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An Elucidating Response to Erroneous Outrage: Why Continued Law of War Detention under Executive Order 13,567 Is Legal

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AN ELUCIDATING RESPONSE TO ERRONEOUS OUTRAGE: WHY CONTINUED LAW OF WAR DETENTION UNDER EXECUTIVE ORDER 13,567 IS LEGAL

Jenny Liabenow

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*"[W]ar captivity is neither revenge nor punishment, but solely protective custody."*¹

I. INTRODUCTION

On March 7, 2011, President Barack Obama signed Executive Order 13,567 to establish a process for the periodic review of the detention status of detainees held at Guantanamo Bay Naval Station in Cuba.² The Order applies to detainees being held in continued law of war detention, and it defines the standard for such detention.³ The American Civil Liberties Union (ACLU) has expressed outrage over the Order's standard for continued law of war detention, exclaiming that it "institutionalizes [unlawful] indefinite detention,"⁴ and several media outlets⁵ and scholars⁶ have agreed. This paper presents a straightforward response to these claims in defense of the legality of the Executive Order's standard for continued law of war detention. This paper will show the inaccuracy of these claims by explaining how the Order creates a higher legal standard for detention than is required by the laws of war and the 2001 Authorization for Use of Military Force (AUMF).

As a preliminary matter, it is important to note that this paper is narrowly focused on the issue of the Order's standard for continued law of war detention. It does not address other legal issues raised by other provisions in the Order. For example, the Order applies to two

1. Decision of Nuremberg Military Tribunal, reprinted in 41 AM. J. INT'L L. 172, 229 (1947).

2. Exec. Order No. 13,567, 76 Fed. Reg. 13,277.

3. *Id.*

4. American Civil Liberties Union, *President Obama Issues Executive Order Institutionalizing Indefinite Detention* (Mar. 7, 2011), <http://www.aclu.org/print/national-security/president-obama-issues-executive-order-institutionalizing-indefinite-detention>. See also American Civil Liberties Union, *Illegal Detentions in the "War on Terror,"* <http://www.aclu.org/indefinitedetention/> (last visited Dec. 14, 2011).

5. See, e.g., Peter Finn & Anne E. Kornblut, *Obama Creates Indefinite Detention System for Prisoners at Guantanamo Bay*, WASH. POST, Mar. 8, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/07/AR2011030704890.html> (Executive Order 13,567 creates a "formal system of indefinite detention"); Jim E. Lavine, *Unconstitutional Polices Coming Around Again*, THE CHAMPION (Mar. 2011), at 5, available at <http://www.nacdl.org/Champion.aspx?id=15992> (Executive Order 13,567 "institutionaliz[es] a regime of indefinite detention for detainees"); *Military Documents Detail Life At Guantanamo*, NPR (Apr. 25, 2011), <http://www.npr.org/2011/04/25/135690218/military-documents-detail-life-at-guantanamo> ("[T]he executive order . . . essentially codifies indefinite detention, though the administration was careful not to use that language.").

6. See, e.g., Laurie R. Blank, *A Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS L. REV. 1169, 1169 (2011) (noting that Executive Order 13,567 provides for indefinite detention of Guantanamo detainees).

categories of detainees at Guantanamo,⁷ but this paper only addresses its legality as applied to those detainees who have been designated for continued law of war detention. It does not address the legality of the Order as applied to detainees who have been referred for prosecution, or who are awaiting transfer or release to a foreign country. In addition, the Order describes procedures for the periodic review of the detainees' detention status, but this paper does not address whether the procedures are legally sufficient. Finally, this paper does not examine the President's authority to issue the Order. While these issues are certainly worthy of examination, they are outside the scope of this paper.

This paper defends the legality of Executive Order 13,567's standard for continued law of war detention in four sections. Part I provides background information about the Guantanamo detainees to whom the Order applies and parses out the applicable language of the Order. Part II discusses the President's authority for detaining individuals in continued law of war detention under both the laws of war and the AUMF. Part III addresses the duration requirement for continued law of war detention under the laws of war and the AUMF. Part IV analyzes the legality of the Order's standard by applying the legal standards of the laws of war and the AUMF. It argues that the Order's detention standard is lawful because it is narrowly tailored, stricter than the laws of war and the AUMF, and limits the scope of the President's detention power.

II. BACKGROUND

A. *Guantanamo Detainees in Continued Law of War Detention*

On September 11, 2001, al-Qaeda terrorists hijacked several commercial airplanes in a massive and unprecedented attack on the United States that killed approximately 3,000 people.⁸ The following week, Congress passed the AUMF, which authorized the President to take military action against those responsible for the terrorist attacks.⁹ Shortly thereafter, U.S. Armed Forces entered Afghanistan under the direction of President George W. Bush "with a mission to

7. Exec. Order No. 13,567, 76 Fed. Reg. at 13,277 (This order "applies only to those detainees held at Guantanamo [as of March 7, 2011] . . . (i) designated for continued law of war detention; or (ii) referred for prosecution, except those detainees against whom charges are pending or a judgment of conviction has been entered.").

8. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (O'Connor, J., plurality).

9. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF].

subdue al-Qaeda and quell the Taliban regime that was known to support it.”¹⁰

Between 2002 and 2008, President Bush directed the capture of 779 suspected al-Qaeda terrorists and had them transferred to Guantanamo for detention.¹¹ While most of these detainees have since been transferred to foreign countries for detention or release, some still remain at Guantanamo.¹² The detainees remaining at Guantanamo fit into one of three categories:

- (1) Those who have been detained in order to prevent their return to the battlefield, i.e. non-penal, preventative detention or continued law of war detention;¹³
- (2) Those who have been detained to prevent their return to the battlefield and have criminal charges pending against them or have been referred for prosecution;¹⁴ or
- (3) Those who are awaiting release or transfer to a foreign country.¹⁵

There are currently 171 detainees at Guantanamo,¹⁶ and 48 of them fall into the first category—continued law of war detention.¹⁷ These 48 detainees were designated for continued law of war detention as a result of a comprehensive interagency review of the status of all Guantanamo detainees mandated by Executive Order 13,492.¹⁸ The final report of the interagency review, issued on January 22, 2010, revealed that “48 detainees were determined to be too dangerous to transfer but not feasible for prosecution.”¹⁹ The report concluded that those 48 detainees were to “remain in detention [at Guantanamo] pursuant to the government’s authority under the [AUMF].”²⁰

10. *Hamdi*, 542 U.S. at 510.

