief note on interpretive background may be helpful. LOAC is codified in the first instance in a set of treaties called the Geneva Conventions, each of which the United States has signed and ratified, and each of which provide individuals caught up in armed conflict with a basic set of humanitarian protections.<sup>164</sup> In addition to the four principal Geneva treaties, many states have adopted two related treaties, called Additional Protocols, elaborating on the law described in the four main treaties.<sup>165</sup> While the United States has not ratified either of the Additional Protocols, it recognizes a number of their provisions as customary international law—that is, as binding on the United States nonetheless.<sup>166</sup> Beyond the treaty texts them-

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mo Bay. *Hamdan II*, 696 F.3d at 1245. The article returns to other aspects of the question in Part II.C, below.

162. Drawing on the applicable international law precedent discussed below, the commission presiding officer in *United States v. Hamdan* did just that. 801 F. Supp. 2d at 1278 n.54 (quoting *Hamdan Tr.* 3752–53).

163. 10 U.S.C. §§ 948a(9), 950p(c) (2012).

164. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva III, *supra* note 5; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

165. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

166. See Office of the Press Sec’y, The White House, *Fact Sheet: New Actions on Guantanamo and Detainee Policy*, LAWFARE (Mar. 7, 2011), [http://www.lawfareblog.com/wp-content/uploads/2011/03/Fact\\_Sheet\\_-\\_Guantanamo\\_and\\_Detainee\\_Policy.pdf](http://www.lawfareblog.com/wp-content/uploads/2011/03/Fact_Sheet_-_Guantanamo_and_Detainee_Policy.pdf) (calling on the Senate to ratify Protocol II and recognizing Article 75 of Additional Protocol I as customary international law).

selves, the Commentaries to the Conventions—prepared at the time the Conventions were drafted, essentially as a form of interpretive ‘legislative’ history—are considered by courts and legal scholars as a highly persuasive source of meaning.<sup>167</sup> Finally, the meaning of LOAC “hostilities” has been elucidated by a number of national and international courts whose rulings, while of varying degrees of binding significance, now regularly inform judicial interpretations in the field. This section relies on all of these sources in elucidating the meaning of hostilities.

Questions of the existence of war under LOAC arise most commonly in two interpretive settings. The first is in efforts to define the LOAC term “armed conflict,” the existence of which triggers the applicability of the entire body of law, as set forth in Common Articles 2 and 3 of all four Geneva Conventions. The issue has arisen internationally most often just as it now arises in the example of the MCA—in determining whether war crimes tribunal jurisdiction exists. Violations of certain provisions of the Geneva Conventions constitute “grave breaches” of the treaties, and may be prosecutable as war crimes before a jurisdictionally relevant tribunal. War crimes are not prosecutable as such unless there is a war; thus, various war crimes tribunals have had to determine whether and when a dispute rose to the level of “armed conflict” within the meaning of LOAC such that war crimes jurisdiction may attach.<sup>168</sup> Second, LOAC elsewhere uses the term “hostilities” expressly, as in Common Article 3, which defines the group of individuals entitled to its protection as those “[p]ersons taking no active part in the hostilities.”<sup>169</sup> Perhaps most relevant for AUMF purposes, dis-

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167. See, e.g., JEAN DE PREUX ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet, ed., A.P. de Heney, trans., 1960). The International Committee of the Red Cross (ICRC) Commentary is widely viewed as the informal legislative history of the Conventions. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 620 n.48 (2006) (“The International Committee of the Red Cross is referred to by name in several provisions of the 1949 Geneva Conventions and is the body that drafted and published the official commentary to the Conventions. Though not binding law, the commentary is, as the parties recognize, relevant in interpreting the Conventions’ provisions.”); RICHARD P. DIMEGLIO ET AL., THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK 22 (William J. Johnson & Andrew D. Gillman, eds., 2012) (“The [ICRC] commentaries provide critical explanations to many treaty provisions, and are therefore similar to legislative history in the domestic context.”).

168. See, e.g., *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion & Judgment ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

169. Geneva III, *supra* note 5, art. 3.

cussed below, in setting forth rules governing the disposition of prisoners at the end of an international armed conflict, Article 118 of the Third Geneva Convention provides that “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities.”<sup>170</sup> Because the terms “armed conflict” and “hostilities” are themselves different, and appear in different provisions of the Conventions, the following discussion treats them each separately. But both are relevant for understanding the meaning of “hostilities” within the statutory context of the MCA and AUMF.

### 1. The Existence of an Armed Conflict

The Geneva Conventions recognize two kinds of armed conflict: international (a conflict between one or more states) and non-international (a conflict between a state party and a non-state actor, or between two or more non-state actors).<sup>171</sup> In its global counterterrorism operations post-9/11, the United States has taken the position that it is involved in a non-international armed conflict (NIAC) with the Taliban, and with the terrorist organization Al Qaeda and “associated forces.”<sup>172</sup> While the ICRC has never embraced the view “that a conflict of global dimensions is or has been taking place [between the United States and Al Qaeda],”<sup>173</sup> a point to which the Article returns

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170. *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (quoting Geneva III, *supra* note 5, art. 118). Article 118 further states:

In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.

Geneva III, *supra* note 5, art. 118.

171. See, e.g., Geneva III, *supra* note 5, at arts. 2–3.

172. See Respondents’ Memorandum Regarding the Government’s Det. Auth. Relative to Detainees Held at Guantanamo Bay at 1–2, *In re: Guantanamo Bay Detainee Litig. Misc.*, No. 08-442 (TFH) (D.D.C. Mar. 13, 2009), available at <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>.

173. INT’L COMM. OF THE RED CROSS, 31IC/11/5.1.2, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 10 (2011), available at <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>; see also INT’L COMM. OF THE RED CROSS, 30IC/07/8.4, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 8 (2007), available at <http://www.icrc.org/eng/assets/files/other/ihl-challenges-30th-international-conference-eng.pdf> (“IHL rules on what constitutes the lawful taking of life or on detention in international armed conflicts, for example, allow for more flex-

below, this section examines NIAC-related law in light of the U.S. view.

Common Article 3, which prohibits torture and unfair trials, among other things, recognizes “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>174</sup> The phrase “not of an international character” is meant to distinguish such conflicts from those described in Common Article 2 of the Conventions as conflicts between “two or more of the High Contracting Parties.”<sup>175</sup> As the U.S. Supreme Court explained in *Hamdan v. Rumsfeld*, a NIAC is “distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase ‘not of an international character’ bears its literal meaning.”<sup>176</sup> While there remains substantial dispute surrounding the extent to which NIACs exist under law *transnationally*—that is, not simply as a conflict internal to a single state—the requirement that an armed conflict must occur “in the territory of one of the High Contracting Parties” of itself is a small hurdle; the Geneva Conventions have now been ratified by every nation in the world.<sup>177</sup>

From the outset of treaty negotiations, it was clear that Common Article 3 NIACs were meant to encompass internal armed conflicts or civil wars, which had not been plainly covered by the Geneva regime until the modern conventions of

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ibility than the rules applicable in non-armed conflicts governed by other bodies of law. . . . [I]t is both dangerous and unnecessary, in practical terms, to apply IHL to situations that do not amount to war.”)

174. Geneva III, *supra* note 5, art. 3. Common Article 3 provides a baseline set of safeguards against torture and other cruel treatment for a broad set of protected persons.

175. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (citing Geneva III, *supra* note 5, art. 2).

176. *Id.* at 630–31 (citing CLAUDE PILLOUD ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 annex II at 1355 (Yves Sandoz et al., eds., Tony Langham et al. trans., 1987)) (“[A] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other . . .”).

177. *How Is the Term “Armed Conflict” Defined in International Humanitarian Law?*, ICRC, 3, 5 (Mar. 17, 2008), <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> (“Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.”).

1949. It was also clear that the primary interpretive challenge arising from the advent of Common Article 3 would center on how to distinguish an “armed conflict” from any lesser “act committed by force of arms.”<sup>178</sup> What was the difference between a war on the one hand, and terrorism, domestic riots, or simple crime on the other? The distinction was of no small moment to state parties. States, while accepting of the need for basic humanitarian protections in the bloody civil wars that had proliferated in the decades before the modern Conventions were ratified, had previously viewed all such matters as properly within the realm of sovereign discretion. Among states’ other concerns was the “risk of ordinary criminals being encouraged to give themselves a semblance of organization as a pretext for claiming the benefit of the Convention, representing their crimes as ‘acts of war’ in order to escape [criminal] punishment for them.”<sup>179</sup>

Despite this concern, negotiators rejected limiting language that would have rendered Common Article 3 applicable “especially [to] cases of civil war, colonial conflicts, or wars of religion.”<sup>180</sup> They likewise rejected a set of criteria some had developed for determining whether violence had reached the level of armed conflict, including whether the non-state actor had an “organized military force,” with “an authority responsible for its acts”; and that the legal government “recognized the insurgents as belligerents,” and was “obliged to have recourse to the regular military forces” in response.<sup>181</sup> While acknowledging the criteria as “convenient” but not at all “obligatory,” the Commentary ultimately urged that “the scope of the . . . Article must be as wide as possible.” In essence, the Commentaries less-than-helpfully concluded: “the conflicts referred to in Article 3 are armed conflicts, with ‘armed’ forces on either side engaged in ‘hostilities.’”<sup>182</sup>

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178. OSCAR M. UHLER ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 35–36 (Jean S. Pictet, ed., Ronald Griffin & C.W. Dumbleton, trans., 1958); *see also* Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion & Judgment ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) (describing the need for factors to distinguish a NIAC from “banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”).

179. DE PREUX ET AL., *supra* note 167, at 32.

180. *Id.* at 31.

181. *Id.* at 36.

182. *Id.* at 37.

