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1	DFL	sig	Austin, AD-23 8 May 2014	6			
2	DFER	approve	<i>SOLTI, AD-22, 8 May 14</i>	7			
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Clearance for Material for Public Release				20140508
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SUMMARY

1. PURPOSE. To provide security and policy review on the document at Tab 1 prior to release to the public.

2. BACKGROUND.

Authors: Chad Austin, DFL, x2816, Dr. Sarah Lohman

Title: When the War Doesn't End: Detainees in Legal Limbo

Circle one: Abstract Tech Report Journal Article Speech Paper Presentation Poster

Thesis/Dissertation Book Other: _____

Check all that apply (For Communications Purposes):

☐ CRADA (Cooperative Research and Development Agreement) exists

☐ Photo/ Video Opportunities ☐ STEM-outreach Related ☐ New Invention/ Discovery/ Patent

Description: The law review companion discusses that war on terror legislation still has the power to allow U.S. and foreign citizens to be held indefinitely. On April 25, the U.S. Supreme Court decided not to review *Hedges v. Obama*, a case that challenged legislation on which the detentions are based. The authors argue that holding indefinitely those with no proven link to terrorism undermines U.S. leadership. Information: To be submitted to various journals for consideration for publication.

Previous Clearance information: (If applicable) N/A

Recommended Distribution Statement: Distribution A, Approved for public release, distribution unlimited.

3. DISCUSSION. This potential journal article is an academic commentary of current U.S. domestic legislation authorizing indefinite detention under the laws of war. In "today's conflict" this detention appears to be indefinite as it is uncertain when hostilities end.

4. RECOMMENDATION. Sign coord block above indicating document is suitable for public release. Suitability is based on the document being unclassified, not jeopardizing DoD interests, and accurately portraying official policy.

Paul E. Pirog

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1. Tab
1. Copy of paper

Abstract:

War on terror legislation still has the power to allow U.S. and foreign citizens to be detained anywhere, and to be held indefinitely. On April 25, the U.S. Supreme Court decided not to review *Hedges v. Obama*, a case that challenged the judicial precedence on which such security detentions are based. The authors argue that holding indefinitely those with no proven link to terrorism puts the security of U.S. citizens at risk and compromises U.S. leadership. First, in a war with no foreseeable end, such a policy puts the United States in the position of detaining and holding persons for decades. This practice is impractical and legally questionable. Second, it jeopardizes relationships with allies who can assist America in responding to terrorism. Third, such policies have left a lack of legal clarity for how detainees should be treated while they are waiting to be charged or released. Fourth, the policy is costly for the U.S. military and diverts funds and focus from other national security priorities. The military and Congress have put helpful accountability mechanisms in place to ensure that indefinite detention will end. As long as the judicial precedent for indefinite detentions and the war on terror legislation is allowed to stand, however, detainees remain in legal limbo.

Key Words: Detainee, *Hedges v. Obama*, war on terror, terrorism, habeas corpus, Korematsu, National Defense Authorization Act (NDAA)

When the War Doesn't End: Detainees in Legal Limbo

By Dr. Sarah Lohmann and Prof. Chad Austin¹

Over a decade after the terrorist attacks of September 11, "war on terror" legislation still has the power to allow both American and foreign citizens to be detained anywhere in the world without charge or trial, and to be held indefinitely if they are suspected of having ties to terrorism. On April 25, the U.S. Supreme Court decided not to review *Hedges v. Obama*, a case that challenged the judicial precedence on which such security detentions are based. In so doing, the Supreme Court lost a historic opportunity to set the record straight on how long and under what circumstances post-9/11 detainees may be held.