11. *Id.* See Dep’t of Justice, FINAL REPORT: GUANTANAMO REVIEW TASK FORCE 1 (2010), available at <http://justice.gov/ag/guantanamo-review-final-report.pdf> (632 detainees were brought to Guantanamo in 2002; 117 in 2003; 10 in 2004; 14 in 2005; five in 2007; and one in 2008).

12. MICHAEL JOHN GARCIA ET AL., CONG. RESEARCH SERV., R 40139, CLOSING THE GUANTANAMO DETENTION CENTER: LEGAL ISSUES 1 (2011), available at <http://www.fas.org/sgp/crs/natsec/R40139.pdf>.

13. *Id.* at 1-2

14. *Id.*

15. Andrei Scheinkman et al., *The Guantanamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/> (last visited Nov. 26, 2011).

16. GUANTANAMO REVIEW TASK FORCE, *supra* note 11, at 10.

17. *Id.* at 12.

18. Exec. Order No. 13,492, 74 Fed. Reg. 4,897, 4,898 (Jan. 27, 2009).

19. GUANTANAMO REVIEW TASK FORCE, *supra* note 11, at ii.

20. *Id.*

B. Executive Order 13,567

President Obama responded to the interagency review's final report on March 7, 2011 by issuing Executive Order 13,567.²¹ The Order was issued "to ensure that military detention of individuals . . . [at Guantanamo], who were subject to the interagency review . . . of Executive Order 13492 . . . continues to be carefully evaluated and justified, consistent with the national security and foreign policy interests of the United States and the interests of justice."²² The Order's purpose was to establish a process for the periodic review of the detention status of those persons designated for continued law of war detention.²³

The Order defines "law of war detention" as "detention authorized by the Congress under the AUMF, as informed by the laws of war."²⁴ It requires a Periodic Review Board (PRB) to review a detainee's detention status every four years to determine whether continued law of war detention is warranted.²⁵ If the PRB determines that detention of a detainee "is necessary to protect against a significant threat to the security of the United States," then the Order mandates that the detainee is to remain in continued law of war detention.²⁶ The Order specifically states that "[i]t does not create any additional or separate source of detention authority," or "affect the scope of detention authority under existing law."²⁷ It also expressly recognizes that Guantanamo detainees have the "constitutional privilege of the writ of habeas corpus," and it does not "affect the jurisdiction of Federal courts to determine the legality of their detention."²⁸

21. Exec. Order No. 13,567, 76 Fed. Reg. at 13,277.

22. *Id.*

23. GARCIA ET AL., *supra* note 12, at 6. While the Order also applies to detainees referred for prosecution, except those detainees against whom charges are pending or a judgment of conviction has been entered, this paper does not address the legality of continued detention as applied to those detainees.

24. Exec. Order No. 13,567, 76 Fed. Reg. at 13,280.

25. *Id.* at 13,279.

26. *Id.* at 13,277.

27. *Id.*

28. *Id.*

III. AUTHORITY TO DETAIN FOR CONTINUED LAW OF WAR DETENTION²⁹

The laws of war have long-established that nations engaged in hostilities may lawfully detain members of the enemy's fighting force in non-penal, continued law of war detention, without charge or trial, in order to prevent their return to the battlefield.³⁰ This authority even extends to civilians to the extent necessary for reasons of security.³¹ Similarly, according to the U.S. Supreme Court, the President may detain terrorist enemy combatants (or belligerents)³² in continued law of war detention, without charge or trial, pursuant to Congressional authorization in the AUMF.³³ Thus, the President may lawfully capture and detain enemy combatants engaged in hostilities against the United States in continued law of war detention at Guantanamo, without charge or trial.³⁴

29. The author of this paper recognizes that there is an argument that the President may have inherent war powers, as Commander in Chief, to detain enemy belligerents during wartime hostilities, even absent Congressional authorization. See *Hamdi*, 542 U.S. at 516. However, it is unnecessary to examine the extent of this Presidential power because Congress granted the President this detention authority in the 2001 AUMF. See *id.* at 521 (O'Connor, J., plurality opinion), 587 (Thomas, J., dissenting). Moreover, President Obama cited the AUMF as his authority for enacting Executive Order 13,567, and it is widely recognized that "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (Jackson, J., concurring). See also Duncan, John C., Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 Vt. L. Rev. 333, 369 (2010) (noting that when the President issues an Executive Order with the backing of Congress, "such action is well within the President's universally recognized power"). Accordingly, this paper only addresses the President's detention authority over enemy belligerents under the laws of war and the 2001 AUMF, not his authority to issue the Executive Order.

30. See *infra* Part. II.A.

31. *Id.*

32. The Bush Administration used the phrase "enemy combatant," in defending these cases before the federal courts, but the Obama Administration uses the phrase "enemy belligerent" instead. However, both phrases identify the same class of persons—those participating in hostilities against the United States. See Harold Hongju Koh, Keynote Address at the Annual Meeting of the American Society of International Law in Washington D.C.: THE OBAMA ADMINISTRATION AND INTERNATIONAL LAW (Mar. 25, 2010), available at <http://www.state.gov/s//releases/remarks/139119.htm>; GARCIA ET AL., *supra* note 12, at 1.

33. See *infra* Part II.B.

34. See *infra* Part II.A-B.

A. *The Laws of War*

The laws of war, also known as the law of armed conflict or humanitarian law,³⁵ represent a subset of international law.³⁶ They reflect hundreds of years of evolving efforts by nations to reduce the devastating effects of war on humanity.³⁷ Recognizing that it is unlikely that warfare itself can ever be completely eliminated, nations have agreed to conduct themselves in accordance with the laws of war in exchange for their enemies doing the same.³⁸ The laws of war can be thought of as the *jus in bello* just war theory—the law governing conduct during war.³⁹

The laws of war can be broken down into two branches, one that governs the rules of engagements during hostilities and one that concerns the treatment of human beings during hostilities.⁴⁰ The detention of individuals during hostilities is properly analyzed under the human rights branch.⁴¹ However, the humanitarian rules specific to detention vary according to whether the armed conflict is classified as “international” or “non-international,”⁴² and there is general disagreement about the proper classification of the war on terror.⁴³ Yet, for the purpose of analyzing the continued law of war detention standard in Executive Order 13,567, the characterization of the war on terror conflict is immaterial because the Order’s detention standard is lawful even if the detainees are afforded the fullest extent of human rights protections available under the laws of war.⁴⁴ As such, this paper ana-

35. JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL 31367, TREATMENT OF “BATTLEFIELD DETAINEES” IN THE WAR ON TERRORISM 10 (2007), available at <http://www.fas.org/sgp/crs/terror/RL31367.pdf>. See also Int’l Comm. of the Red Cross, *War and International Humanitarian Law* (Oct. 2010), <http://www.icrc.org/eng/war-and-law/overview-war-and-law.htm>.