The Commentaries' seemingly tautological definition gained substantial clarification during the proceedings of the International Criminal Tribunal for the Former Yugoslavia (ICTY), an international court created by U.N. Security Council Resolution in 1993 to conduct trials for war crimes arising out of the conflict in Bosnia and Kosovo.<sup>183</sup> Drawing on the Commentaries for guidance, the case of *Prosecutor v. Tadic* gave the ICTY an opportunity to elaborate on the Common Article 3 definition of armed conflict for purposes of determining whether an "armed conflict" existed at the time the allegedly unlawful conduct occurred. In *Tadic*, the Court held that a NIAC exists when two factors are present: "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."<sup>184</sup> In a brief analysis applying this standard, the *Tadic* court concluded that the violence in Bosnia and Herzegovina in early 1992 had been sufficient. While noting the relevance of official intergovernmental acts acknowledging the hostilities—in that case, the UN Security Council had acted during this period to maintain peace and security in the region—the court most heavily emphasized the intensity of hostilities—how many casualties sustained, how much property destroyed, how many refugees displaced.<sup>185</sup>

Subsequent ICTY decisions elaborated on the intensity of "protracted armed violence" required, developing a robust list of factors to be considered in a totality-of-the-circumstances type inquiry.<sup>186</sup> The lengthy list of determinants the court came to examine was predominated by factual indicators of violence: the number, duration, and intensity of individual confrontations; types of weapons used; number and types of forces en-

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183. S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

184. *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, ¶ 70, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

185. *Id.* at ¶¶ 73–77.

186. *See, e.g.*, *Prosecutor v. Delali*, Case No. IT-96-21-T, Judgment ¶ 134 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (describing a two-day artillery bombardment killing villagers, destroying property, and creating numerous refugees); *see also* *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment ¶ 248 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008); *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgment ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008). *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-T, Judgment ¶ 419 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007); *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment ¶ 90 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); *Prosecutor v. Milosovic*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal ¶¶ 27–32 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004).

gaged in the fighting; the geographic and temporal distribution of clashes (including whether attacks were increasing over the relevant period); any territory captured; the extent of material destruction; the number of civilians fleeing combat zones; and of course the number of casualties.<sup>187</sup> Only one factor on the list required semi-direct consideration of the government's political decision-making: whether the government felt obliged to use military (not just police) force in response to insurgent attacks.

The ICTY cases likewise shed light on the second requirement that a non-state party to the conflict possess *organized* armed forces, with an identifiable command structure and the capacity to sustain military operations.<sup>188</sup> The degree of the non-state party's organization could also be determined by assessing a range of factual criteria: the group's organizational structure; its ability to recruit and train fighters and conduct operations using military weapons and tactics; its recognition (formal or otherwise) by international representatives and its ability to enter peace or cease-fire agreements; its ability to issue and enforce internal regulations; its ability to coordinate multiple units; and any degree of territorial control and administration.<sup>189</sup>

As LOAC scholars have since pointed out, the effect of the two-part ICTY standard has been to clarify the objective nature of the inquiry in the interest of ensuring law application:

Just as Common Article 2's paradigm for international armed conflict eliminates the opportunity for states to engage in law avoidance by creating an objective trigger untethered to declarations of war or other public pronouncements, so Common Article 3 also introduced the same objective approach to internal armed conflict. . . . [T]he nature of the government's actions cannot be the determinative or exclusive component, for the very reason that the [Geneva] Conventions substituted the term 'armed conflict' for war: any trigger for the law that

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187. *Haradinaj*, Case No. IT-04-84-T ¶ 49; *Limaj*, Case No. IT-03-66-T ¶¶ 135–43; *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment ¶¶ 564–65 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

188. See, e.g., *Limaj*, Case No. IT-03-66-T ¶¶ 84, 135–70 (detailing the hostilities criterion); *id.* ¶¶ 94–134 (discussing the organized forces criterion); *Tadic*, Case No. IT-94-1-T ¶¶ 561–68; see also INTERNATIONAL COMMITTEE OF THE RED CROSS, HOW IS THE TERM "ARMED CONFLICT" DEFINED IN INTERNATIONAL HUMANITARIAN LAW? (2008), available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

189. See e.g., *Prosecutor v. Lukic*, Case No. IT-98-32/1-T, Judgment ¶ 884 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009); *Haradinaj*, Case No. IT-04-84-T ¶ 60; *Limaj*, Case No. IT-03-66-T ¶¶ 95–109.

rests solely on governmental rhetoric or action will lose that essential objectivity.<sup>190</sup>

At the same time, some have cautioned that applying too formulaic a test to the determination can have the effect of undermining the protection of humanitarian interests that is the central purpose of the LOAC. In the context of the current bloody civil war in Syria, for instance, Laurie R. Blank and Geoffrey S. Corn note that the international community failed to “acknowledge the existence of armed conflict until the legalistic elements test was apparently objectively satisfied in the summer of 2012, at least fifteen months after the violence erupted.”<sup>191</sup> Blank and Corn argue that such reluctance is especially troubling given “the motivation for adopting the armed conflict trigger: mitigate the impact of technical legal formulas when determining the applicability of humanitarian protections.”<sup>192</sup>

Blank and Corn are surely right in cautioning against the application of an overly technical definition if its effect is to weaken the humanitarian protections that animate the entire body of law. In the case of Syria, it may be that other states’ reluctance to acknowledge the existence of an armed conflict there further emboldened the Syrian Government to use force in ways manifestly contrary to the law of war. However, it is not clear that the non-recognition of armed conflict will invariably have this effect. As the ICRC and others have noted, because LOAC “rules governing the use of force and detention for security reasons are less restrictive than the rules applicable outside of armed conflicts governed by other bodies of law,” it is “inappropriate and unnecessary to apply” LOAC to circumstances not amounting to armed conflict.<sup>193</sup> Humanitarian interests could equally be compromised when states use the armed conflict designation as a way of circumventing greater legal protections that would otherwise apply in times of peace. Indeed, LOAC in many places recognizes the applicability of

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190. Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VAND. J. TRANSNAT’L L. 693, 711 (2013).

191. *Id.* at 696.

192. *Id.* at 697.

193. INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT ON INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS (2011) (incorporating by referencing the INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT ON INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICT (2007)).

certain of its provisions *unless* the individuals to be protected would receive more favorable treatment under some other body of law.<sup>194</sup> In this respect, the law is designed to be flexible enough to apply as a baseline, but not a ceiling, of humanitarian protections.

## 2. The Cessation of Hostilities

As the foregoing demonstrates, “protracted armed violence” (as the ICTY puts it) or “hostilities” (in the Commentaries’ term) is one of two central elements in the Conventions’ definition of “armed conflict.” Yet the Conventions at times use the term “hostilities” independently as well. In particular, in setting forth rules governing the disposition of prisoners at the end of an international armed conflict, Article 118 of the Third Geneva Convention provides that “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities.”<sup>195</sup> While Article 118’s requirement that prisoners be released when “active hostilities” are over applies by its terms only to situations of *international* armed conflict, it is relevant here at least by analogy and perhaps as more direct interpretive guidance as well. It is Article 118 on which the *Hamdi* plurality relied in holding that the AUMF authorized the detention of certain individuals “engaged in an armed conflict against the United States,” only “for the duration of these hostilities.”<sup>196</sup>

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194. See, e.g., Geneva III, *supra* note 5, art. 4 (recognizing the entitlement of “merchant marine and the crews of civil aircraft of the Parties to the conflict” to prisoner of war protection if they “do not benefit by more favourable treatment under any other provisions of international law”).

195. *Id.* art. 118 (“In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.”).

196. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (emphasis added); see also *id.* at 520 (“It is a clearly established principle of the law of war that detention may last no longer than active hostilities. See Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S. T. 3316, 3406, T. I. A. S. No. 3364 (‘Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.’).”); *Al-Bihani v. Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010), *reh’g denied en banc*, 619 F.3d 1 (2010). The *Hamdi* Court limited its analysis to the conflict in *Afghanistan* in which they understood Yaser Hamdi had been captured, noting that “[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan,” and holding that “[t]he United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants.” *Hamdi*, 542 U.S. at 521 (“If the record es-

The purpose of marking the cessation or close of “hostilities” in the detention provision of Article 118, as well as in analogous portions in the related Conventions,<sup>197</sup> is addressed in the Commentaries with some clarity.

In calling for the general repatriation of all prisoners of war once active hostilities have ceased, the 1949 Diplomatic Conference took account of the experience of the Second World War. It recognized that captivity is a painful situation which must be ended as soon as possible, and was anxious that repatriation should take place rapidly and that prisoners of war should not be retained in captivity on various pretexts. In time of war, the internment of captives is justified by a legitimate concern—to prevent military personnel from taking up arms once more against the captor State. That reason no longer exists once the fighting is over.<sup>198</sup>

Negotiators were particularly conscious of avoiding the perceived inadequacies of the predecessor Geneva Conventions on this point. Cognizant that hostilities could cease well before any peace treaty or formal settlement was adopted (if ever it was), it was “essential to lay down that repatriation should take place as soon as possible after the end of hostilities, and to make this requirement unilateral so that its implementation would not be hampered by the difficulty of obtaining the consent of both parties.”<sup>199</sup> As with the recognition of the existence of an “armed conflict” in the first instance, the cessation of hostilities would depend on a factually objective test: “The words ‘close of hostilities’ express a notion which has already been met with several times in the Convention: they mean the actual end of the fighting and not the official termination of a state of belligerency.”<sup>200</sup>

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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.”).

197. See, e.g., Geneva IV, *supra* note 177, art. 46 (“In so far as they have not been previously withdrawn, restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities. Restrictive measures affecting their property shall be cancelled, in accordance with the law of the Detaining Power, as soon as possible after the close of hostilities.”); *id.* art. 49 (“[T]he Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. . . . Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.”); *id.* art. 133 (“Internment shall cease as soon as possible after the close of hostilities.”).

198. DE PREUX ET AL., *supra* note 166, at 546–47.

199. *Id.* at 541.

