GUANTANAMO AND THE END OF HOSTILITIES

Eric Talbot Jensen*

I. INTRODUCTION

"*By the end of [2014], our war in Afghanistan will be over*."[1]

The import of this statement by President Obama in his 2013 State of the Union address reverberated not only through the halls of Congress[2] and in the Pentagon, but also through the cells of Guantanamo. In addition to affecting U.S. troop stationing and logistics,[3] this course of action will have significant legal effects on detainees held at Guantanamo Bay, Cuba, including the United States' legal authority to continue to hold them.

To the extent that this announcement signals, as a matter of law, that the conflict is over between the United States and certain organized armed groups in Afghanistan, the United States' authority to continue to detain members of those groups is called into question. Under traditional law of armed conflict (LOAC) provisions, once a conflict between two nations ends, the detaining power is required to repatriate those it is detaining.[4]

This Article will analyze the applicability of these traditional LOAC provisions to the current conflict in Afghanistan and the legality of continued detention of individuals detained during that conflict, even if the specific conflict in that geographic region is declared to be over. The Article will conclude that the President's determination that hostilities have concluded between specific Parties to an armed conflict and that the

---

* Associate Professor, Brigham Young University Law School. The author would like to thank Allison Arnold and Aaron Worthen, who provided excellent research and assistance on this Article, and the staff of the Southern Illinois University Law Journal for hosting this symposium and for their excellent work on this Article.

1. Address Before a Joint Session of Congress on the State of the Union, 2013 DAILY COMP. PRES. DOC. 90, at 8 (Feb. 12, 2013) [hereinafter State of the Union].
2. Congress has also taken measures to quicken the withdrawal of troops from Afghanistan. *See Senate Backs Quicker Withdrawal from Afghanistan*, CBSNEWS (Nov. 29, 2012, 11:07 PM), http://www.cbsnews.com/8301-250_162-57556355/senate-backs-quicker-withdrawal-from-afghanistan/.
3. Thom Shanker, *Main Hurdle in Afghan Withdrawal: Getting the Gear Out*, N.Y. TIMES, Feb. 15, 2013, at A10, *available at* http://www.nytimes.com/2013/02/15/world/middleeast/afghan-withdrawals-main-hurdle-getting-gear-out.html?pagewanted=all; Rob Taylor, *Afghanistan Pullout A Logistical 'Nightmare,'* HUFFINGTON POST (Aug. 26, 2012, 8:29 AM), http://www.huffingtonpost.com/2012/08/26/afghanistan-pullout-complicated_n_1831129.html.
4. Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

corresponding withdrawal of troops from the area of conflict creates a presumption that detainees from that conflict should be repatriated. This presumption may be overcome on an individual basis by a finding that released and repatriated fighters will return to the battle.

Section II will briefly discuss the LOAC doctrines of detention and repatriation, both as they apply to prisoners of war in an international armed conflict (IAC) and as they apply under customary law provisions applicable in a non-international armed conflict (NIAC). Section III will then apply this discussion to the situation in Afghanistan in light of the President's commitment to withdraw military forces by the end of 2014 and conclude that at least some detainees must be given the presumption of repatriation. This presumption may be overcome based on an individual determination that a detainee is likely to return to the fight against the United States. The Article will conclude in Section IV.

II. DETENTION AND REPATRIATION

"*The ICRC believes, mainly on the basis of these considerations, that there is an urgent need to explore new legal ways for dealing exhaustively with the subject of protection for persons deprived of liberty during non-international armed conflict*."[5]

One of the "incident[s] to war" is the ability to detain.[6] It grows out of the justification of military necessity[7] and naturally follows from a military force's right to target and kill those that they could alternatively detain. The purpose of military detention is to prevent the belligerent from taking further part in hostilities.[8] This customary right to detain developed over centuries of warfare.[9] It began to be codified as early as 1863,[10] and

5. Jakob Kellenberger, President, Int'l Comm. of the Red Cross, Strengthening Legal Protection for Victims of Armed Conflicts (Sept. 21, 2010), *available at* http://www.icrc.org/eng/resources/documents/statement/ihl-development-statement-210910.htm.
6. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).
7. Jeffrey Kahn, *Responses to Ten Questions*, 36 WM. MITCHELL L. REV. 5041, 5051–52 (2010).
8. *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. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated or otherwise released.").
9. *See* Gregory Noon et al., *Prisoners of War in the 21st Century: Issues in Modern Warfare*, 50 NAVAL L. REV. 1, 7–13 (2004).
10. Instructions for the Government of Armies of the United States in the Field arts. 74–75, 105, 109, Apr. 24, 1863, General Orders No. 100, *available at* http://avalon.law.yale.edu/19th_century/lieber.asp (last visited Feb. 1, 2013); *see also* Convention for the Amelioration of the Condition of the Wounded in Armies in the Field art. 6, Aug. 22, 1864, 129 Consol. T.S. 361, *available at* http://www1.umn.edu/humanrts/instree/1864a.htm; Hague Convention (V)

has its current treaty codification in the Geneva Convention for the Protection of Prisoners of War (GPW),[11] the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GCC),[12] the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (API),[13] and the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (APII).[14]

These sources contain extensive provisions about detention,[15] many of which are focused on the treatment appropriate for various classifications of detainees.[16] Few provisions exist concerning the effect of the end of hostilities on detention authority and detainees. However, these provisions, combined with their customary underpinnings, will become more and more important as the United States withdraws forces from active combat in Afghanistan. To the extent that the withdrawal of forces from Afghanistan signals a cessation of hostilities against certain Parties to the conflict, individuals detained at Guantanamo may seek release or repatriation under applicable or analogous international law. In light of this, it is useful to analyze the treatment afforded to detainees under the existing treaty regime and also under the customary authority to detain.