The case, filed just before Christmas, asked the Supreme Court to make a final decision on whether U.S. citizens and others can be held indefinitely without charge or trial by the U.S. military. The case had been bounced around in the lower courts for two years.²

Originally filed on Jan. 13, 2012, the case argued that a section of the 2012 National Defense Authorization Act which allows the United States to indefinitely detain those suspected of having an affiliation with terrorists is unconstitutional because it allows journalists or human

¹ The views expressed in this paper are solely those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense or the U.S. Government

² *Hedges v. Obama*, U.S. Supreme Court, No. 13-758. Dec. 16, 2013. Retrieved from: Westlaw Next . Copyright Thomson Reuters, accessed Jan. 3, 2014.

rights workers to be arrested based on vague assumptions.³ The 2012 law was the first in history to allow military detention without charge or trial for an indefinite amount of time.⁴

While President Obama had issued a signing statement to the legislation proclaiming that he did not intend to allow the provision to be applicable to U.S. citizens, the question of who the U.S. military can hold and for how long continues. In January 2014, lawyers asked the U.S. Solicitor General Donald B. Verrilli, Jr. to use the *Hedges* case to overturn or refuse to allow as authority for the 2012 NDAA law a Supreme Court precedent that has been used to justify indefinite detentions of U.S. citizens and others since World War II.⁵

The lawyers had been representatives of the U.S. citizen Korematsu and other Japanese Americans put in U.S. internment camps during World War II, and had successfully had the Japanese-American convictions overruled in lower courts.⁶ The historical case in which Korematsu was tried, *Korematsu vs. United States*, granted former President Roosevelt a judicial blessing for his detention of over 120,000 Japanese-Americans living mostly on the West Coast of the United States, and deporting them to concentration camps in the wake of the Japanese attack on Pearl Harbor. The detention and deportation was based on ancestry and not on the individual's proven guilt of crimes of espionage or treason.⁷ Acting Solicitor General Neal Kumar Katyal issued a formal confession of error for the lawyers' actions in the *Korematsu* case to the families in 2011. Justice Antonin Scalia rated *Korematsu* as one of the court's worst mistakes. Justice Stephen Breyer wrote that the ruling can no longer have standing as precedent.⁸ And yet, the ruling has not been formally overturned and can be used to justify indefinite detentions of all those suspected of terrorism.

Argument

While keeping true terrorists locked up ensures they no longer are a danger to U.S. security, holding those with no proven link to terrorism without charge or trial puts the security of our citizens at risk for three reasons. First, in a war with no foreseeable end, such a policy puts the United States in the position of detaining and holding persons for decades. This is impractical and legally questionable. Second, it jeopardizes relationships with allies who can assist America in responding to terrorism. Third, such policies have left lack of legal clarity for how detainees

³ *Hedges v. Obama*, U.S. District Court for the Southern District of New York, No. 12-cv-331, Jan. 13, 2012.

⁴ *Ibid.*

⁵ Letter to Hon. Donald B. Verrilli, Jr., re: *Hedges v. Obama*, Jan. 13, 2014. URL: <http://sblog.s3.amazonaws.com/wp-content/uploads/2014/01/Hedges-letter-re-Korematsu-1-13-14.pdf>, last accessed March 13, 2014.

⁶ Lyle Denniston, "A plea to cast aside *Korematsu*", SCOTUSblog, Jan. 16, 2014. URL: <http://www.scotusblog.com/2014/01/a-plea-to-cast-aside-korematsu/>

⁷ Yoo, John 2009: *Crisis and Command*. Kaplan Publishing: New York, 233, 321. See also: *Korematsu v. United States*, 323 U.S. 214 (1944).

⁸ Liptak, Adam, "A Discredited Supreme Court Ruling That Still, Technically Stands", New York Times, Jan. 27, 2014.

should be treated while they are waiting to be charged or released. Fourth, the policy is costly for the U.S. military and diverts funds and focus from other national security priorities.