36. Int’l Comm. of the Red Cross, *supra* note 35.

37. *Id.*

38. *Id.*

39. ELSEA, TREATMENT OF “BATTLEFIELD DETAINEES,” *supra* note 35, at 11.

40. *Id.* at 10-11 (“The older of the two branches, known as ‘Hague law’ after the Hague Conventions of 1899 and 1907, prescribes the rules of engagement during combat and is based on the key principles of military necessity and proportionality. The humanitarian side of the law, known as ‘Geneva law,’ emphasizes human rights and responsibilities, including the humane and just treatment of prisoners.”) (citations omitted).

41. *See id.*

42. *Id.* at 12.

43. *Id.* at 13-15 (explaining the competing scholarly theories regarding the characterization of the armed conflict between the United States and the Taliban and al Qaeda).

44. *See id.* at 12-13 (noting that the full protections of the Geneva Conventions apply to international conflicts).

lyzes the Order's standard under the complete protections of the laws of war—those that apply to international conflicts.

Continued law of war detention has long been a legal practice during armed conflict under the laws of war.⁴⁵ Detention during war is recognized by "universal agreement and practice" as an "important incident of war."⁴⁶ The primary purpose of law of war detention is to prevent enemy combatants "from returning to the field of battle and taking up arms once again."⁴⁷ However, it may also be used for non-fighters, i.e. civilians or non-combatants, if necessary to protect against a serious breach of security.⁴⁸

The Third Geneva Convention, one of the treaties codifying the laws of war,⁴⁹ allows nations to capture enemy combatants and detain them as prisoners of war (POWs) in continued law of war detention in order to prevent them from rejoining the enemy in battle.⁵⁰ This Convention does not require the detaining nation to bring charges against the POWs during their continued law of war detention because the detention is not penal in nature, only preventative.⁵¹ It is not designed to punish POWs for their participation in hostilities, but to "remove them from the battlefield."⁵²

Similarly, the Fourth Geneva Convention allows for continued law of war detention of civilians if "absolutely necessary"⁵³ or for "imperative reasons of security."⁵⁴ While the interning nation must have serious reasons for believing that the civilians will "cause disturbances, or . . . seriously prejudice its security,"⁵⁵ the Convention clearly contemplates the possibility of continued law of war detention of civilians in these instances. For instance, after the United States invaded

45. See Blank, *supra* note 6, at 1183.

46. *Id.* See also Decision of Nuremberg, *supra* note 1; W. Winthrop, *Military Law & Precedents* 788 (rev.2d ed. 1920) ("It is now recognized that . . . '[a] prisoner of war is no convict; his imprisonment is a simple war measure.'" (citations omitted)); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) ("The object of capture is to prevent the captured individual from serving the enemy.").

47. *Hamdi*, 542 U.S. at 518 (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

48. Blank, *supra* note 6, at 1183.

49. Int'l Comm. of the Red Cross, *supra* note 35.

50. Blank, *supra* note 6, at 1184.

51. Blank, *supra* note 6, at 1184 (quoting Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 42, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]).

52. *Id.* at 1186.

53. *Id.* (quoting Fourth Geneva Convention, *supra* note 48, art. 78).

54. *Id.* at 1186.

55. *Id.* (quoting Int'l Comm. Red Cross, *Commentary on the Geneva Convention (IV) Relative to the Protection of Civilian Person in Time of War*, art. 42, P 1 (1958)).

Iraq in 2003, the United Nations Security Council passed a resolution allowing for the internment of civilians by coalition forces if “necessary for imperative reasons of security.”⁵⁶ Like the Third Geneva Convention, the Fourth Geneva Convention does not require the detaining nation to bring charges against the civilians in order to hold them for continued detention.⁵⁷ This is because the purpose of this detention is not to punish the civilians for their conduct, but to protect the intern- ing nation’s security.⁵⁸

In sum, the laws of war clearly permit continued law of war detention of both enemy combatants and civilians. They also permit this detention to continue in the absence of charges or trial by a tribu- nal.⁵⁹ By not requiring detention to be accompanied by a cumbersome judicial process, the laws of war make it easier for nations to comply with the *jus in bello* principle of proportionality, which requires na- tions to use the least amount of force necessary to accomplish their objectives.⁶⁰

B. 2001 Authorization for Use of Military Force

Following the September 11, 2001 terrorist attacks, a nearly unanimous Congress approved the 2001 AUMF.⁶¹ The AUMF granted the President the authority to use all *necessary and appropriate force* against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that oc- curred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁶² While there is no express language in the AUMF allowing for deten- tion, the U.S. Supreme Court and other federal courts have interpreted the “necessary and appropriate force” language as granting the Presi- dent the authority to detain both citizens and aliens fighting against

56. *Id.* (quoting S.C. Res. 1546, P 10, U.N. Doc. S/RES/1546, Annex 11 (June 8, 2004)).

57. *Id.* at 1170.

58. *Id.* at 1186.

59. *See* Blank, *supra* note 6, at 1170, 1184.

60. Jasmine Moussa, *Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law*, 90 INT’L REV. RED CROSS 872, 976 (2008) (noting that the principle of proportionality encompasses the “fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy”).

61. Jay M. Zitter, Annotation, *Construction and Application of Authorization for Use of Military Force*, 16 A.L.R. FED. 2d 333 (2011).

62. *Id.* (quoting AUMF, *supra* note 9) (emphasis added).

the United States.⁶³ These Courts have approved such a reading of the AUMF by recognizing that detention is one of the most fundamental and acknowledged incidents of war.⁶⁴

In *Hamdi v. Rumsfeld*, the U.S. Supreme Court upheld the AUMF as a grant of authority authorizing the President to place captured enemy combatants in continued law of war detention.⁶⁵ Although a plurality opinion resulted, a majority of the Court was in agreement that the AUMF's "grant of authority for the use of 'necessary and appropriate force'" granted the President "the authority to detain" both U.S. citizens and aliens properly classified as enemy combatants.⁶⁶ The Court reasoned that its understanding of the AUMF's grant of detention authority was "based on longstanding law-of-war principles"⁶⁷ that allowed for such detention to "prevent captured individuals from returning to the field of battle."⁶⁸

Importantly, the plurality in *Hamdi* examined the President's detention authority under the AUMF as applied to enemy combatants—not civilians, since that was all that was necessary to decide the case. This narrow ruling, however, certainly does not foreclose the possibility that the AUMF also permits the President to detain civilians, or non-combatants, since such detention is permitted under longstanding law-of-war principles,⁶⁹ just like the detention of enemy combatants.⁷⁰ Therefore, while the AUMF's "necessary and appropriate force" language clearly allows the President to detain enemy combatants,⁷¹ it may also allow him to detain non-combatants to the extent permitted under the laws of war.