A. Treaty Based Detention and Repatriation

The sources mentioned above are the primary sources for treaty-based detention obligations, including repatriation at the end of detention.[17] The first Geneva Convention of 1864 required repatriation for combatants who

---

Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land art. 20, Oct. 18, 1907, 36 Stat. 2310.

11. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 4.
12. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
13. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].
14. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].
15. *See generally* Chris Jenks & Eric Talbot Jensen, *Indefinite Detention Under the Laws of War*, 22 STAN. L. & POL'Y REV. 41 (2011) (outlining the LOAC detention paradigm and how it might apply to detainees at Guantanamo).
16. *See id.* at 51–87.
17. *Id.* at 87–91.

were considered "unfit for further service."[18] Successive Geneva conventions continued to refine the requirements for repatriation.

After World War II (WWII), the doctrine of repatriation was formalized again in the 1949 Geneva Conventions and 1977 Additional Protocols. These rules apply differently, depending on the type of conflict. The analysis below will be divided into the treaty provisions applicable in IACs and those applicable in NIACs.

1. International Armed Conflicts

Article 118 of the GPW contains the current statement of the law with respect to prisoners of war. It states, "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."[19] There is no requirement to establish "continuing dangerousness" or hold an interim review for prisoners of war (PW). By virtue of their status as members of the opposing state's armed forces, their dangerousness is presumed and they are detained until hostilities have ended.

There are two exceptions to this general rule for PWs: parole and serious health issues. The GPW directs repatriation when a PW is "incurably wounded" or when a PW's "mental or physical fitness [has] been gravely and permanently diminished,"[20] even if hostilities are still on-going. Additionally, the GPW allows for parole of PWs "[i]n so far as is allowed by the laws of the Power on which they depend."[21] Note that the United States does not allow its members of the military to accept parole.[22]

In contrast, the rules on civilian detention take a significantly different approach. While detention is allowed when necessary for security reasons,[23] it can only continue until "the reasons that necessitated his

---

18. Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, *supra* note 10, at art. 6. Article 6 states:

> Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for. Commanders-in-Chief may hand over immediately to the enemy outposts enemy combatants wounded during an engagement, when circumstances allow and subject to the agreement of both parties. Those who, after their recovery, are recognized as being unfit for further service, shall be repatriated. The others may likewise be sent back, on condition that they shall not again, for the duration of hostilities, take up arms. Evacuation parties, and the personnel conducting them, shall be considered as being absolutely neutral.

Id.

19. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 4, at art. 118.
20. *Id.* at art. 110, Annex I.
21. *Id.* at art. 21. *See generally* Gary D. Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200 (1998).
22. *See* Exec. Order No. 10,631, 3 C.F.R. 266 (1954-1958).
23. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 12, at arts. 42, 78.

internment no longer exist,"[24] but no later than "as soon as possible after the close of hostilities."[25]

Though the API, to which the United States is a signatory but not a Party,[26] does not contain explicit provisions on repatriation, Articles 3 and 78 assume that repatriation is still a required step at some point after hostilities cease.[27] As previously mentioned, the Geneva Conventions and API provisions apply as a matter of law, only to IACs.[28] Therefore, they have limited application to Guantanamo detainees as will be discussed below.

2. Non-International Armed Conflicts

For NIACs, such as the current conflict in Afghanistan, Article 3 of the Geneva Conventions would apply, as would the provisions of APII for those who are Parties to that Protocol (which does not include the United States).[29]

Article 3 of the Geneva Conventions has provisions concerning treatment of detainees and became the major point of discussion in *Hamdan v. Rumsfeld*,[30] where the Supreme Court ruled that Article 3 treatment provisions applied to those detained at Guantanamo.[31] However, Article 3 contains no provisions on release or repatriation at the end of hostilities.

Article 2.2 of APII states:

> At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.[32]

The commentary to Article 2.2 allows that "if such measures were maintained with regard to some persons for security reasons, or if the

24. *Id.* at art. 132.
25. *Id.* at art. 133.
26. GEOFFREY S. CORN ET AL., THE LAW OF ARMED CONFLICT 88–94 (2012).
27. Protocol I, *supra* note 13, at art. 3; *see also id.* at art. 78.6.
28. CORN ET AL., *supra* note 26, at 70–88.
29. *International Humanitarian Law—State Parties/Signatories*, INT'L COMM. OF THE RED CROSS, http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=S (last visited Mar. 6, 2013).
30. 548 U.S. 557 (2006).
31. *Id.* at 630–31.
32. Protocol II, *supra* note 14. at art. 2.2.

victorious party were making arrests in order to restore public order and secure its authority, legal protection would continue to be necessary for those against whom such actions were taken."[33] Therefore, if there was a time between the end of the armed conflict and repatriation or release, the detainees continue to get the benefits of the convention and protocol.