A War Without End

Unfortunately, by refusing to hear *Hedges*, the Supreme Court has left *Korematsu* on the books and it can continue to be used as judicial precedent to justify indefinite detention. This is not surprising considering that two weeks before the *Hedges* case was filed with the Supreme Court, the court decided on Dec. 3, 2013 in *Ali v. Obama* that the detainee could continue to be held indefinitely and denied his petition for a writ of *habeas corpus* based on the fact that Congress had given the president power to use any force necessary to defeat terrorism in the Authorization for Use of Military Force (AUMF) after the attacks of September 11, 2001.⁹

The *Ali* ruling states “The 2001 AUMF does not have a time limit, and the constitution allows detention of enemy combatants for the duration of hostilities ... The war against al Qaeda, the Taliban, and associated forces obviously continues.”¹⁰

Yet in a speech before the National Defense University, President Obama declared on May 23, 2013 that he hoped to influence Congress and the American people to repeal the AUMF mandate, stating that “this war, like all wars, must end.”¹¹ In the same speech, he also declared that “Journalists should not be at legal risks for doing their jobs.”¹²

Several activists including former New York Times reporters Christopher Hedges and Daniel Ellsberg, columnist Noam Choamsky, Icelandic parliamentarian Birgitta Jónsdóttir, and founder of the activist media group RevolutionTruth Jennifer Bolen, put that statement to the test in the *Hedges* case, claiming they have been threatened with detention for doing their jobs in covering the war on terrorism. Christopher Hedges claims he was arrested and held without explanation as a New York Times reporter after covering conflicts in the Middle East, once by the U.S. military, and once by Homeland Security.¹³

Relationships with Allies

Indefinite detention tests the United States’ relationship with its allies who are valuable partners in the war on terror. Both the Bush administration and the Obama administration have used the AUMF as basis for detaining, and holding without trial, those suspected of terrorism

⁹ *Ali v. Obama*, United States Court of Appeals for the District of Columbia Circuit, No. 11-5102, Dec. 3, 2013.

¹⁰ *Ali v. Obama*, United States Court of Appeals for the District of Columbia Circuit, No. 11-5102, Dec. 3, 2013, p. 20. URL: [http://www.cadc.uscourts.gov/internet/opinions.nsf/617ECA7B72261CFD85257C360054C510/\\$file/11-5102-1468579.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/617ECA7B72261CFD85257C360054C510/$file/11-5102-1468579.pdf), last accessed Dec. 19, 2013.

¹¹ Obama, President Barack, “The Future of Our Fight Against Terrorism,” National Defense University, May 23, 2013. URL: [/2013/05/text-of-the-presidents-speech-this-afternoon/#.UsaLZOIsazE](http://2013/05/text-of-the-presidents-speech-this-afternoon/#.UsaLZOIsazE), last accessed Jan. 3, 2014.

¹² *Ibid.*

¹³ Hedges, Chris, “The Last Chance to Stop the NDAA,” Truthout. Sept. 2, 2013. URL: http://www.truthdig.com/report/item/the_last_chance_to_stop_the_ndaa_20130902/, last accessed Jan. 3, 2014.

abroad. Blurring the lines between international law, and domestic, State Department legal advisor Koh recently explained the importance for the Obama administration in using the AUMF to detain terrorism suspects abroad, including in Afghanistan: "...as a matter of international law, this Administration has expressly acknowledged that international law informs the scope of our detention authority. Both in our internal decisions about specific Guantanamo detainees, and before the courts in habeas cases, we have interpreted the scope of detention authority authorized by Congress in the AUMF as informed by the laws of war."¹⁴

He called this new kind of law "The law of 9/11" because it exists to deal with an enemy that knows no national boundaries, and can thus not be limited by only applying domestic or international law.¹⁵ Yet regardless of the label one gives to the new law that has emerged to deal with the new threat, the reality is, how the United States treats the citizens of its allies has an impact on the extent of their cooperation in the war on terror or other important foreign policy issues.¹⁶

Starting in 2005, there were tense relations between the United States and Germany over the detention and torture of German citizen Khaled el-Masri, who was abducted from Macedonia and held in Afghanistan.¹⁷ El-Masri sued the CIA, and Angela Merkel asked then Secretary of State Condoleezza Rice for an apology for his detention.¹⁸ The German chancellor raised the issue again with President Bush in 2006.¹⁹ While these meetings were supposed to focus on important security and trade issues, the detention scandal caused a level of distrust on the executive level that pushed the pressing foreign policy issues of the day to the background. Issues over where to settle Guantanamo Bay detainees continued to cloud the U.S.-German relationship even into the Obama administration, diverting foreign policy discussions away from important matters, up until 2010.²⁰

¹⁴ Koh, Harold Hongju, Legal Adviser, U.S. Department of State, "The Obama Administration and International Law," Annual Meeting of the American Society of International Law, Washington, D.C., March 25, 2010. URL: <http://www.state.gov/s/l/releases/remarks/139119.htm>, last accessed May 7, 2010.