200. UHLER ET AL., *supra* note 177, at 270; *id.* at 514–515 (“The expression ‘the close of hostilities’ should be taken to mean a state of fact rather than the legal situation covered by laws or decrees fixing the date of cessation of hostili-

As the next section discusses, an argument might be made that Article 118 is not the LOAC element that most usefully informs the interpretation of the AUMF here. It is, after all, strictly applicable only in international armed conflicts, and was designed to ensure that the members of state armed forces were returned promptly to their home country at war's end. Some scholars have thus suggested it might be more appropriate to look to other Geneva provisions that require release from detention not when fighting stops, but rather when the reason for the individual's detention—for example, the threat he poses to security—ceases to exist.<sup>201</sup> For reasons discussed below, this Article concludes such an interpretation of the AUMF is unlikely to be correct.<sup>202</sup> For present purposes, it may suffice to note the prospect of a difference between Article 118 “hostilities” and the statutory meaning of the AUMF.

### 3. Applying the Law in Al-Nashiri's Case

A “conflict subject to the laws of war”—the language used in the MCA statute to define the kind of “hostilities” giving rise to commission jurisdiction—seems plainly to mean an “armed conflict” as defined by Common Articles 2 or 3 of the Geneva Conventions—a finding of which triggers the application of the Geneva law-of-war regime. In Al-Nashiri's case, the United States alleges a non-international armed conflict between the United States and Al-Qaeda, and thus embraces the definition described above by *Tadic*—a condition of “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>203</sup>

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ties. The similar provision concerning prisoners of war speaks of ‘the cessation of active hostilities’ and the wording of the paragraph here should be understood in the same sense.”); *see also id.* at 270 (“This rule, which is in accordance with the usual practice among States, is justified by the fact that a fairly long time may elapse between the close of hostilities and the conclusion of a peace treaty; during that time the continuation of security and control measures would no longer be warranted.”).

201. *See, e.g.,* Bradley & Goldsmith, *supra* note 13, at 2124; John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 202 (2011).

202. *See infra* Part III.

203. *See* Government Response to Defense Motion To Dismiss Because the Convening Authority Exceeded His Power in Referring This Case to a Military Commission, United States v. Al Nashiri, Military Comm'ns Trial Judiciary, Guantanamo Bay Sept. 13, 2012, AE 104, [hereinafter Government Nashiri Response] available at [http://www.mc.mil/Portals/0/pdf/alNashiri%20II%20\(AE104A\).pdf](http://www.mc.mil/Portals/0/pdf/alNashiri%20II%20(AE104A).pdf) (citing Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on the

As the ICTY has demonstrated, as has the U.S. Supreme Court in other contexts,<sup>204</sup> an assessment of “protracted armed violence” requires a remarkably common form of judicial inquiry: the application of a multi-pronged standard to a set of empirical facts and circumstances in the world.<sup>205</sup> It is certainly true that the *Tadic* test is multi-factor and complex. But the Court has never suggested that complex standards are perforce unmanageable; on the contrary, it has embraced just such “totality-of-the-circumstances” measures for the purpose of determining police compliance with U.S. constitutional law.<sup>206</sup>

What, then, might the application of the *Tadic* standard tell us about the existence of an armed conflict at the time of Al-Nashiri’s alleged conduct? In the U.S. Government’s estimation, both the organization of the non-state group Al-Qaeda, and the level of hostilities by the year 2000, suffice to trigger the recognition of an armed conflict. Osama bin Laden began issuing statements “declaring war” against the United States in 1996, publicly announcing the formation of an organization he called the “International Islamic Front for Jihad Against the Jews and the Crusaders” in 1998, and urging Muslims to kill Americans wherever they may find them.<sup>207</sup> The now rich public literature on the nature of the Al-Qaeda organization at this time agrees that Al-Qaeda in the 1990’s was a highly structured organization.<sup>208</sup> While there is no suggestion Al-Qaeda has ever asserted any degree of territorial control or administration, there is evidence that the group had the ability to recruit and train fighters and conduct operations using military

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Defence Motion for Interlocutory Appeal on Jurisdiction ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

204. See *supra* Part II.A.

205. See, e.g., *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 843 (D.C. Cir. 2010) (affirming that it poses no political question and courts may determine whether a foreign organization has engaged in terrorist activity for purposes of meeting the statutory definition of “foreign terrorist organization”).

206. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (holding that courts should examine the totality of the circumstances in determining whether probable cause existed to obtain a warrant required by the Fourth Amendment).

207. Government Nashiri Response, *supra* note 202, at 3.

208. See, e.g., LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11* 131–34, 141–44 (2007).

weapons and tactics, and could issue and enforce internal regulations and coordinate multiple units.<sup>209</sup>

The first acts of violence the government cites in this conflict are Al-Qaeda's coordinated attacks on August 7, 1998 against U.S. Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, killing 213 people and injuring approximately 4,000 in Nairobi, and killing 11 and wounding 85 in Dar es Salaam. On August 20, 1998, in response to these attacks, U.S. Armed Forces struck suspected Al-Qaeda training camps in Afghanistan and a suspected chemical weapons laboratory in Khartoum, Sudan.<sup>210</sup> The attacks in which Al-Nashiri is charged with participating occurred a year and a half later: an attempted attack on the USS *The Sullivans* on January 3, 2000; and the successful attack on the USS *Cole* on October 12, 2000, which killed seventeen U.S. sailors, injured thirty-seven others, and caused significant property damage.<sup>211</sup> While the scope and relatively sporadic nature of these attacks over a period of two years pale in comparison to the statistics the ICTY confronted in finding sufficient level of armed violence to recognize the existence of an armed conflict in Bosnia, relatively smaller absolute numbers need not necessarily foreclose the possibility that an armed conflict exists.<sup>212</sup>

Yet despite the presence of an organized enemy and multiple incidents of violence preceding Al-Nashiri's alleged war crimes, the government's case for the existence of an armed conflict faces some substantial hurdles. During the primary period of the indictment, alleging conduct by Al-Nashiri between August 1996 and October 2000, the level of actual violence between the United States and Al-Qaeda amounted to two attacks in four years. The October 2000 attack on the USS *Cole* was met by the United States with only a law enforcement response; the bombing of the U.S. Embassies in 1998 did produce

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209. *See id.* For the relevant organizational factors, see, for example, Prosecutor v. Lukić, Case No. IT-98-32/1-T, Judgment ¶ 884 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009); Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008); Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment ¶ 95–109 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

210. Government Nashiri Response, *supra* note 203. at 4.

211. *Id.*

212. *Abella v. Argentina*, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. (1997) (discussing the engagement of Argentina's armed forces with organized, armed militants that lasted thirty hours and resulted in casualties and property destruction was an armed conflict under international law).

a one-time missile strike by the United States against two suspected Al-Qaeda targets, but it was also met with a series of criminal prosecutions of those involved.<sup>213</sup> Throughout the period, there was no territory captured, no civilians fleeing combat zones, no sustained military engagement. Beyond *Tadic*, the United States remains unique among states in understanding the sporadic attacks of an international terrorist organization like Al-Qaeda as triggering an armed conflict. The vast majority of U.S. allies, the ICRC, and others have generally treated incidents of terrorism—particularly those incidents not tied to any particular territory by either the organization’s national affiliation, its possession of land, or the geographic locus of its targets—as precisely that kind of sporadic violence such as “banditry, unorganized and short-lived insurrections, or terrorist activities,” the definition of “armed conflict” meant to except.<sup>214</sup>

What then of the attacks that followed within the year after the bombing of the USS *Cole*—the attacks of 9/11 themselves, killing 3,000 people? After those attacks, the United States embarked upon vast and sustained military operations against Al-Qaeda in Afghanistan, killing at least that number of Afghans or more in its first months of operations alone.<sup>215</sup> Even the U.S. Supreme Court recognized the existence of an armed conflict between the parties in Afghanistan after that.<sup>216</sup> Indeed, while the primary charges against Al-Nashiri relate to his role in the attack on the *Cole*, he is also charged with participation in an October 2002 attack on a French oil tanker, the MV *Limburg*, resulting in the death of one person, injuries to twelve others, and serious damage to the tanker. The period of the full indictment, the government will contend, should thus be understood to include the hostilities between the United States and Al Qaeda in 2001–2002, and Al-Nashiri’s pre-2001 conduct should be recognized as earlier salvos in what plainly

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213. The United States responded to the attack on the USS *Cole* by sending a team of law enforcement agents from the FBI to Yemen to investigate; even when the United States became convinced several months after the attack that Al-Qaeda was the perpetrator, it declined to respond with military force. See generally ALI H. SOUFAN, *THE BLACK BANNERS: THE INSIDE STORY OF 9/11 AND THE WAR AGAINST AL-QAEDA* (2011).

214. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

215. See *Afghanistan’s Civilian Deaths Mount*, BBC NEWS (Jan. 3, 2002), [http://news.bbc.co.uk/2/hi/south\\_asia/1740538.stm](http://news.bbc.co.uk/2/hi/south_asia/1740538.stm).

216. *Hamdan v. Rumsfeld*, 548 U.S. 557, 684 (2006).

became an armed conflict by 2001. A contrary approach—treating the 1998 and 2000 attacks in isolation from these later events—risks just the kind of overly technical definition of “armed conflict” of which Blank and Corn warned.<sup>217</sup>

Yet this argument, too, is not without problems. Among them, it is not at all clear why an attack by Al-Qaeda against a French vessel should be understood as evidence of the intensity of hostilities between Al-Qaeda and the United States (any more than a U.S. attack on Iran should be viewed as evidence of hostilities between Iran and Iraq). In any case, Blank’s and Corn’s concern about the dangers of undue technicality were to a very particular end, namely, that an unduly limited conception of “armed conflict” might result in the *weakening* of humanitarian protections that attach once LOAC is triggered. For the purpose of determining war crimes liability in this context, however, there is no such concern. If a court were to determine no armed conflict existed at the time Al-Nashiri carried out his attacks, the effect would not be to weaken protections otherwise available to Al-Nashiri, but rather to make clear that his conduct must be treated not as a war crime per se, but as an ordinary domestic criminal law offense. Instead of being subject to trial by military commission, broadly recognized to carry modestly weaker procedural protections for defendants that civilian criminal justice,<sup>218</sup> Al-Nashiri would presumably be entitled to the robust rights attendant criminal prosecution under U.S. law in the ordinary course. In this regard, one might argue that the definition of “armed conflict” is most consistent with LOAC principles if construed narrowly, to ensure that individuals caught up in conflict are not stripped of more favorable treatment available under another applicable body of law.<sup>219</sup>

The foregoing analysis is not intended to insist that there is a singular necessary resolution to the question of “armed conflict” in Al-Nashiri’s case. It is rather to demonstrate two points. First, the detailed LOAC standards for determining the existence of an armed conflict are both familiar in nature and

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217. See Blank & Corn, *supra* note 189.