IV. DURATION OF CONTINUED LAW OF WAR DETENTION

The laws of war expressly require the release of enemy combatants from law of war detention upon the "cessation of active

63. *Id.*

64. *Id.*

65. JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R 41156, JUDICIAL ACTIVITY CONCERNING ENEMY COMBATANT DETAINEES: MAJOR COURT RULINGS 2 (2011), available at <http://www.fas.org/sgp/crs/natsec/R41156.pdf> (citing *Hamdi*, 542 U.S. 507).

66. *Hamdi*, 542 U.S. at 521 (O'Connor, J., plurality opinion), 587 (Thomas, J., dissenting). See also *Boumediene v. Bush*, 553 U.S. 723, 733 (2008).

67. *Hamdi*, 542 U.S. at 521.

68. *Id.* at 518.

69. See Fourth Geneva Convention, *supra* note 48, art. 42.

70. See *Hamdi*, 542 U.S. at 520-21.

71. See ELSEA, MAJOR COURT RULINGS, *supra* note 65.

hostilities.”⁷² While there is no clear or consistent interpretation of that phrase, the consistent theme among all interpretations is that the requirement for release is not triggered until fighting forces have left the battlefield.⁷³ Similarly, the U.S. Supreme Court has held that the AUMF grants the President authority to keep enemy combatants in law of war detention until active combat operations cease.⁷⁴ Therefore, in accordance with the laws of war and the AUMF, the President may lawfully detain enemy combatants in continued law of war detention at Guantanamo for as long as U.S. combat operations persist against the Taliban and al-Qaeda.

A. *The Laws of War*

1. Release Requirement for Prisoners of War

Continued law of war detention for the duration of an armed conflict is a fundamental and accepted principle under the laws of war.⁷⁵ Since the primary purpose of such detention is to prevent the enemy fighter from returning to the battlefield,⁷⁶ it logically follows that the fighter need not be released and repatriated until the battle is over.⁷⁷ The Third Geneva Convention requires the law of war detention of POWs to cease when no longer necessary.⁷⁸ Specifically, it requires their release and repatriation “without delay at the cessation of *active hostilities*.”⁷⁹ A few federal courts have been faced with the issue of determining the meaning of the phrase “active hostilities,” and the resulting case law reveals an unclear and inconsistent definition.

In *In re Territo*,⁸⁰ the Ninth Circuit suggested that the Third Geneva Convention’s requirement for the release and repatriation of POWs is not automatic after the fighting is over.⁸¹ In that case, a World War II Italian prisoner argued that the U.S. Army was required to release and repatriate him because hostilities between the United

72. See *infra* Parts III.A., III.B.

73. See *infra* Part III.A.

74. See *infra* Part III.C.

75. *Hamdi*, 542 U.S. at 518.

76. *Id.*

77. Blank, *supra* note 6, at 1179 (quoting Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 118 (entered into force Oct. 21, 1950) [hereinafter Third Geneva Convention]).

78. ELSEA, TREATMENT OF “BATTLEFIELD DETAINEES,” *supra* note 35, at 49 (quoting Third Geneva Convention, *supra* note 72, art. 21).

79. *Id.* (quoting Third Geneva Convention, *supra* note 72, art. 118) (emphasis added).

80. 156 F.2d 142 (9th Cir. 1946).

81. ELSEA, TREATMENT OF “BATTLEFIELD DETAINEES,” *supra* note 35, at 49.

States and Italy had ceased.⁸² While acknowledging that Italy had in fact left the axis powers and rejoined the war on the side of the allied powers, the Court summarily rejected the prisoner's argument because the United States and Italy had not yet negotiated a peace treaty.⁸³ In essence, the Court was of the view that repatriation under the Third Geneva Convention is only required after there has been an express agreement between the parties acknowledging the cessation of hostilities.⁸⁴ This interpretation has been recognized as consistent with international state practice.⁸⁵

In *Hamdi v. Rumsfeld*, the U.S. Supreme Court interpreted the collective body of the laws of war, which includes the Third Geneva Convention, as allowing for the detention of enemy combatants only for the "duration of the particular *conflict* in which they were captured."⁸⁶ While the Court did not specify what constitutes the end of a "conflict," it seemed to imply that the repatriation requirement is triggered once the battlefield has been abandoned so that there is no opportunity for the repatriated enemy fighter to take up arms again.⁸⁷ At first glance, this interpretation seems to be of the view that the release and repatriation requirement of POWs is self-executing as soon as the battlefield has been cleared, unlike the Ninth Circuit's holding in *In re Territo*.⁸⁸ However, whether this was in fact the view of the *Hamdi* Court is highly questionable because the *Hamdi* Court quoted *In re Territo* for support of its interpretation.⁸⁹ Therefore, the U.S. Supreme Court's interpretation of the Third Geneva Convention's release and repatriation requirement is uncertain at best and of little help to resolving the issue of when POWs must be released from law of war detention.

Most recently, in *Al-Bihani v. Obama*, the District of Columbia Court of Appeals rejected a Guantanamo detainee's argument that his release was required because the United States' conflict with the Taliban had ended.⁹⁰ While the Court doubted the factual accuracy of

82. *In re Territo*, 156 F.2d at 147.

83. *Id.*

84. ELSEA, TREATMENT OF "BATTLEFIELD DETAINEES," *supra* note 35, at 49.

85. *Id.* (citing DOCUMENTS ON PRISONERS OF WAR, document no. 160, at 796 (U.S. Naval War College 1979) (noting that it took nearly two years after hostilities between Pakistan and India ended in 1971 before Pakistani prisoners of war were repatriated).

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

87. *Id.* (noting that "the purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again").

88. *See In re Territo*, 156 F.2d at 147.

89. *But see Basardh v. Obama*, 612 F. Supp. 2d 30, 34 n.10 (D.C. Cir. 2009) (noting that the *Hamdi* Court only cited the provision in *Territo* recognizing the limited purpose for detention, which was to prevent a prisoner from returning to the battlefield).