¹⁵ Ibid.

¹⁶ See the Lawfare commentary on how nominal differences do not change the reality of procedure in Goldsmith, Jack, "Detention, the AUMF, and the Bush Administration – Correcting the Record", Lawfare, Sep. 14, 2010. URL: <http://www.lawfareblog.com/2010/09/detention-the-aumf-and-the-bush-administration-correcting-the-record/>, last accessed May 8, 2014.

¹⁷ Case of *El Masri vs. the Former Yugoslav Republic of Macedonia*, European Court of Human Rights, Dec. 13, 2012. Nicholas Kulish, "Court Finds Rights Violation in C.I.A. Rendition Case", New York Times, December 13, 2012. The court found the CIA had tortured El Masri, including sodomy and beatings, and the court awarded him compensation.

¹⁸ The Washington Times, "Ex-detainee suit overshadows Rice-Merkel visit," Dec. 6, 2005.

¹⁹ Knowlton, Brian, "Merkel and Bush in 'spirited' and friendly talks", The New York Times, Jan. 13, 2006.

²⁰ Administration of Barack Obama. Public Papers of the Presidents of the United States: Barack Obama 2009. Government Printing Office. June 5, 2009, 778. See also: Spiegel, "Deutschland nimmt Obama zwei Problemfälle ab. Aufnahme ehemaliger Guantanamo-Häftlinge", July 7, 2010.

Likewise the foreign minister Jack Straw called for the closing of Guantanamo, where detainees have been held without charge indefinitely.²¹ The EU and the UN called for its closing and the prevention of conditions where there is no room for rule of law.²² The Organization for American States protested the legal status and physical treatment of the Guantanamo detainees, and the UN Committee Against Torture condemned the detainees' indefinite detention as a violation of the CAT, and called for the center to be closed.²³

For the crucial regional access and cooperation the U.S. needed in the war on terrorism in the Middle and Near East, especially from those who could assist the U.S. with intelligence and access to air bases in the region, the treatment of detainees also created a problem. In the case of Pakistan and Kuwait, for example, the treatment of detainees became an issue at the highest levels. Five dozen Pakistanis were held in Guantanamo from 2002 to 2006. The last of the Pakistanis was released in 2008.²⁴ The Pakistani Ambassador to the United States pleaded on their behalf in 2008 after the detainees spent over six years in legal limbo.²⁵

Twelve Kuwaitis were also held in Guantanamo according to the DOD list, and two have yet to be released. The lack of judicial review, being held without charge, using hearsay as evidence, and refusing to release the detainees after the courts had ruled in favor of their release caused tense US-Kuwait relations. The issues were raised to the level of Secretary of State Hillary Clinton during the Obama administration.²⁶

President Obama recognized the challenge that this poses for international relations in his 2013 National Defense University speech when he said: "In the meantime, Guantanamo has become a symbol around the world for an America that flouts the rule of law. Our allies won't cooperate with us if they think a terrorist will end up at GTMO."²⁷ He has called on Congress to help him close it, but other nations continue to express reluctance to accept freed Guantanamo

²¹ *Spiegel Online*, "Straw rechnet mit baldiger Schließung von Guantanamo", 15. März 2006.

²² Plassnik für Schließung von Guantanamo, ORF. URL: <http://news1.orf.at/ticker/215755.html>, last viewed March 13, 2014; Beer, Angelika "Europäisches Parlament fordert Schließung von Guantanamo", Jan. 18, 2005; "Anna drängt auf Schließung von Guantanamo", SF Tagesschau, Feb. 16, 2006.