218. Brigadier Gen. Mark Martinsk Chief Prosecutor of U.S. Military Comm’ns, Address to the Royal Institute of International Affairs (Sept. 28, 2012), *available at* <http://www.lawfareblog.com/2012/09/brig-gen-mark-martins-address-at-chatham-house>.

219. *Cf., e.g.,* Geneva III, *supra* note 5, art. 4 (recognizing the entitlement of “merchant marine and the crews of civil aircraft of the Parties to the conflict” to prisoner-of-war protection if they “do not benefit by more favourable treatment under any other provisions of international law”).

manageable in application for courts needing to confront them. Indeed, the quantity of text, structure and history available to shed light on the meaning of “armed conflict” is at least as substantial as that available to the Court when it was faced with construing the rather more vague constitutional provisions at issue in *Zivotofsky*.<sup>220</sup> While the legal standard for “armed conflict” requires a fact-intensive inquiry, the political question doctrine is designed to limit court jurisdiction not for fear that the courts will confront complex patterns of *fact*, but rather to disengage the courts from deciding questions in the absence of identifiable *law*. That is not the case here. Second, the preceding analysis shows there are at least colorable arguments on both sides of the question of the existence of pre-2001 hostilities for the purpose of applying the MCA. As a result, how much weight courts afford the views of the executive (here, executive as prosecutor) may matter substantially in the outcome.

#### B. AUTHORIZATION FOR USE OF MILITARY FORCE

As noted above, the AUMF authorizes the President to detain individuals “engaged in an armed conflict against the United States,” only “for the duration of these hostilities.”<sup>221</sup> To date, judicial elaboration of this standard has been driven by the Guantanamo habeas cases, an “overwhelming majority” of which “concern persons who were captured in Afghanistan, captured fleeing from Afghanistan, or captured in more remote locations where they allegedly were engaged in activities linked to the hostilities in Afghanistan (such as recruiting fighters to go there).”<sup>222</sup> Even before U.S. operations in Afghanistan began more actively to wind down, the issue of when those hostilities were to be considered over had already begun to arise. Ghaleb Nassar Al-Bihani, seized in Afghanistan in late 2001, argued in his 2009 petition for habeas corpus, declaring that he must be

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220. *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) (citing as relevant text the President’s Article II power to “receive Ambassadors and other public Ministers,” and Congress’s Article I powers over naturalization and foreign commerce). *Zivotofsky’s* conclusion in this regard is notably different from that of the Rehnquist plurality in *Goldwater v. Carter*, 444 U.S. 996, 1002–03 (1979) (Rehnquist, J., concurring).

221. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (emphasis added); see also *id.* at 520 (“It is a clearly established principle of the law of war that detention may last no longer than active hostilities.” (citing Geneva III, *supra* note 5, art. 118)); *Al-Bihani v. Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010), *reh’g denied en banc*, 619 F.3d 1 (2010).

222. Chesney, *supra* note 9, at 182.

released because the U.S. conflict with the Taliban had come to an end.<sup>223</sup>

The D.C. Circuit's analysis in Al-Bihani's case provides a useful partial roadmap to how courts will be required to resolve the duration of the AUMF's detention authority going forward. On its way to rejecting Al-Bihani's argument that hostilities had ceased in 2010, the D.C. Circuit adopted the Supreme Court's assumption in *Hamdi* that the most relevant provision of the Geneva Conventions was Article 118 of Geneva III, requiring "release and repatriation only at the 'cessation of active hostilities.'"<sup>224</sup> Finding significance in the Conventions' use of the term "active hostilities" in this context instead of "armed conflict," the Court reasoned that the difference "serves to distinguish the physical violence of war from the official beginning and end of a conflict because fighting does not necessarily track formal timelines."<sup>225</sup> LOAC thus "codif[ies] what common sense tells us must be true: release is only required when the fighting stops."<sup>226</sup>

As judicially manageable standards go, this inquiry is perhaps as clear as it gets. In Al-Bihani's case, the Court found the notion that the relevant fighting had stopped in Afghanistan impossible to accept. Among other things: "[T]here are currently 34,800 U.S. troops and a total of 71,030 Coalition troops in Afghanistan, with tens of thousands more to be added soon."<sup>227</sup> While the Taliban had been forced out of power in 2002, the fighting plainly continued. Examining the factual state of affairs in a way quite consistent with *Tadic* and the Geneva

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223. *Al-Bihani*, 590 F.3d at 874 (describing Al-Bihani's argument that the relevant conflict had ended either when the Afghans established a post-Taliban interim authority, when the United States recognized that authority, or when Hamid Karzai was elected President).

224. *Id.* (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 75 U.N.T.S. 135). The panel decision emphasized here, and on more than one occasion in the course of its opinion, that "we do not rest our resolution of this issue on international law or mere common sense." *Id.*; see also *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (publishing multiple opinions addressing the panel's treatment of international law).

225. *Al-Bihani*, 590 F.3d at 874 (quoting Geneva III, art. 2 (provisions apply "even if the state of war is not recognized") and Geneva III, art. 118 (discussing the possibility of the cessation of active hostilities even in the absence of an agreement to cease hostilities)).

226. *Id.*

227. *Id.* (citations omitted).

Commentaries,<sup>228</sup> the court's opinion thus rejected an interpretation of the law that would require the release of detained fighters under those circumstances.

This is not to suggest that the application of the "cessation of hostilities" standard in non-international armed conflict is always straightforward. What if, for example, fighting between parties was limited to a single exchange of fire over a period of a year? Or, in present terms, what if Al Qaeda as an organization had been rendered substantially incapable of conducting attacks against U.S. interests,<sup>229</sup> but the United States continued to bomb alleged "Al Qaeda" targets overseas? Under such circumstances, the court might be required to determine whether there was a certain level of hostilities beneath which no "armed conflict" could be said to exist, falling back on the *Tadic* standard outlined in the previous section.<sup>230</sup> The nature of the inquiry will undoubtedly vary according to the circumstances. But such variance hardly makes it judicially unmanageable. It makes the result a function of the application of a definable legal standard to varying facts.

Indeed, the fact-intensive nature of the inquiry demonstrates the extraordinary control the political branches retain over the end-of-hostilities finding—even if the courts engage in review. The *parties' behavior* is the determinative factor. So long as the U.S. armed forces are a party to the conflict and keep shooting, the government has at least a colorable argument that hostilities continue. The legal test thus puts a heavy thumb on the political branches' side of the scale. In this sense, the *Al-Bihani* court was right in later concluding that "when

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228. DE PREUX ET AL., *supra* note 167, at 514–15 ("The expression 'the close of hostilities' should be taken to mean a state of fact rather than the legal situation covered by laws or decrees fixing the date of cessation of hostilities.").

229. *See supra* note 9 (quoting officials). In international armed conflict, the analogous circumstance is known as *debellatio*, when "all organized resistance has disappeared," and the enemy state "has been reduced to impotence." YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 82 (5th ed. 2011). *Debellatio* is recognized as one of the modes by which international armed conflict may come to an end. *Id.* at 80.

230. In the one-sided-fight scenario, for example, one might argue that it is not possible for there to be an "armed conflict" of any kind if there are not at least two parties to the conflict. The effective failure of one side to fight back in any way suggests there is no longer a sufficiently organized force to constitute a party. In other wars, in other times, such a circumstance has been called *defeat*.

hostilities have ceased is a political *decision*.<sup>231</sup> Indeed, the *Al-Bihani* opinion highlights the key difference between a political question and a political decision. The former forecloses the possibility that the courts may exercise jurisdiction. The latter allows the courts to hold the executive to the legal results of its political decisions. The political branches may decide how long force is necessary. But once a political judgment is made to stop shooting, it is within the power of the courts to determine under the objective standard given by law—whatever the government subsequently *says*—that hostilities have come to an end.

While Article 118 thus seems to offer judicially typical manageable standards, the prospect that the “hostilities” contemplated by the AUMF describe a non-international armed conflict between the United States and Al Qaeda does raise another legal concern: the possibility that Article 118 is not the relevant test for when detainees in this conflict must be released. As mentioned above, Article 118 applies by its terms only to *international* armed conflicts arising under the Conventions. One could argue, as some scholars have, that the end of detention in NIACs is more appropriately understood by reference to the idea contained in the Geneva Conventions’ Additional Protocol II (APII), a treaty applicable directly to NIACs between states and non-state actors.<sup>232</sup> On the question of detention, Article 2 of APII provides that “[a]t the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of [the Protocol] until the end of such deprivation or restriction of liberty.”<sup>233</sup> Because this provision does not require release, as Article 118 does, it has been read to suggest that detention authority may in some circumstances continue even after active hostilities are over as long as

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231. *Al-Bihani*, 590 F.3d at 874–75 (emphasis added) (quoting *Ludecke v. Watkins*, 335 U.S. 160, 168–70 (1948) (“[T]ermination [of a state of war] is a political act.”)).

232. See, e.g., Bellinger & Padmanabhan, *supra* note 201, at 228–29; see also Bradley & Goldsmith, *supra* note 13, at 2124–25 (suggesting, without reference to Additional Protocol II, that whether hostilities have ceased should be based on a determination as to whether the individual detainee “no longer poses a substantial danger of rejoining hostilities” based on, for example, “the detainee’s past conduct, level of authority within al Qaeda, statements and actions during confinement, age and health, and psychological profile”).