90. 590 F.3d 866, 874 (D.C. Cir. 2010).

this argument, it also rejected it on practical grounds, noting that there were still over 70,000 Coalition troops on the ground in Afghanistan, with tens of thousands more expected.⁹¹ The Court reasoned that the Third Geneva Convention's use of the phrase "active hostilities" in the release and repatriation requirement served to "distinguish the physical violence of war from the official beginning and end of a conflict."⁹² The Court stated that this phrase meant that the release of POWs is required "when the fighting stops."⁹³ By recognizing that coalition ground troops were still present in Afghanistan in rejecting the detainee's argument, the Court seemed to espouse the view that release of POWs is only required once the interning nation has withdrawn its fighting forces from the battlefield.⁹⁴ However, the Court ultimately refused to rest its holding on this ground, instead the Court determined that the issue of when hostilities have ceased is a non-justiciable "political decision" best left to the "Executive's opinion on the matter."⁹⁵

In sum, *In re Territo* suggests that the Third Geneva Convention does not require the release of POWs absent a formal agreement between the parties, even when the interning nation's enemy is no longer a belligerent nation.⁹⁶ While the view of the *Hamdi* Court on this issue is unclear, it is significant that the Court did not expressly reject or clarify the Ninth Circuit's *In re Territo* interpretation.⁹⁷ Although *Al-Bihani* recognized that release is not required so long as there are troops on the battlefield, it ultimately concluded that the repatriation requirement could only be triggered by a determination from the President that hostilities have ceased.⁹⁸ While these cases do not reveal a consistent definition, the one consistent principle among them is that the laws of war permit law of war detention for at least as long as combat forces are on the battlefield.

91. *Id.*

92. *Id.*

93. *Id.*

94. *See id.*

95. *Id.* (citing *Ludecke v. Watkins*, 335 U.S. 160, 168-70 & n.13 (1948) ("[T]ermination [of a state of war] is a political act.")).

96. *See In re Territo*, 156 F.2d at 147.

97. *See Hamdi*, 542 U.S. at 518.

98. *See Al-Bihani*, 590 F.3d at 874.

i. Release Requirement for Civilians and Other Non-Combatants

The Fourth Geneva Convention governs the duration of the law of war detention of civilians and other non-combatants.⁹⁹ Such detention is permitted so long as the detaining nation seriously believes that such detention is “absolutely necessary,”¹⁰⁰ or “imperative [for] reasons of security.”¹⁰¹ If either determination is made, the detained individuals do not need to be released until “the reasons which necessitated [their] internment no longer exist,”¹⁰² which should occur “as soon as possible after the close of hostilities.”¹⁰³ However, in practical application, “as soon as possible” has sometimes been effectuated years after the cessation of hostilities and signing of peace treaties.¹⁰⁴

For example, from 1998 until 2000, an international armed conflict existed between Ethiopia and Eritrea.¹⁰⁵ The last 95 civilian internees held by the Ethiopian government were not repatriated to Eritrea until nearly two years after the parties signed a peace agreement.¹⁰⁶ The peace agreement referenced the Fourth Geneva Convention’s requirement that all civilian internees had to be repatriated without delay after the end of hostilities.¹⁰⁷ The International Committee of the Red Cross (ICRC) praised Ethiopia’s repatriation of the civilians, noting that the repatriation was done in accordance with the requirements of the Geneva Conventions.¹⁰⁸ Therefore, while the Fourth Geneva Convention requires civilians to be released “as soon as possible after the close of hostilities,”¹⁰⁹ the ICRC has recognized that

99. See Int’l Comm. of the Red Cross, *Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949: Commentary*, <http://www.icrc.org/ihl.nsf/COM/380-600007?OpenDocument>.

100. Fourth Geneva Convention, *supra* note 89, art. 42.

101. *Id.* art. 78.

102. ELSEA, TREATMENT OF “BATTLEFIELD DETAINEES,” *supra* note 35, at 49 (citing Fourth Geneva Convention, *supra* note 48, art. 132).

103. *Id.* (citing Fourth Geneva Convention, *supra* note 49, art. 133).

104. See *infra* notes 105-108 and accompanying text.

105. *Facts and Figures: Eritrea 2008*, INT’L COMM. OF THE RED CROSS NEWSLETTER, at 1, available at <http://www.icrc.org/eng/assets/files/other/eritrea-newsletter-2008-icrc.pdf>.

106. Int’l Comm. of the Red Cross, *Ethiopia: Release of last prisoners of war and civilian internees visited by the ICRC in connection with the conflict between Ethiopia and Eritrea* (Nov. 29, 2002), available at <http://www.icrc.org/eng/resources/documents/misc/5gccla.htm> (last updated Nov. 29, 2002).

107. *Id.*

108. *Id.*

109. ELSEA, TREATMENT OF “BATTLEFIELD DETAINEES,” *supra* note 35, at 49 (citing Fourth Geneva Convention, *supra* note 49, art. 133).

this provision can be lawfully complied with even when done years after the signing of a formal peace agreement.¹¹⁰

The repatriation requirement for non-combatant detainees, similar to the provision covering POWs, makes reference to the end of hostilities as its triggering requirement.¹¹¹ However, the custom among nations reveals that this provision can be complied with years after hostilities have formally ended if done in good faith.¹¹² Thus, the repatriation requirement of the Fourth Geneva Convention does not need to be immediately complied with after the end of hostilities in order to prevent a violation of the laws of war. Rather, the requirement can be fulfilled after formal hostilities have ceased so long as the repatriating nation has made a good-faith effort under the circumstances to comply with the provision.

B. 2001 Authorization for Use of Military Force

1. Federal Jurisprudence

As discussed in Part II.B., a majority of the Court in *Hamdi v. Rumsfeld* concluded that the AUMF's "necessary and appropriate force" language grants the President the power to utilize law of war detention.¹¹³ However, the *Hamdi* Court was less precise in describing the duration of the President's detention power under the AUMF.¹¹⁴ The District of Columbia Court of Appeals concluded that the *Hamdi* Court understood the AUMF as allowing the President to use continued law of war detention until hostilities have ceased, and not merely until the detained individuals cease to pose a threat to U.S. interests.¹¹⁵

In *Hamdi*, a majority of the Court agreed that the AUMF granted the President the authority to detain for at least as long as "United States troops are still involved in active combat in Afghanistan."¹¹⁶ Justice Thomas was the fifth Justice to comprise the

110. See Int'l Comm. of the Red Cross, *supra* note 105.

111. ELSEA, TREATMENT OF "BATTLEFIELD DETAINEES," *supra* note 35, at 49 (citing Fourth Geneva Convention, *supra* note 49, art. 133).

112. See Int'l Comm. of the Red Cross, *supra* note 105.

113. See *supra* text accompanying notes 56-63.

114. See *Hamdi*, 542 U.S. at 509 (since *Hamdi* only challenged the government's legal authority to detain him and not the duration of his detention, the Court did not address the issue of whether there are any durational limitations on the government's detention power.)