²³ Committee Against Torture, "Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture", May 18, 2006. URL: http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/19_05_06_torture.pdf, last accessed April 3, 2014.

²⁴ Department of Defense, "List of Individuals Detained by the Department of Defense at Guantanamo Bay, Cuba from January 2002 through May 16, 2008". URL: <http://www.defense.gov/news/May2006/d20060515%20List.pdf>, last accessed April 9, 2014.

²⁵ Daily Times (Pakistan), "Haqqani meets US officials, discusses release of Pakistanis at Guantanamo", Sep. 7, 2008. See also list of Pakistani detainees and their treatment and rulings. URL: http://en.wikipedia.org/wiki/Pakistani_detainees_at_Guantanamo_Bay#cite_note-ConsolidatedReleaseList-4, last accessed April 9, 2014.

²⁶ Tanglen, Lucas, "US pledges to review files of Kuwaiti Guantanamo detainees: Kuwait minister", Jurist, April 26, 2009. URL: <http://jurist.law.pitt.edu/paperchase/2009/04/us-pledges-to-review-files-of-kuwaiti.php>, last accessed April 9, 2014.

²⁷ Obama, President Barack. "Remarks from the President at the National Defense University", NDU, Fort McNair, Washington, D.C. The White House. Office of the Press Secretary, May 23, 2013.

detainees. The president's powers to detain anyone, anywhere under the 2012 NDAA and AUMF continue. As the U.S. laws can be used to detain foreign citizens in their home country without charge or trial, it is no wonder that allies are calling for change in U.S. detention policy, as U.S. domestic law thrusts itself into the realm of international human rights.

A 2009 Angus Reid Global Monitor poll showed that 59% of respondents believed American treatment of prisoners in Guantanamo boosted anti-American sentiment in the world.²⁸ The detention issue caused distrust in U.S. world leadership, and complicated cooperation in fighting terrorism with close allies at the time when we needed it most. While the images of Abu Ghraib may have been forgotten by many, the limitless detention laws provide a legal basis that allows many to continue to be detained for indefinite periods of time, without adequate means to prove their innocence.

Legal Confusion

During the Bush administration alone, 80,000 men, women and children, including U.S. citizens, were detained by U.S. forces between 2001 and 2008 in connection with the war on terrorism.²⁹ Another 26,000 were held in black sites.³⁰ The Washington Post puts the number of those held in Iraq only at 100,000 by Dec. 2008.³¹ Most detained were innocent. In Guantanamo, only 29 of 779 were charged with any crime, and 13 of those were released or had their charges withdrawn.³²

While different legal basis could be used for detaining the individuals, most detained worldwide were not considered prisoners of war, and could thus not be afforded the protections of the Geneva Conventions. Of those detained, 2,400 children were detained in Iraq for security reasons. Children were held by U.S. military forces in Camp Cropper (Baghdad) and Camp Bucca (near Basra) in excess of 130 days since 2003. Another 90 children were held as "unlawful

²⁸ Angus Reid Global, "Guantanamo Hurt U.S. Image, Say Americans," May 28, 2009.

URL: http://www.angusreidglobal.com/polls/36188/guantanamo_hurt_us_image_say_americans1/, last accessed May 1, 2014.

²⁹ Shear, Michael, Finn, Peter, and Eggan, Dan: "Obama to Meet with Terrorism Victims and Families", Washington Post, Feb. 5, 2009. As of June 2008, according to Legal Director Clive Stafford Smith of the Human Rights Organization Reprieve, "By its own admission, the US government is currently detaining at least 26,000 people without trial in secret prisons, and information suggests up to 80,000 have been 'through the system' since 2001." See: Campbell, Duncan, and Norton-Taylor, Richard, "US accused of holding terror suspects on prison ships", June 2, 2008. Between 2001 and 2004 alone, 50,000 people were detained by U.S. forces in Iraq and Afghanistan, according to Pentagon spokesman Lawrence DiRita. See: Jehl, Douglas, and Schmitt, Eric, "The Conflict in Iraq: Detainees", New York Times, March 16, 2005.