233. Protocol II, *supra* note 165, art. 2.

there is a security-related reason to continue.<sup>234</sup> Indeed, a separate passage in the *Tadic* decision may be seen to reaffirm this view, noting that “[i]nternational humanitarian law applies from the initiation of . . . armed conflicts and extends beyond the cessation of hostilities . . . in the case of internal conflicts, a peaceful settlement is achieved.”<sup>235</sup>

Yet there are several problems with the notion that APII’s standard in this regard should guide the interpretation of the AUMF. First, while the United States is a party to the Third Geneva Convention (containing Article 118), it is not a party to APII. That APII is not legally binding on the United States as treaty law need not necessarily be dispositive. The United States has submitted APII for ratification, so is required at a minimum not to undermine its object and purpose.<sup>236</sup> Moreover, the ICRC contends that the restriction on detention in NIACs is the same under customary international law (to which the United States is bound whether a signatory to the treaty or not) as under APII.<sup>237</sup> At the same time, the methodology of the ICRC’s customary international law study has been subject to strong criticism by the United States and others.<sup>238</sup>

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234. See, e.g., DE PREUX ET AL., *supra* note 167, at 1360 (noting that the parties had rejected an amendment to the Protocol that would have required its application cease “upon the general cessation of military operations”); *id.* at 1359 (“In principle, measures restricting people’s liberty, taken for reasons related to the conflict, should cease at the end of active hostilities, i.e., when military operations have ceased, except in cases of penal convictions. Nevertheless, if such measures were maintained with regard to some persons for security reasons, or if the victorious party were making arrests in order to restore public order and secure its authority, legal protection would continue to be necessary for those against whom such actions were taken.”); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 451 (2005) (“Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist.”); *id.* at 452 (“Refusal to release detainees when the reason for their detention has ceased to exist would violate the prohibition of arbitrary deprivation of liberty . . .”).

235. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction ¶ 70 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

236. See Message from President Ronald Reagan, Transmitting Additional Protocol II to the U.S. Senate for Ratification (Jan. 29, 1987), [http://www.loc.gov/rr/frd/Military\\_Law/pdf/protocol-II-100-2.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/protocol-II-100-2.pdf).

237. HENCKAERTS & DOSWALD-BECK, *supra* note 234, at 451.

238. See, e.g., PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Elizabeth Wilmshurst & Susan Breau eds., 2007).

Perhaps more important, ICRC's statement of the customary international law principle in the case of NIAC detention is centrally concerned not with legal support for prolonged detention authority, but with preventing unjustified delays in release.<sup>239</sup> It is for a related reason that one should be suspicious of the notion that APII, Article 2 should be read to authorize extended detention in the first place. Article 2 is concerned centrally with ensuring the continued application of humanitarian protection for as long as possible—whatever the underlying detention scheme applicable in a particular NIAC. API, Article 75(6), applicable in IACs, contains an analogous provision.<sup>240</sup> Yet no one reads this regulation of IAC law as in tension with or in any sense overriding the parallel requirement in IAC (in GCIII, Art. 118), that prisoners be released upon the cessation of hostilities. Rather, in both IAC and NIAC provisions on this point, the rule is best understood as intended only to extend as far as possible the application of humanitarian safeguards in detention—all unrelated to the separate question of when detention is legally required to end, a question that, in NIAC in particular, is likely to be resolved in the first instance by domestic law.<sup>241</sup>

A further reason the APII argument is problematic is also related to its applicability. To the extent the argument in favor of relying on the law of APII is that the conflict authorized by the AUMF is more like a NIAC than an IAC, it is worth noting that neither the classic IAC model (contemplating conflicts between two states), nor the NIAC model (contemplating conflicts *internal* to a single state) actually reflects the unusual nature of the conflict between the United States and Al Qaeda—a trans-border conflict between a state and a non-state actor. Indeed, it is in part for this reason that the United States is

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239. HENCKAERTS & DOSWALD-BECK, *supra* note 234, at 451 (“The United Nations and other international organizations have on various occasions highlighted the importance of the release of detainees held in connection with non-international armed conflicts . . .”).

240. Protocol I, *supra* note 165, at 38 (“Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.”).

241. The same argument explains the effect of the *Tadic* court's statement that international humanitarian law applies beyond the cessation of hostilities. It is one thing to insist, as the court does, that humanitarian protections last as long as possible, until a peaceful settlement is achieved. It would be another thing to hold that LOAC allows, much less authorizes, detention until this point.

largely alone in the world in describing the violence between it and Al Qaeda as an “armed conflict” of any kind.

Finally, and most important, APII can be read to stand at most for the proposition that NIAC law does not *prohibit* detention beyond the cessation of hostilities. This is far from the same thing as a claim that APII itself somehow *authorizes* such detention. The United States has consistently rejected the idea that international law may serve as a source of authority enlarging government power beyond that authorized by our own Constitution or laws.<sup>242</sup> Indeed, APII rules are based on the assumption that the primary law regulating intra-state conflicts would remain the law of the state in which the conflict occurred.<sup>243</sup> To understand which standard—GCIII, Article 118 or APII, Article 2—best applies here, one must ask which is most consistent with the meaning of the *domestic* law authorizing the power—in this case, the AUMF.

Here, there are several reasons to think the IAC standard is the best reading of the AUMF. Congress’s most immediate focus in enacting the AUMF was the pending invasion by the United States of Afghanistan, for the stated purpose of ridding that country of a government that had harbored Al Qaeda.<sup>244</sup> Shortly after the passage of the AUMF, the invasion happened. And the United States entered into an IAC in the classic sense—an armed conflict between two state parties to the Geneva Conventions. Further, the notion that what Congress meant to authorize was instead a NIAC between the United States and Al Qaeda—or perhaps an IAC with Afghanistan and a broader NIAC with the terrorist organization worldwide—raises far more concerns under international law. The notion that a conflict between a state and a terrorist organization might rise to the level of an “armed conflict” covered by LOAC is a novel interpretation of international law, one that has not gained acceptance by the ICRC or by other state parties to the

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242. See *Medellin v. Texas*, 554 U.S. 759 (2008); *Reid v. Covert*, 354 U.S. 1 (1957); *Missouri v. Holland*, 252 U.S. 416 (1920).

243. To the extent the ongoing NIAC in which the United States is involved is one between it and non-state actors in Afghanistan, it was most properly Afghan law, not U.S. law, which should have been recognized as the key source of law authorizing the continued detention of those picked up in the course of that conflict now at Guantanamo.

244. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (“There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF.”).

Conventions. Longstanding canons of construction requiring the Court to favor interpretations of ambiguous statutes that are more, rather than less, consistent with international law would thus also tend to favor the IAC interpretation here.<sup>245</sup>

In this respect, it is of no small matter that both the D.C. Circuit and the Supreme Court have now held that the AUMF is informed by Article 118,<sup>246</sup> a conclusion that Congress even in subsequent legislation has done nothing to dispel.<sup>247</sup> Precisely to avoid interpreting the scope of the AUMF in a way that might raise broader legal concerns, the courts have embraced the view that the detention authority granted by Congress was not meant to be unlimited, but was intended to be cabined by this particular “longstanding principle” of the law of war.<sup>248</sup> In all events, just as the Court did in *Hamdi*, the choice of which provision of international law best informs the meaning of the AUMF is a classic question of statutory interpretation for the courts.

### C. TEXTUAL COMMITMENTS

However manageable the standards available for discerning the existence of war may be, there remains the outstanding central element of political question doctrine that requires considering: whether the U.S. Constitution textually commits the inquiry into the existence of hostilities to one of the political branches. While the Court’s historical resolution of such questions would seem to foreclose such an argument, it is worth briefly contemplating here.

In the MCA context, the strongest argument that an aspect of the statute’s meaning is textually committed to another branch is the Article I provision allocating to Congress the power to “define and punish . . . offenses against the law of na-

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245. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

246. See *Hamdi*, 542 U.S. at 507; *Al-Bihani v. Obama*, 590 F.3d 866, 874–75 (D.C. Cir. 2010).

247. See, e.g., National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298.

248. See *Hamdi*, 542 U.S. at 521 (“[W]e understand Congress’s grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. 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. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan.”).

tions.”<sup>249</sup> To the extent the existence of an “armed conflict” is an element of a military commission offense, one might argue that defining the scope and nature of those hostilities is part and parcel of Congress’s power to define the offense. While the meaning of the Define and Punish Clause is, to say the least, contested,<sup>250</sup> at least one federal judge has embraced the view that Congress’s power in this respect is substantial, and not limited by international law.<sup>251</sup>

The problems with this argument are severalfold. For one, as explained above, the question of the existence of hostilities in the MCA arises both as an element of the offense, and in connection with the jurisdiction of the commissions in the first instance. While Congress may have a special claim to defining the offenses established pursuant to its power under that Clause, it is difficult to see how the Clause could give Congress sole textual claim to the *jurisdictional* question—that is, to deciding whether commissions are constitutionally permitted as to a particular offender at all. The Court in *Hamdan* certainly gave no indication that this was the case in its study of commission jurisdiction.<sup>252</sup> Indeed, as scholars have long pointed out, giving Congress unfettered (unreviewable) power to create or expand the jurisdiction of non-Article III courts would pose a fundamental challenge to the Constitution’s separation-of-powers scheme. In Richard Fallon’s account: “[C]onstitutional principles must be derived to circumscribe the role of legislative courts, or else the functions of the article III judiciary could, at Congress’s option, be all but obliterated.”<sup>253</sup>

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249. The Define and Punish Clause provides that Congress has the power “to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” U.S. CONST. art. I, § 8, cl. 10.

250. See also, e.g., Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149 (2009); Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power To “Define and Punish... Offenses Against the Law of Nations,”* 42 WM. & MARY L. REV. 447 (2000). Compare *Hamdan v. United States*, 696 F.3d 1238, 1247 n. 6 (D.C. Cir. 2012) (arguing the Define and Punish Clause is not limited by international law), with Vladeck, *supra* note 159, at 295 (discussing Define and Punish Clause).

251. See *Hamdan*, 696 F.3d at 1247 n. 6 (“Congress’s war powers under Article I are not defined or constrained by international law.”).

252. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

253. Richard H. Fallon Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 923 (1988) (citing *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73–74 (1982)).