115. See *infra* notes 108-111 and accompanying text.

116. *Hamdi*, 542 U.S. at 521 (O'Connor, J., plurality opinion), 587-88 (Thomas, J., dissenting).

majority's conclusion on this point, although he did so in his dissenting opinion of the case.¹¹⁷ Justice Thomas opined that the President's detention power was actually broader than that suggested by the plurality and not limited by the end of "active combat in Afghanistan" or "the cessation of formal hostilities."¹¹⁸ However, this broad view has not garnered approval from a majority of the Court.¹¹⁹ To date, a majority of the Court has only gone so far as recognizing the AUMF's authorization for the President to detain individuals "for the duration of the particular conflict in which they were captured."¹²⁰

In April of 2009, District Court Judge Huvelle decided *Basardh v. Obama* and held that the President's power to detain enemy combatants in continued law of war detention under the AUMF depended on the likelihood of the detainee rejoining the enemy if released.¹²¹ Judge Huvelle stated that *Hamdi's* interpretation of the AUMF meant that the President was limited to detaining only those individuals who would resume fighting on the battlefield if released.¹²² Judge Huvelle reasoned that this limited interpretation meant that the President could not detain an enemy combatant if there was no real threat that he would return to the battlefield and fight for the enemy.¹²³ Accordingly, Judge Huvelle stated that the President had the burden of proving that a detainee presented a threat of returning to the battlefield in order to justify his continued law of war detention under the AUMF.¹²⁴ Judge Huvelle held that the President did not have the authority to continue the detention of the petitioner detainee because it was undisputed that the detainee had severed all of his ties with the enemy and presented no real threat of rejoining the battle.¹²⁵

The following year, the District of Columbia Court of Appeals decided *Awad v. Obama* and implicitly rejected *Basardh's* conclusion that the AUMF requires the President to prove that a detainee poses a threat of rejoining the battlefield in order to continue his law of war detention.¹²⁶ The *Awad* Court stated that its decision in *Al-Bihani*¹²⁷

117. *Hamdi*, 542 U.S. at 588 (Thomas, J., dissenting).

118. *Id.* (citing *Madsen v. Kinsella*, 343 U.S. 341, 360 (1952); *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950)).

119. *Boumediene*, 553 U.S. at 733.

120. *Id.*

121. 612 F. Supp. 2d at 35.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. 608 F.3d 1, 11 (D.C. Cir. 2010).

127. *Id.* See *supra* text accompanying notes 84-88.

“ma[d]e plain that the United States’[] authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities.”¹²⁸ The Court declared that the issue of “whether a detainee would pose a threat to U.S. interests if released is not an issue . . . concerning aliens detained under the authority conferred by the AUMF.”¹²⁹

Thus, the current interpretation of the President’s detention authority under the AUMF is that he may continue law of war detention of enemy combatants until hostilities have ceased.¹³⁰ The AUMF does not require the President to determine whether or not these detainees pose a threat to U.S. interests in order for him to continue their detention.¹³¹ Rather, the AUMF allows the President to detain captured enemy combatants until the end of hostilities, even if there is conclusive evidence showing that the detainees will not return to the battlefield if released.¹³²

2. The President’s View

Consistent with the former Bush Administration, the current Obama Administration is of the view that the AUMF is Congressional approval for the President to utilize continued law of war detention for the duration of the current conflict.¹³³ However, the Bush Administration espoused the view that the President’s detention power existed even without the AUMF because of his Commander-in-Chief power in Article II of the U.S. Constitution.¹³⁴ Conversely, the Obama Administration is of the view that the President’s power to detain in a current conflict stems only from the AUMF’s grant of authority.¹³⁵ Although the Bush Administration asserted that the President’s war powers were shaped by the laws of war,¹³⁶ it never expressly stated that his war powers were in fact limited by the laws of war.¹³⁷ However, the

128. *Awad*, 608 F.3d at 11.

129. *Id.*

130. *See Boumediene*, 553 U.S. at 733.

131. *See Awad*, 608 F.3d at 11.

132. *See id.*

133. *See infra* note 122 and accompanying text.

134. *See infra* note 118 and accompanying text.

135. *See infra* note 123 and accompanying text.

136. *See infra* note 120 and accompanying text.

137. *See infra* note 121 and accompanying text.

Obama Administration has repeatedly stated that his detention power under the AUMF is limited by the laws of war.¹³⁸

The Bush Administration defended the President's power to detain enemy combatants at Guantanamo by arguing that "wartime detention falls squarely within the Commander in Chief's war powers."¹³⁹ It asserted that this power continued "at least for the duration of a conflict."¹⁴⁰ The Bush Administration pointed to prior military actions during international conflicts, such as World War II, and internal conflicts, like the Civil War, to support its view that "the practice of capturing and detaining enemy combatants in wartime" has deep roots in U.S. history and warfare itself.¹⁴¹ While the administration asserted that the President's use of law of war detention comported with the laws of war, it did not take the position that the laws of war dictated the *scope* of the President's detention power.¹⁴²

Since taking office in January of 2009, President Obama's administration has taken the legal position that his authority to utilize continued law of war detention at Guantanamo stems solely from the AUMF.¹⁴³ In fact, the Obama Administration has publicly rejected the Bush Administration's position that the President has such power as Commander in Chief.¹⁴⁴ The administration also asserts that the "authority conferred by the AUMF is informed by the laws of war."¹⁴⁵ This position was formulated because of the *Hamdi* Court's reference to the laws of war during its interpretation of the AUMF,¹⁴⁶ and President Obama's policy that the United States will conduct its armed conflicts consistent with international law.¹⁴⁷ Thus, the Obama Administration's position is that the President's detention authority

138. See *infra* note 124 and accompanying text.

139. Brief for Respondent at 13, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

140. *Id.* at 14. See also William Glaberson, *U.S. Won't Label Terror Suspects as 'Combatants'*, N.Y. TIMES, Mar. 13, 2009, <http://www.nytimes.com/2009/03/14/us/politics/14gitmo.html?adxnnl=1&adxnnlx=1322589825-XGHZeqrHVtn19Qt†Dd7Fg>.

141. Brief for Respondent at 14, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

142. See Koh, *supra* note 32.

143. See *id.* (emphasizing that the Obama Administration "rest[s] . . . [its] detention authority on a domestic statute – the 2001 Authorization for Use of Military Force (AUMF)").