³⁰ According to the Watson Institute of International Studies, 80,000 were detained and put in U.S. detention centers in Iraq, Afghanistan, and Guantanamo Bay and 26,000 in black sites. See: Brown University: <http://costsofwar.org/article/detention>.

³¹ Paley, Amit R. "In Iraq, a Prison Full of Innocent Men", Washington Post, Dec. 6, 2008.

³² Human Rights Watch, "The Guantanamo Trials". URL: <http://www.hrw.org/features/guantanamo>, last accessed April 11, 2014.

enemy combatants” at Bagram airbase in Afghanistan since 2002, and 17 at Guantanamo Bay since it opened.³³

How could it come to this legal confusion? The attacks of September 11, 2001, introduced the United States to a new kind of enemy who would not wait for battle lines to be drawn and their actions to be anticipated before they strike. Unlike in previous wars to which the United States has been a party, those who perpetrated the attacks on September 11 did not wear uniforms, did not fight on behalf of a state, and did not fight to gain territory. They intentionally targeted civilians. They had interconnected cells all over the world but no formal military command structure.³⁴

Thus, those arrested in the wake of the terrorist attacks were often detained far from the battlefield, and their status as “enemy combatant” or “detainee” presented the question of whether the Geneva Conventions would still afford them protection. The Commander of Operation Enduring Freedom had ordered in October 2001 that all captured persons be treated according to the Geneva Conventions, and if there was a doubt as to the person’s status, the detainee was to be afforded the protections of a prisoner of war until a Geneva Convention III Article 5 tribunal could decide the status. But this policy was quickly changed.³⁵

On Feb. 22, 2002, President Bush issued a memo saying that detainees did not have to be protected by the Geneva Conventions.³⁶ In addition, an Aug. 1, 2002 Office of Legal Counsel Memo stated that only those acts that intend to inflict torture can be considered torture. Further undermining the desire of the U.S. military to uphold a higher standard in times of war, The Department of Justice approved waterboarding as an interrogation method for the CIA the

³³ Hamilton, Carolyn, Anderson, Kirsten, Barnes, Ruth, Dorling, Kamena: “Administrative Detention of Children: A Global Report”, UNICEF, Child Protection Center, and The Children’s Legal Center, Feb. 2011, 24. URL: http://www.unicef.org/protection/Administrative_detention_discussion_paper_April2011.pdf, last accessed Jan. 16, 2014.

³⁴ A similar paragraph can be found in Lohmann, Sarah M. The post-9/11 Detainee Policy: Popular President Meets Unified Government. Universität der Bundeswehr 2013, 92.

³⁵ Strasser, Steven 2004. The Abu Ghraib Investigations. New York: Public Affairs, 86. See also: Lohmann, Sarah M. 71.

³⁶ Bush, President George W., Memorandum from The White House, “Human Treatment of al Qaeda and Taliban Detainees”, Feb. 7, 2002. Sec. 2a of the President’s memo reads: “I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.” Sec. 2c states: “I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to ‘armed conflict not of an international character.’” Sec. 2d states: “Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.”

same day.³⁷ It wasn't long before the methods that were to be used on isolated detainees in Guantanamo were approved and were brought to Iraq and Afghanistan as well.³⁸ While these methods have since been recalled by the Obama administration, the legal no man's land in which detainees find themselves unable to prove their innocence and in detention for the duration of hostilities with no foreseeable end poses problems for the military of a practical and legal nature.

Cost for the U.S. Military

Indefinite detention is a costly exercise for the United States. The U.S. military spends \$161 million per year in overseeing approximately 150 prisoners at Guantanamo Bay. Of the 517 Guantanamo detainees reviewed in Department of Defense data, 92 % are not categorized as Al Qaeda fighters, and 18% have no connection with Al Qaeda or the Taliban.³⁹ The question remains of whether this money could better be invested elsewhere, and if the United States has become safer by holding detainees who have largely had no connection to the attacks of September 11, 2001 or to the war on terror.