In any case, even if Congress's power under the Define and Punish Clause affords it exclusive power to define offenses as war crimes, there is no reason to assume that in allocating to Congress this power, the Constitution meant thereby to deprive the courts of their Article III power to review the legality of trials and convictions of those offenses, much less of their power to construe the statutory meaning of the offenses Congress defines. Just as the Court has not hesitated to decide whether Congress has by statute invoked its Article I power to suspend the writ of habeas corpus,<sup>254</sup> so too the Court must be able to interpret statutes invoking Congress's Article I power to define and punish offenses against the law of war.

In contrast, the argument that the scope of the hostilities authorized by the AUMF is textually committed to Congress likely turns first on Congress's Article I power to "declare war."<sup>255</sup> Whether or not expressly invoked in particular legislation, one might imagine a reading of the Declare War Clause that would give Congress exclusive power to say whether "war" exists. It would, after all, seem ludicrous to suggest that the federal courts could, for example, constitutionally "declare war" in the sense of initiating a conflict with another nation or group.

Yet recognizing that Congress holds the exclusive power to declare war does not necessarily deprive the courts of otherwise extant Article III power to interpret a statute describing the scope of the war Congress has declared, or even taking notice of a condition in which the country is or is not at war. Indeed, a contrary reading of the Declare War Clause would seem flatly inconsistent with the Supreme Court's treatment of the question in, among others, *The Prize Cases*, in which it explained that a civil war in particular was "never publicly proclaimed," but was rather "a fact in our domestic history which the Court is bound to notice and to know."<sup>256</sup> Here, the statutory question in the AUMF context is not whether war has begun but rather whether the "hostilities" Congress has authorized continue to exist. At least as a matter of textual commitment of power under the Constitution, there seems no difference between the

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254. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008); *Williams v. Taylor*, 529 U.S. 420 (2000) (interpreting AEDPA).

255. U.S. CONST. art. I, § 8.

256. *The Prize Cases*, 67 U.S. (2 Black) 635, 667 (1863); see also *Matthews v. McStea*, 91 U.S. 7 (1875); *Neustra Senora de la Caridad*, 17 U.S. 497, 502 (1819).

power to resolve the question in one direction and the power to resolve it in another.

### III. BEYOND THE DOCTRINE

In one sense, the conclusion that the existence-of-war conditions in the MCA and AUMF are not political questions flows unremarkably from the existence of a law of armed conflict. A body of law that has in some form existed for centuries, its rapid growth following World War II, led in large measure by political leaders of the United States, reflected a commitment to the idea that law should constrain the conduct of war, whether the war was between nation states or between a state and a non-state organization. State parties to the Conventions thus embraced a singular bargain: individuals who would in any other circumstance be prosecuted for murder for the act of killing would be relieved of this liability, provided they satisfied standards for being a “privileged” fighter, and provided they abided by a set of rules in the exceptional circumstance in which a dispute among parties rose to the level of “armed conflict.”<sup>257</sup> Because the consequences of triggering LOAC were so stark—allowing killing by a class of privileged combatants where it would otherwise be murder—the law required that there be a meaningful, *legal* distinction between a state of war and a state of peace. The notion that it is impossible to distinguish *legally* between the state of affairs in which killing may be lawful, and the state of affairs in which it is not, is anathema to LOAC’s central scheme.

The conclusion is likewise consistent with U.S. legal traditions, particularly courts’ historical insistence, even in the face of executive opposition, that they determine for themselves whether war exists.<sup>258</sup> This has been expressly true in the context implicated by the MCA: whether criminal military jurisdiction exists and what criminal punishment may be affixed.<sup>259</sup> The reasons for judicial engagement in such cases seem readily understandable. As the Court and scholars have long recognized, political question doctrine is best understood as a func-

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257. Johnson, *supra* note 9 (“‘War’ must be regarded as a finite, extraordinary and unnatural state of affairs. War permits one man—if he is a ‘privileged belligerent,’ consistent with the laws of war—to kill another.”).

258. See *supra* Part II.A.

259. See *supra* Part I.A (citing, e.g., *Ex parte Milligan*, 71 U.S. 2 (1866); *Lee v. Madigan*, 358 U.S. 228 (1959)).

tion of the separation-of-powers interests it serves,<sup>260</sup> interests that begin with the protection of individual liberty.<sup>261</sup> Individual rights are acutely implicated in matters of criminal justice; fully half of the Bill of Rights is devoted to establishing process constraints on the government's power in the application of criminal law, including the right to trial by jury.<sup>262</sup> It is difficult to imagine how many of these rights could be protected if courts could opt out of the process of criminal justice that the Constitution commits to judicial supervision.

Indeed, because the existence of hostilities under the MCA is not only a question of jurisdiction, but also an element of a charging offense in commission prosecutions, the Constitution requires that the government prove their existence to a commission jury beyond a reasonable doubt.<sup>263</sup> In the context of a standard criminal prosecution in particular, the Constitution insists that an independent jury, not the executive, serve as a neutral finder of fact. Ceding to the executive the effective power to determine the presence of this circumstance would present a grave constitutional question, effectively relieving the prosecuting power of its obligation to prove a key element of the defendant's guilt.

Yet if the separation-of-powers interest in protecting individual rights weighs heavily against less than full-throated participation by the judicial branch on the question when

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260. See, e.g., *Baker v. Carr*, 369 U.S. 186, 210 (1962). For a more detailed discussion of the functional separation-of-powers interests at stake in deference doctrines, see, for example, Pearlstein, *supra* note 24, at 1573.

261. See, e.g., *Marbury v. Madison*, 5 U.S. 137, 165–66 (1803); see also Pearlstein, *supra* note 14, at 1573 (citing Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 715–27 (2000)) (discussing interests the separation of powers protects); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 323–30 (2002) (defending some form of political question doctrine on grounds of promoting accountability); Pearlstein, *supra* note 26, at 820–25, 836.

262. See U.S. CONST. amend. I (public trial), IV–VI, VIII.

263. See *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (declaring that a criminal defendant is entitled to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt”) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)) (citing *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993)); *In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”). This is indeed how the question was treated when it arose in the prosecution of Salim Hamdan for material support to Al Qaeda. *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1278 (C.M.C.R. 2011).

armed conflict begins, what of the similarly fact-intensive inquiry at hostilities' end? Individual rights are equally implicated in, for example, the long-term detention of prisoners carried out under AUMF authority. But to what extent would a court really be willing to find that hostilities were over—even in the face of, for example, a presidential statement that hostilities persist? After all, earlier formulations of political question doctrine included consideration not only of the Constitution's textual commitment of a question to another branch of government, and the availability of judicially manageable standards, but also of the concern that the Court not express a lack of respect to its coordinate branches of government, and recognize when there might be an unusual need for finality in a political decision already made.<sup>264</sup>

More important, separation-of-powers interests have never been thought limited to the protection of individual rights. As the Court and scholars have variously recognized, they also include the maintenance of democratic accountability, and, in contrast to the Articles of Confederation regime the Constitution replaced, the promotion of governmental effectiveness.<sup>265</sup> The political question doctrine emerged largely as a narrow exception to the presumption in favor of judicial engagement to serve these other two goals.<sup>266</sup> So, for example, where effectiveness in foreign policy might require that the Government speak with one voice in international relations, the political branches' superior electoral accountability favors the President (or even

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264. See *supra* Part I.B (citing *Baker v. Carr*, 369 U.S. 186 (1962)). Indeed, *Munaf v. Geren* may be read to suggest that concerns of avoiding inter-branch embarrassment may still matter to an extent. 553 U.S. 674, 702–03 (2008).

265. See, e.g., Pearlstein, *supra* note 24, at 1573 (citing Ackerman, *supra* note 260, at 715–27) (discussing interests the separation of powers protects); see also Barkow, *supra* note 260, at 323–30 (defending some form of political question doctrine on grounds of promoting accountability); Pearlstein, *supra* note 26, at 799, 809, 811–12, 817–21.

266. *Marbury v. Madison*, 5 U.S. 137, 165–66 (1803) (“By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [W]hatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.”).

Congress) over the Court as the voice to do it.<sup>267</sup> Particularly where the question implicates the President's power to target or detain individuals he maintains continue to plan attacks against the United States, it seems a direct challenge to these interests for the Court to insist on second-guessing the executive's assessment of the nature of the conflict.

Here, it is helpful to recall that judicial engagement in law interpretation has never been limited to an on/off switch, one position where jurisdiction exists and independent decision-making follows, another position in which no jurisdiction exists, and the courts are therefore silent. Rather, the political question doctrine is best viewed as on one end of a continuum of mechanisms by which the courts tailor their interpretive role to recognize the varied separation-of-powers interests that shape the Court's power.<sup>268</sup> If the political question end of the continuum reflects a judgment that some separation-of-powers interests prohibit judicial engagement at all, and at the other end is the pursuit of full-throated independent judicial review, in the middle are various doctrines of judicial deference, in which the views of the executive are afforded more or less dispositive weight in interpretation.<sup>269</sup> It is among these options one finds, for example, what Robert Chesney has called "national security fact deference"—a mode of review in which the executive's superior expertise and access to information, its need to protect operational security and efficiency, and its direct accountability to the voters, are said to justify the executive's demand that the Court defer to its findings of fact.<sup>270</sup> Indeed, our system vests all kinds of fact-finders—from juries to administrative agencies—with enormous authority to determine facts with severe consequences for individual rights. That the Commander-in-Chief

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267. See *Munaf*, 553 U.S. at 702–03 (citing THE FEDERALIST NO. 42, at 279 (James Madison) (J. Cooke ed., 1961)) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations." (citations omitted)).

268. See *Baker*, 369 U.S. at 210 (describing political question doctrine as "primarily a function of the separation of powers"); Rachel E. Barkow, *The Rise and Fall of the Political Question Doctrine*, in THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES (Nada Mourtaba-Sabbah & Bruce E. Cain eds., 2007).

269. See, e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008) (describing a continuum of judicial deference regimes to executive branch interpretation) (citing, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936)).

270. Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009).

should be entitled to deference on the essentially factual question whether hostilities exist seems, in the scope of our system, a rather less challenging allocation than many.