144. See *id.* ("[T]he Obama [a]dministration has not based its claim of authority to detain . . . on the President's Article II authority as Commander-in-Chief.").

145. Brief for Appellees at 23, *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010). See also Koh, *supra* note 32 ("[U]nlike the . . . [Bush] [A]dministration, as a matter of international law, this Administration has expressly acknowledged that international law informs the scope of our detention authority.").

146. Koh, *supra* note 32.

147. See *id.*

under the AUMF ceases at the cessation of hostilities, as required by the laws of war.¹⁴⁸

V. ANALYSIS OF EXECUTIVE ORDER 13,567

A. *The Order's Detention Standard is Strict & Limits the President's Power*

1. The Scope is Narrowly Tailored

Executive Order 13,567 has limited and specific application. It only applies to the 48 detainees who were in continued law of war detention on March 7, 2011.¹⁴⁹ Thus, its scope is clearly fixed and expressly states that it is inapplicable to any detainees interned after March 7, 2011.¹⁵⁰ The Order's limited scope suggests that it is narrowly tailored to achieving the President's objective of ensuring that the detention of these 48 individuals remains "consistent with national security and foreign policy interests of the United States and the interests of justice."¹⁵¹

Moreover, the Order is beneficial to the 48 detainees to whom it applies because its fixed parameters clearly inform the detainees of the standards by which their detention is governed, which will assist them in the filing of their habeas corpus petitions. Further, the Order's narrow scope provides a benefit for courts handling these habeas corpus petitions because it eliminates any uncertainty over the government's authority for their detention.

2. The Standard for Detention is Limited by the Laws of War

The Order's standard for law of war detention is lawful because it limits the President's detention authority to a level that is both authorized by Congress and permissible under the laws of war.¹⁵² Since the AUMF broadly authorized the President to use "all necessary and appropriate force . . . in order to prevent any future acts of international terrorism"¹⁵³ without reference to limitations in the laws of war,

148. *See id.*

149. GUANTANAMO REVIEW TASK FORCE, *supra* note 11, at 12.

150. *See* Exec. Order No. 13,567, 76 Fed. Reg. at 13,277.

151. Exec. Order No. 13,567, 76 Fed. Reg. at 13,277.

152. *See* Exec. Order No. 13,567, 76 Fed. Reg. at 13,280 ("Law of War Detention' means: *detention authorized by the Congress under the AUMF, as informed by the laws of war*") (emphasis added).

153. Zitter, *supra* note 61 (quoting AUMF, *supra* note 9).

a reasonable inference is that Congress intended exactly what it said: that the President was authorized to use *all means necessary*—even those that violate domestic law and the laws of war—in order to prevent a repeat of September 11, 2001. Theoretically, this literal interpretation of the AUMF would have allowed the President to detain any person, under any conditions, even in violation of domestic law and the laws of war, so long as he deemed such detention to be necessary to prevent future acts of international terrorism.

However, the *Hamdi* plurality seemed to reject this expansive view of Congress' intent for the AUMF by stating that its understanding of the AUMF's grant of detention authority was "based on longstanding law-of-war principles."¹⁵⁴ The Executive Order plainly recognizes the Court's reliance on the laws of war in *Hamdi* because it expressly defines "law of war detention" as "detention authorized by the Congress under the AUMF, as informed by the laws of war."¹⁵⁵ It also makes clear that "[i]t does not create any additional or separate source of detention authority," or "affect the scope of detention authority under existing law."¹⁵⁶ The Court has expressly held that the AUMF gives the President the authority to detain enemy combatants,¹⁵⁷ and implicitly approved any other detention that would be consistent with the laws of war.¹⁵⁸ Since the Order does not create "any additional or separate source of detention authority," it merely codifies the Court's current interpretation of the President's detention authority under the AUMF.¹⁵⁹ Moreover, the Order limits itself to the Court's interpretation of the AUMF because it does not "affect the scope of detention authority under existing law." Thus, the Order's standard for detention is clearly lawful because it merely codifies the President's detention authority granted by the AUMF as approved by the Court.¹⁶⁰

3. The Standard is More Restrictive than the Laws of War Require

With respect to enemy combatants, the laws of war permit continued law of war detention for as long as the internment nation's armed forces are on the battlefield, even if there is no chance that the de-

154. 542 U.S. at 521.

155. Exec. Order No. 13,567, 76 Fed. Reg. at 13,280.

156. *Id.* at 13, 277

157. See *Hamdi*, 542 U.S. at 521 (O'Connor, J., plurality opinion), 587 (Thomas, J., dissenting); *Boumediene*, 553 U.S. at 733.

158. See *infra* notes 64-66 and accompanying text.

159. See Exec. Order No. 13,567, 76 Fed. Reg. at 13,277.

160. See *Boumediene*, 553 U.S. at 733.

tained POWs will return to the battlefield if released.¹⁶¹ The critics of Executive Order 13,567 acknowledge this longstanding principle, but they claim that it is unlawful when applied to the war against terrorism.¹⁶² They conclude that the Order's standard for continued law of war detention is unlawful because it codifies the standard for continued detention under the laws of war which is only lawful in a traditional armed conflict setting.¹⁶³

The critics support this conclusion under the premise that the war against terrorism is different from traditional international armed conflict because the United States' enemy is not another "nation."¹⁶⁴ They assert that this raises significant questions about the geographic scope of the "battlefield,"¹⁶⁵ since the enemy is not located within a single sovereign's borders. They argue that if law of war detention of enemy combatants were to be allowed to continue until active hostilities cease, then the United States would never have to release the Guantanamo detainees because the fight against terrorism will likely never end.¹⁶⁶ For this reason, they conclude that the Order authorizes unlawful indefinite detention.¹⁶⁷

This author agrees with these critics' determinations that the war on terrorism is different from traditional international armed conflict in many ways. However, the Order's legal standard for continued law of war detention is not unlawful because it does not merely codify the traditional detention standard under the laws of war. Rather, it requires detention to be both "informed by the laws of war"¹⁶⁸ and "necessary to prevent a significant threat to the security of the United States."¹⁶⁹ As such, it does not allow detainees to remain in continued law of war detention until U.S. troops have stopped fighting terrorism, which arguably, might continue forever. Instead, by requiring that the detainees also present a "significant threat to the security of the United States," the Order requires the President to release non-threatening detainees even if U.S. troops are still engaged in hostilities against terrorism.¹⁷⁰ Therefore, the Order's standard for continued detention cannot be unlawful for the reason that it merely codifies the

161. *See supra* p. 13-14.

162. *See* Blank, *supra* note 6, at 1173-88.

163. *See id.* at 1174-79.