The U.S. military has also not been given a clearly defined mission or exit strategy for holding war on terror detainees. The Law of Armed Conflict allows the detention of individuals for the duration of hostilities, but with the United States pulling most of its troops out of Iraq and Afghanistan by the end of the year, and the actual participants in the attacks of September 11, 2001 killed or locked up, the question is, whether a formal end to hostilities will be declared. The Supreme Court recognized in *Hamdi v. Rumsfeld* that the capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war."⁴⁰ The Court recognized the purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms again.⁴¹

³⁷ U.S. Department of Justice, Office of Legal Counsel, Aug. 1, 2002. See also: Lohmann, Sarah M. The post-9/11 Detainee Policy: Popular President Meets Unified Government. Universität der Bundeswehr 2013, 109.

³⁸ On Dec. 2, 2002 Defense Secretary Rumsfeld approved new interrogation techniques, on Jan. 28, 2003 the CIA recorded that it was using the enhanced techniques, on April 16, 2003, Rumsfeld added additional interrogation methods that were allowed beyond FM 34-52, by August 2003, Maj. Gen Miller brought Rumsfeld's April 2003 guidelines to Iraq, recommending they be used by the whole command, and by September 2003, Commander Ricardo Sanchez authorized 12 techniques that went beyond FM 34-52. See: Report of the U.S. Senate Committee on Armed Services. "Inquiry into the Treatment of Detainees in U.S. Custody," Nov. 20, 2008. American Civil Liberties Union, "Documents Released by the CIA and Justice Department in Response to the ACLU's Torture FOIA."

³⁹ Denbeaux, Prof. Mark, Denbeaux, Joshua, Esq., "Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data", Seton Hall University School of Law. URL: http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf, last accessed May 7, 2014. See also: American Civil Liberties Union, "Guantanamo By the Numbers". URL: <https://www.aclu.org/national-security/guantanamo-numbers>, last accessed 1 May 2014.

⁴⁰ *Hamdi v. Rumsfeld*, 542 U.S. at (2004) citing *Ex Parte Quirin* 318 U.S. at 28.

⁴¹ *Ibid*.

The problem is that many of the detainees were not captured on the battlefield, nor were they detained by U.S. forces, nor are they being held in connection to the attacks of September 11, 2001. Only 5 % of the 517 Guantanamo detainees listed in the Department of Defense data were captured by U.S. forces.⁴² Pakistan or the Northern Alliance arrested 86% of the detainees and then turned them over to U.S. custody, during a time when the United States offered large bounties for capture of suspected enemies.⁴³ Only 8 % have any battlefield association and are considered fighters for a terrorist organization.⁴⁴ Another 30 % of detainees are considered members of al Qaeda or the Taliban or another terrorist group, but 60 % of all the detainees did not even have a minimum level of contact with an al Qaeda member.⁴⁵ Even more telling, only 8% of the organizations identified by the Combatant Status Review Board as being terrorist organizations which can establish links between the detainee and al Qaeda or the Taliban even target U.S. interests abroad.⁴⁶

These Review Boards, originally created in 2004 under the name Combatant Status Review Tribunals in response to the *Hamdi* ruling, determine whether a detainee can be considered an enemy combatant, and thus, not protected by the Geneva Conventions. Of the detainees held in Guantanamo between 2004 and 2009, the Tribunals determined that 539 detainees were properly classified as enemy combatants and 39 were no longer deserving of the status.⁴⁷ Detainees then were subject to annual Administrative Review Boards to determine whether the detainee should be released, transferred, or remain in detention. Of the population that remains at Guantanamo, 77 have been designated for transfer, 33 for prosecution and 45 for continued detention.⁴⁸

⁴² Denbeaux, Prof. Mark, Denbeaux, Joshua, Esq., "Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data", Seson Hall University School of Law. URL: http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf, last accessed May 7, 2014.

⁴³ Ibid.

⁴⁴ Ibid, pg. 9.

⁴⁵ Detainees were also considered a member of a terrorist organization even if they were unwilling to be one, and had never sworn an oath or undergone training with the organization, ie, if a person ever spoke to an al Qaeda member. See Denbeaux, pg. 9, 10.