Yet as the following discussion shows, it is far from clear that deference to the executive on the existence of hostilities in these contexts invariably advances any of the separation-of-powers purposes just named. Assuming that individual rights under the AUMF and MCA are better served by judicial engagement, this Part focuses in particular on the interests in promoting political accountability and government effectiveness. It examines how such interests are or are not served by deferring to executive interpretation of existence-of-war conditions in the MCA and AUMF, and argues that just as the Court has developed varied regimes and degrees of deference depending on the subject and nature of the judicial inquiry, it should tailor the degree of deference given based on the extent to which it serves the interests separating powers were meant to advance.

#### A. ACCOUNTABILITY

The expectation that it is the job of the electorate to hold political actors accountable for certain kinds of decision-making is a core animating principle of political question doctrine.<sup>271</sup> Not only in the context of war-making, but throughout administrative law, the notion that the executive is better positioned in this respect to resolve uncertainties in statutory interpretation is central. As the Court put it perhaps most famously:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.<sup>272</sup>

That the President is elected and the justices are not is beyond dispute. But would denying the courts the power to conduct a *de novo* inquiry into the existence of hostilities really serve the interests of accountability at stake in applying the MCA and AUMF?

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271. See Barkow, *supra* note 260, at 323–30 (defending some form of political question doctrine on grounds of promoting accountability).

272. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

The argument that simple deference to the executive's view of when hostilities begin best serves political accountability fails for several reasons. First, the notion that the executive is substantially more politically accountable than the courts may be especially questionable in the national security context.<sup>273</sup> Whereas in other realms of administrative law it may be plausible to argue that major executive agency decisions will enjoy "the kind of public scrutiny that is essential in any democracy,"<sup>274</sup> appropriate government interests in secrecy surrounding certain aspects of security may make it impossible for political accountability checks to function effectively. That is, *because* security sometimes requires secrecy, the involvement of multiple branches may be required to make accountability possible at all.

Second, it is too facile to assume that judicial involvement in the determination of the existence of hostilities somehow deprives the political branches of the ability to exercise authority they, as the most politically accountable branches, are most institutionally suited to exercise. Congress could readily have written statutes that made the condition of their operation dependent on the existence of a *political* trigger (a presidential proclamation, for example), rather than a factual one. Congress has certainly written such authorizations in the past.<sup>275</sup> Yet neither the MCA nor the AUMF is such a statute. Both laws make their operation dependent on the application of an external body of law, which self-consciously requires an objective determination of whether hostilities exist. Congress and the President's decisions to embrace this legislative scheme took place in full view of the electorate. Such decisions are surely within the competence of the political branches to make.

Indeed, there is reason to imagine that Congress and the President wanted to leave key questions of detention and trial to the courts to resolve *because* judicial engagement could make

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273. Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1246 n.58 (2007); Pearlstein, *supra* note 24, at 1577–78.

274. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 190–91 (2000) (Breyer, J., dissenting); cf. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32 (2001) ("Presidential administration promotes accountability in two principal and related ways. First, presidential leadership enhances transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power. Second, presidential leadership establishes an electoral link between the public and the bureaucracy . . . .").

275. See *supra* Part II.A.

it easier for the political branches to avoid electoral accountability for security decision-making.<sup>276</sup> Political scientists have long noted that Congress has tended to shirk decision-making responsibility on questions of the use of force, effectively ceding key questions of force to executive control in the interest of avoiding the political cost of engagement.<sup>277</sup> Recent scholarship has persuasively demonstrated how the executive, too, has in some instances relied on judicial involvement to avoid taking direct public responsibility for its foreign policy goals.<sup>278</sup> Such behavior is in striking contrast to the framers' expectation that the branches would seek to enlarge their control, and that checks on power must be established in order to counteract such natural institutional ambition.<sup>279</sup> But where, as here, the

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276. See, e.g., 157 CONG. REC. S8632, S8658 (daily ed. Dec. 15, 2011) (statement of Sen. Feinstein) (explaining the import of her proposed, later adopted, amendment to the National Defense Authorization Act, and describing the agreed-upon amendment as “preserv[ing] current law for the three groups specified, as interpreted by our Federal courts, and to leave to the courts the difficult questions of who may be detained by the military, for how long, and under what circumstances”); 157 CONG. REC. S8094, S8124 (daily ed. Dec. 11, 2011) (statement of Sen. Durbin on same amendment) (“[T]he latter amendment . . . makes it clear that this bill does not change existing detention authority in any way. It means the Supreme Court will ultimately decide who can and cannot be detained indefinitely without a trial. . . . The Supreme Court will decide who will be detained; the Senate will not.”).

277. See, e.g., HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 123–33 (1990); THEODORE J. LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED* 161–75 (1985).

278. David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145 (2008) (detailing how the George Washington Administration “chose to defer to the Judicial Branch and allow judicial decision making in the privateering cases to guide the implementation of U.S. neutrality policy”). In this context, consider President Obama’s early speech on the necessity of closing Guantanamo detention facilities. See President Obama, Remarks by the President on National Security (May 21, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09> (“The third category of detainees includes those who have been ordered released by the courts. . . . This has nothing to do with my decision to close Guantanamo. It has to do with the rule of law. The courts have spoken. They have found that there’s no legitimate reason to hold 21 of the people currently held at Guantanamo. Nineteen of these findings took place before I was sworn into office. I cannot ignore these rulings because as President, I too am bound by the law. The United States is a nation of laws and so we must abide by these rulings.”).

279. See, e.g., *THE FEDERALIST* NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961) (“[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.”).

Constitution allocates both Congress and the President substantial roles in regulating the use of force, and where shirking pathologies make it more difficult for the public to hold elected officials accountable for use of force decisions, judicial interpretation may be especially valuable. Particularly where there is evidence of such political process failure, robust judicial engagement may force the disgorgement of legal and factual findings from the executive otherwise inappropriately withheld, better informing public deliberation. And if the Court misconstrues one or the other statutory command, Congress may have new incentive to engage in difficult policy decision-making. In this respect, if the authority Congress has granted in the MCA or AUMF does not clearly afford the President the power he seeks to assert, the Court can promote democratic deliberation by saying so.

Finally, it bears returning to a point made above for the purpose of understanding why the political branches may have made the decision they did. The decision to make the duration of statutory authorities turn substantially on the existence of hostilities *vel non* in practical operation gives the political branches an extraordinary degree of control, especially over the end of the war. So long as the U.S. armed forces keep shooting, the government has at least a colorable argument that hostilities continue. But once the political judgment is made to stop shooting, it is within the power of the courts to determine—whatever the government subsequently *says*—that hostilities have come to an end. In effect, all allowing the courts to adjudicate these issues accomplishes is that the courts are able to hold the government to the legal consequences of the political decisions already made. Active judicial engagement in these existence-of-hostilities questions thus facilitates political accountability in the most direct sense.

#### B. EFFECTIVENESS

There is little question that the Constitution's framers, Alexander Hamilton above all, believed that however the new government was designed, it should address the inadequacy of the Articles of Confederation government in being capable of effectively repelling a foreign attack.<sup>280</sup> The notion that there should be a "unitary executive," rather than a committee body

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280. THE FEDERALIST NO. 15, at 146 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("Are we in a condition to resent or to repel the aggression? We have neither troops, nor treasury, nor government.").

in the executive, was among the results of this imperative.<sup>281</sup> At the same time, Hamilton's goal of "good government" applied equally to all branches and every sector of government affairs.<sup>282</sup> It has thus been in a wide variety of settings that the Court has attended in its decision making to the perceived efficacy of a given separation-of-powers outcome. That is, by considering whether it is necessary to alter the usual distribution of powers among the branches in order to make a legitimate mission of government work.<sup>283</sup> Where an executive agency en-

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281. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1786 (1996) ("The advocates of [a unitary executive] prevailed over noisy opposition—primarily with the argument that a single magistrate would give the most 'energy' . . . ." (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 65 (Max Farrand ed., rev. ed. 1937) (James Wilson) (June 1))); see also THE FEDERALIST NO. 70, at 402 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("Energy in the executive is a leading character in the definition of good government."); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 768, at 546 (Ronald D. Rotunda & John E. Nowak eds., Carolina Acad. Press 1987) (1833) ("Of all the cases and concerns of government, the direction of war most peculiarly demands those qualities, which distinguish the exercise of power by a single hand.").

282. THE FEDERALIST NO. 70, at 402 (Alexander Hamilton) (Isaac Kramnick ed., 1987); see also THE FEDERALIST NO. 37, at 243 (James Madison) (Isaac Kramnick ed., 1987) ("Energy in government is essential to that security against external and internal danger and to that prompt and salutary execution of the laws which enter into the very definition of good government."); THE FEDERALIST NO. 27, at 201 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("[C]onfidence in and obedience to a government will commonly be proportioned to the goodness or badness of its administration.").

283. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847, 856 (1986) ("[T]he constitutionality of a given congressional delegation of adjudicative functions to a non-Article III body must be assessed by reference to the purposes underlying the requirements of Article III. . . . It was only to ensure the effectiveness of [the regulatory] scheme that Congress authorized the CFTC to assert jurisdiction over common law counterclaims. Indeed . . . absent the CFTC's exercise of that authority, the purposes of the reparations procedure would have been confounded."); *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950) (opining that habeas hearings "would hamper the war effort and bring aid and comfort to the enemy [and] . . . would diminish the prestige of our commanders, not only with enemies but with wavering neutrals"); see also *Boumediene v. Bush*, 553 U.S. 723, 769 (2008) ("The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees' claims."); *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) ("We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts."); *id.* at 535 ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." (quoting *Sterling v. Constantin*, 287 U.S. 378, 401 (1932))); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) ("[T]he war power . . . is a power to wage war successfully . . .").

joys special expertise in a subject area, or unique access to information, or where secrecy may be thought essential to protect operational security or efficiency, judicial deference might be thought essential for effectiveness.<sup>284</sup>

Is deference to the executive on the existence of hostilities necessary to make the legitimate aims of the MCA and AUMF effective? Consider first the MCA. The existence of hostilities for purposes of military commission jurisdiction turns on *Tadic*'s two-factor test: protracted armed violence, and a sufficiently organized armed group as a party to the conflict. While there is likely little dispute over Al Qaeda's relative organizational sophistication at the time of the bombing of the USS *Cole*,<sup>285</sup> there is much dispute as to whether the intensity of violence in the year 2000 rose to the level of an "armed conflict," as distinct from criminal activity or terrorism.<sup>286</sup> In making the distinction, the *Tadic* court considered not just whether the government was obliged to use military (not just police) force in response to the violence, but more the number, duration, and intensity of individual confrontations; the types of weapons used; the number and types of forces engaged in the fighting; the geographic and temporal distribution of clashes; any territory captured or material destruction; refugees fleeing combat; and any casualties suffered.