164. *Id.* at 1171.

165. *Id.* at 1174-79.

166. *See id.*

167. *See id.* at 1192-93.

168. Exec. Order No. 13,567, 76 Fed. Reg. at 13,280.

169. *Id.* at 13,277.

170. *Id.*

standard for release of enemy combatants under the laws of war because it requires the President to release POWs before the laws of war would require him to do so.¹⁷¹

The Order's standard for continued law of war detention is also legal as applied to any of the 48 detainees in law of war detention who were non-combatants when captured. Although it is unlikely that these persons, who have been deemed "too dangerous to transfer,"¹⁷² were non-combatants when captured, the possibility is assumed for the purpose of demonstrating the legality of the Order's continued detention standard. The laws of war require civilians to be released from law of war detention "as soon as possible after the close of hostilities."¹⁷³ However, historical examples, like the Ethiopia and Eritrea conflict, reveal that this requirement can be fulfilled years after the signing of a formal peace agreement.¹⁷⁴ However, the Executive Order eliminates the possibility of prolonged internment of non-combatants after the cessation of hostilities because it requires the President to release non-combatant detainees if they do not present a significant threat to U.S. security, even if that determination is made before the close of hostilities.¹⁷⁵ Therefore, the Order cannot be unlawful for the reason that it merely codifies the standard for release of non-combatants under the laws of war because it requires the President to release non-combatants before the laws of war do.¹⁷⁶

Just as the Order's additional threat requirement is not required for continued detention of enemy combatants or non-combatants under the laws of war, it is also not required for continued detention under the AUMF.¹⁷⁷ The AUMF authorizes continued detention even when it is undisputed that a detainee has severed all of his ties with the enemy and is no longer a threat to the United States.¹⁷⁸ Therefore, the Order's standard for continued detention cannot be read as unlawful under the AUMF because it only allows the

171. Compare Exec. Order No. 13,567, 76 Fed. Reg. at 13,277 (only allowing continued law of war detention for detainees who present a "significant threat to the security of the United States"), with *Awad*, 608 F.3d at 11 (holding that the President's authority to detain enemy combatants "is not dependent on whether an individual would pose a threat to the United States").

172. GUANTANAMO REVIEW TASK FORCE, *supra* note 11, at ii.

173. ELSEA, TREATMENT OF "BATTLEFIELD DETAINEES," *supra* note 35, at 49 (citing Fourth Geneva Convention, *supra* note 48, art. 133).

174. See *Facts and Figures*, *supra* note 105.

175. See Exec. Order No. 13,567, 76 Fed. Reg. at 13,277.

176. See note 171.

177. See *Awad*, 608 F.3d at 11.

178. See *Id.*

President to continue detention for detainees who pose a threat to the United States.¹⁷⁹

Thus, claims that the Order institutionalizes indefinite detention are simply inaccurate. The Order not only encompasses the legal requirements for continued detention under the laws of war and the AUMF,¹⁸⁰ but it imposes an additional threat requirement that is not required for legal detention under these laws.¹⁸¹ The Order's strict requirements for continued detention actually facilitate an end to the detention of the 48 Guantanamo detainees currently in continued law of war detention. Accordingly, the Order should be commended because it creates a definitive standard for the release of these detainees in an armed conflict with potentially infinite boundaries.¹⁸²

B. The Order Reflects the President's Intent to Limit His Detention Power

Since January of 2009, the Obama Administration has taken the legal position that the President's detention authority is derived solely from the AUMF, and not the Constitution.¹⁸³ It has also stated that the President's detention authority under the AUMF is limited by the laws of war.¹⁸⁴ Thus, the Obama Administration believes that the President's detention authority under the AUMF can legally continue until the cessation of hostilities.¹⁸⁵ Since hostilities in the war against terrorism may never cease, there is a possibility that the President's detention power under the AUMF could persist forever.

The Executive Order signifies an attempt by the President to limit this possibility. The President could have issued an Order without a threat requirement, one which would have allowed for law of war detention to continue for as long as allowed by the AUMF as informed by the laws of war. Such an Order would have allowed for potentially indefinite detention of detainees who are not a threat to the United States. Notably though, that was not standard the President created

179. See Exec. Order No. 13,567, 76 Fed. Reg. at 13,277.

180. See *id.* at 13,280 ("detention authorized by the Congress under the AUMF, as informed by the laws of war").

181. See *id.* at 13,277 (detention is only warranted when "necessary to protect against a significant threat").

182. See Blank, *supra* note 6, at 1179-84 (suggesting that the war on terrorism will never end).

183. See Koh, *supra* note 32.

184. See *id.*

185. See *id.*

in his Order.¹⁸⁶ Therefore, the Order's threat requirement reflects the President's intent to limit his potentially unlimited detention authority under the AUMF.

Moreover, the Order expressly states that it does not "affect the jurisdiction of Federal courts to determine the legality of . . . [a detainee's] detention."¹⁸⁷ Thus, it does not suspend the 48 detainees' constitutional right to challenge their detention through the writ of habeas corpus in federal court.¹⁸⁸ Rather, the Order expressly recognizes the judiciary's power to check the President's detention authority and requires him to release detainees if the judiciary finds that he is without authority to detain them or if their detention is unlawful.¹⁸⁹

The Order's reference to the laws of war and the AUMF clearly reflects the President's intent to limit, rather than expand, his detention authority over the 48 Guantanamo detainees. Furthermore, its reference to the detainees' constitutional right of access to the federal courts indicates the President's intent for their detention to continue only if consistent with the law.

VI. CONCLUSION

President Obama issued Executive Order 13,567 to ensure that the continued law of war detention of 48 Guantanamo detainees would be consistent with the laws of war and the AUMF, and the Order has successfully achieved those objectives. First, the Order is narrowly focused on addressing the continued detention status of those 48 detainees. Second, it recognizes that the laws of war and the AUMF are a limit on the President's detention authority over these individuals. Third, the Order's standard only allows for the continued law of war detention when the detainee is a significant threat to the United States, which is a requirement not necessary for legal continued detention under the laws of war or the AUMF. Finally, the Order reflects the President's intent to limit his detention authority over these detainees and respects the detainees' rights to the federal courts to challenge their detention. For these reasons, the Order does not institutionalize unlawful indefinite detention as many critics have claimed.

186. Exec. Order No. 13,567, 76 Fed. Reg. at 13,277.

187. *Id.*

188. See *Boumediene*, 553 U.S. at 771 (holding that detainees at Guantanamo have the constitutional privilege of habeas corpus).

189. Exec. Order No. 13,567, 76 Fed. Reg. at 13,277.