⁴⁶ Denbeaux, Prof. Mark, Denbeaux, Joshua, Esq., "Report on Guantanamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data", Seson Hall University School of Law, pg. 18. URL: http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf, last accessed May 7, 2014. The Combatant Status Review Board's list of 72 organizations which is used to determine enemy combatant status does not match with the Terrorist Organization Reference Guide used by the U.S. Department of State, the U.S. Department of Homeland Security, and the U.S. Customs and Border Protection and the U.S. Department of Border Patrol. The CSRB are the military tribunals which determine whether detainees are enemy combatants, and the organizations listed by the Board as terrorist organizations are used to evidence links between the detainees and al Qaeda or the Taliban.

⁴⁷ United States Department of Defense, Combatant Status Review Tribunals, Administrative Review Board, Combatant Status Review Tribunal Summary, Feb. 10, 2009. URL: <http://www.defense.gov/news/csrtsummary.pdf>, last accessed May 7, 2014.

⁴⁸ Ibid.

The Obama administration has established an interagency Periodic Review Board similar to that of the Bush administration to assess the continuing threat posed by each detainee. While it does not determine the legality of any individual's detention under the AUMF, it does consider their security threat. Unlike the Review Board in the Bush administration, the current board, consisting of senior US government officials, meets only every three years.⁴⁹

The Way Forward

While the review boards can provide guidance on those detainees who no longer pose a security threat, the U.S. Congress has begun to put measures in place so that the detention scandal can start to be a thing of the past. While the articles allowing indefinite executive detention in the NDAA 2012 and the AUMF still stand, on Dec. 16, 2013, President Obama signed Congress' 2014 NDAA which made it easier for detainees to be sent to their home countries or to third parties willing to accept them. This is a good step in the right direction.⁵⁰

As Commander In Chief, President Obama can declare an official end to hostilities. He has said that "this war must end", and that he will partner with Congress to repeal the AUMF mandate.⁵¹ The ruling in *Ali* and the silence of the Supreme Court in *Hedges v. Obama* has done the opposite by reiterating that the AUMF has no time limit. Now is the time for the President to work with Congress to repeal it, and its companion article on indefinite detention in the 2012 NDAA. The laws were important in aiding the President in capturing and killing Osama bin Laden, and in capturing dangerous terrorists linked to the attacks of September 11, 2001. However, the President and Congress must recognize that their purpose and power was specific, not indefinite. They should not be used timelessly to detain anyone anywhere in the world without charge or trial.

The President and the military should be given the power to quickly detain terrorists who pose a real threat to our nation. Yet in the name of the thousands of innocent men, women and children who have served time in U.S. detention over the last decade in the name of the war on terror, and for many more who could be detained in a war that has no foreseeable end, there should be limits to that power. The U.S. military urgently needs to focus on the next chapter of priority national security issues, where the money invested sees returns.

The Supreme Court lost a historical chance in *Hedges v. Obama* to set the record straight and to ensure that there is no more legal grey zone for detainees. Its silence allowed *Korematsu* to stay on the books, giving the NDAA law and the AUMF the continued ability to flex their authority over the lives of citizens, Americans and foreign, unless Congress or the President intervene. The U.S. must set limitations to indefinite detentions, for the sake of its own security, America's world leadership in freedom and rule of law, and for the sake of keeping strong relationships with partners in fighting terrorism in the years to come.

⁴⁹ U.S. Department of Defense, Periodic Review Secretariat, Periodic Review Board. URL: <http://www.prs.mil/AboutthePRB.aspx>, last visited 2 May 2014.

⁵⁰ National Defense Authorization Act for Fiscal Year 2014, Public Law 113-66, Sec. 1035 and 1036, Dec. 26, 2013.

⁵¹ Obama, President Barack, "The Future of Our Fight Against Terrorism," National Defense University, May 23, 2013. URL: /2013/05/text-of-the-presidents-speech-this-afternoon/#.UsaLZOIsazE, last accessed Jan. 3, 2014.

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