In evaluating these factors, the executive surely has several functional advantages. It enjoys first and most direct access to information about the number of strikes it has ordered, the types of forces and weapons engaged in the fighting, and the pattern of clashes. While it may have incomplete information about the tactics pursued and casualties sustained by the enemy, it enjoys significant expertise in estimating the likely effects of weapons on casualties and property loss, and in any case has manifestly better access to such insights than do the courts. Above all, the executive is in sole possession of information—about, for example, the extent and nature of the government response or attacks still being planned by either party—that it may have powerful operational interests in keeping secret.

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284. See, e.g., *Munaf v. Geren*, 553 U.S. 674, 702–03 (2008) (discussing judicial deference to the political branches in the context of transferring detainees to Iraq).

285. See WRIGHT, *supra* note 207, at 318–20.

286. See *supra* Part II.A.3.

Without doubting that the executive enjoys superior access to information, it is not immediately apparent why access alone necessarily requires restricting the ordinary function of the court. Typically, parties before a court are required to disgorge what information they have—through processes of discovery, record-making, and the like—in order to aid judicial decision making. To the extent expert estimates offer the best information available, they have likewise regularly been subject to discovery and judicial evaluation across a vast array of complex fields. More, unlike the fact deference the *Munaf* Court seemed inclined to show on the question of the likelihood of torture upon transfer of custody,<sup>287</sup> here there is no predictive or discretionary judgment involved. The relevant period of inquiry is that covered by the allegations in the indictment regarding past events; the court is not required to anticipate whether fighting will (much less should) continue.

More complex might be a circumstance in which the executive has some legitimate claim to resisting discovery in order to keep information *secret*, as in the context of ongoing fighting imagined above. But such interests seem unlikely to be at stake in the criminal prosecutions authorized by the MCA. The inquiry into the existence of hostilities there is retrospective in nature—whether hostilities existed during the period of the acts alleged to be part of the charging offenses. By definition, any operational exigency inherent in those events has passed. A retrospective legal determination of the start date of war likewise imposes non-apparent costs on strategic decision making in a conflict ongoing. It need not affect how (or whether) the government engages in current war-fighting, and it does not limit current battlefield choices. In any case, the practical possibility of sustained secrecy in such circumstances is limited. Particularly because there must be demonstration of some degree of personal and material destruction of at least one organizational party outside the executive branch, many such events are, to a great extent, public facts in our “history which the Court is bound to notice and to know.”<sup>288</sup>

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287. See *Munaf*, 553 U.S. at 702–03; accord *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 843–44 (D.C. Cir. 2010) (emphasizing that while it posed no political question for a court to determine whether a foreign organization had engaged in terrorist activity, it would pose such a question to determine whether that activity “threatens the . . . security of the United States” (quoting the Antiterrorism and Effective Death Penalty Act, 8 U.S.C. § 1189(a)(1)(C) (2012))).

288. *The Prize Cases*, 67 U.S. (2 Black) 635, 667–69 (1863). Indeed, the

In some contrast, consider the position of, for example, a Guantanamo detainee arguing in 2015 that the AUMF no longer authorizes his detention because hostilities with the Taliban and Al Qaeda have come to an end. Assume he is able to argue based on judicially noticeable information that U.S. combat troops have left Afghanistan, and there have been no (or a glancing number of) attacks by Al Qaeda or its co-belligerents against the United States or its interests. Hostilities, he argues, are thus not intense enough to constitute an armed conflict. He will likewise point to government officials' public statements about the organizational deterioration of core Al Qaeda, and that group's inability to exercise effective command over its constituent parts.

As with the MCA, the existence of hostilities in the AUMF context is largely a question about actual events in the world, and in this sense a discoverable set of facts. The inquiry is not retrospective in nature, but neither does it require predictive judgment—it is about what currently is. At the same time, the inquiry involves a set of facts to which the executive may, under some circumstances, wish to preserve special access. If the government's position is that hostilities continue, it may well wish to maintain secrecy about attacks one or both sides planned but were not successful—or not yet successful—in carrying out.<sup>289</sup> Or, the executive might concede that there have

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Court has regularly engaged in its own detailed factual analysis about conditions of war. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 299–300, 301 (1918) (“It appears in the record, and is a matter of general history, that . . . General Carranza . . . inaugurated a revolution against the claimed authority of Huerta and . . . proclaimed the organization of a constitutional government . . . and that civil war was at once entered upon between the followers and forces of the two leaders.”); *The Three Friends*, 166 U.S. 1, 63–66 (1897); *cf. Matthews v. McStea*, 91 U.S. 7, 11 (1875) (recognizing that war may exist whether or not declared, and finding that “[h]ostilities had commenced” and a state of war existed before a presidential proclamation declaring a blockade of the South); *The Neustra Senora de la Caridad*, 17 U.S. 497, 502 (1819) (“War notoriously exists . . .”).

289. While a more legally problematic practice, the government may likewise wish to retain the ability to deny official involvement in ongoing conflicts. *Cf. Earth Pledge Found. v. CIA*, 988 F. Supp. 623, 628 (S.D.N.Y. 1996) (explaining that official confirmation of a CIA field station in the Dominican Republic could cause a disruption of foreign relations because “countries are willing to tolerate the presence of CIA installations in their country only if the United States does not officially acknowledge that such stations exist”). Many public reports reveal the use of U.S. drones against targets in Pakistan, for example, but the U.S. government has insisted upon the importance of not only operational secrecy but also diplomatic deniability in its drone program; only the U.S. government thus has full information on the extent of the use of

been few or no successful attacks against the United States by the other party, but argue the reason that no attacks have been successful is not because they have ceased to be launched, but because U.S. forces have been effective—using sources or methods it would like to preserve the ability to use in secret—in repelling those attacks before they are complete. While it may be that the application of law to fact required for resolving the AUMF question is, broadly speaking, justiciable, the executive’s claim to effectiveness-based fact deference here is stronger.

Yet even here, it is not apparent that *effectiveness* per se requires categorical deference to the executive’s factual assertions. The lessons of administrative law, organization theory, and a host of related fields suggest that it is not only possible, but wise, to impose at a minimum a requirement that the executive have a reasonable basis for its conclusions, even if the facts underlying those conclusions are themselves not wholly subject to scrutiny.<sup>290</sup> In such cases, reasonableness could be tested against an objective measure of accuracy, but it could also be based on an evaluation of process indicators demonstrating that the executive’s findings were based on adequate internal assessments.<sup>291</sup> To the extent information publicly available would tend to undermine the executive’s position on the factual existence of armed conflict, it may be appropriate to place the burden on the executive to come forward with reasons, even if necessarily subject to *in camera* review, why that information is not dispositive. Interests in effectiveness may require the protection of secrecy surrounding such operations, and in this respect may favor deference to the executive to an extent. But as the *Baker* Court recognized, “a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . [It can] inquire whether the exigency still existed upon which the continued operation of the law depended.”<sup>292</sup> Once a political judgment is made to stop shooting, it must be within the power of the courts

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force.

290. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 532–35 (2007); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

291. See, e.g., *Chesney*, *supra* note 269, at 1392–94; Pearlstein, *supra* note 24, at 1620–22.

292. *Baker v. Carr*, 369 U.S. 186, 214 (1962) (alteration in original) (quoting *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547–48 (1924)); *Ex parte Milligan*, 71 U.S. 2, 126–27 (1866) (rejecting the government’s argument that Indiana was a theater of war).

to determine under the objective standard given by law—whatever the government subsequently *says*—that hostilities have come to an end.

### CONCLUSION

For much of the past decade, it has been difficult to overstate the depth of the public and scholarly consensus that existed around the view that when Congress authorized the use of armed force against “those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided” the attacks of September 11, the “war” thus undertaken was one without identifiable limits in time.<sup>293</sup> That is, the view has been that not only would it be impossible in advance to identify when the use of armed force would cease—it has of course never been possible at war’s beginning to identify on which definite date war will end—but there would be no set of events, circumstances, or conditions that could be imagined, the occurrence of which might bring about a recognition of the political, or in any objective way factual, end of the war. That consensus no longer exists. Indeed, as the United States prepares to conclude combat operations in Afghanistan,<sup>294</sup> and as executive branch officials contemplate the likelihood of core Al Qaeda’s “strategic defeat,”<sup>295</sup> courts are already beginning to contend with the legal complexity of when that war began and when it should be understood to end.

Given the legal significance of the question across a range of present authorities, it is important to recognize both the long history of courts’ engagement in such questions, and to identify what factors are relevant in informing their answer here. More, as concepts of war and national security expand, and as boundaries between affairs that are purely “foreign” and those exclusively “domestic” collapse, it is essential to revisit old assumptions about the role of the courts in this vast field of government activity. Deference to the judgment of other

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293. See, e.g., Vladeck, *supra* note 11, at 53 (“Just what *will* mark the conclusion of hostilities? . . . [T]here do not appear to be clearly identifiable objectives that allow for the successful completion of the conflict. There is no physical territory to conquer, no clear leadership structure to topple, no Reichstag over which to fly a foreign flag.”); see also Bellinger & Padmanabhan, *supra* note 200, at 229 (citing, e.g., Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT’L L. 429, 435–36 (2010)).

294. See, e.g., *supra* note 8 (quoting Obama speeches).

295. See *supra* note 9 (quoting officials).

branches in matters of interpretation has always challenged constitutional concepts of judicial independence. But uncritical deference serves no constitutional end—even at the threshold of war.