A word of caution is useful here. As stated by the District Court for the District of Columbia in *Gherebi v. Obama*:

> The Geneva Conventions restrict the conduct of the President in armed conflicts; they do not enable it. And the absence of any language in Common Article 3 and Additional Protocol II regarding prisoners of war or combatants means only that no one fighting on behalf of an enemy force in a non-international armed conflict can lay claim to the protections of such status, not that every signatory to the Geneva Conventions must treat the members of an enemy force in a civil war or transnational conflict as civilians regardless of how important the members in question might be to the command and control of the enemy force or how well organized and coordinated that force might be.[34]

In other words, the absence of specific language in treaty provisions does not equate to affirmative obligations. Specific obligations, particularly with respect to repatriation, require some definite articulable legal basis.

Thus, to varying degrees, existing IAC and NIAC provisions provide a treaty basis for release and repatriation of detainees. Of course, the provisions are only legally binding to the extent that they apply to States who have signed and ratified them. In the absence of legal obligations from treaties, customary rules of detention apply.

B. Customary Detention

Though the United States is a Party to the Geneva Conventions, their application to the War on Terror has been a shifting paradigm.[35] Applying these detention provisions to the Global War on Terror (GWOT) has been problematic[36] and has resulted in much controversy[37] and litigation.[38]

---

33. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1360 (Philippe Eberlin et al. eds., 1987).
34. 609 F. Supp. 2d 43, 65 (D.D.C. 2009).
35. *See generally* David Mortlock, *Definite Detention: The Scope of the President's Authority To Detain Enemy Combatants*, 4 HARV. L. & POL'Y REV. 375 (2010).
36. *See generally* James A. Schoettler, Jr., *Detention of Combatants and the Global War on Terror*, *in* THE WAR ON TERROR AND THE LAW OF WAR 67 (Michael W. Lewis ed., 2009).
37. *See, e.g.*, Stella Burch Elias, *Rethinking "Preventive Detention" from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects*, 41 COLUM. HUM. RTS. L. REV.

However, "[t]he Administration has stated that, whether or not the various international agreements bind the United States, 'principles derived from law-of-war rules governing international armed conflicts' must inform any determination of detention under the AUMF."[39]

1. Hamdi v. Rumsfeld[40]

The first case to come before the Supreme Court on the issue of post 9/11 detention, and the one that still speaks most clearly to the customary law of detention, was *Hamdi v. Rumsfeld*. The case dealt with the authority of the President to detain a U.S. citizen who was captured in Afghanistan as part of the armed conflict there.[41] In writing for a plurality of the Court, Justice O'Connor stated:

> The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use. 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." The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.[42]

Justice O'Connor did not rely on any treaty-based authority to detain, but instead invoked the customary LOAC understanding that detention was

---

99 (2009); Vincent-Joel Prouix, *If the Hat Fits, Wear It, if the Turban Fits, Run for Your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists*, 56 HASTINGS L.J. 801 (2005); Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT'L SECURITY L. & POL'Y 1 (2009).

38. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (2008); Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003).
39. Mortlock, *supra* note 35, at 380–81 (citations omitted).
40. 542 U.S. 507 (2004).
41. *Id.* at 510.
42. *Id.* at 518 (citations omitted).

such an "incident" of war, that it must have been envisioned by the Congress when passing the Authorization to Use Military Force (AUMF).

With respect to the length of detention, and thereby also the potential for release and repatriation, the Court said:

> We understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan.[43]

To the extent that *Hamdi* is a correct reflection on what the customary authority to detain in armed conflict is, it appears that, like with treaty law, the ability to detain lasts at least as long as hostilities, and some reckoning with detainees after that time would be required.

2. Post-WWII U.S. State Practice

Two specific post-WWII incidents are instructive as to the customary law of detention as it relates to repatriation. The first involves the treatment of Italians in the United States during and after WWII, and the second involves the continuation of the exercise of "war powers" after the cessation of hostilities.

The liberation of Italy from Axis control began in July 1943, and the hostilities in Italy formally ceased on May 2, 1945.[44] During the War, the Department of Justice interned about 250 Italians in the United States.[45] Most were interned because of their close ties to their home country, the fact that they were members of pro-Axis groups, they possessed forbidden weapons, or they were known to oppose the United States' involvement in the war.[46] As Mangione documents, "By 1944 about half of the interned

---

43. *Id.* at 521 (2004). *But see* Alec Welen & Ingo Venzke, *Detention in the "War on Terror": Constitutional Interpretation Informed by the Law of War*, 14 ILSA J. INT'L & COMP. L. 45, 54–56 (2007) (arguing that analogy to the Geneva Conventions for understanding the cessation of hostilities is misplaced).

44. *War in Italy Ends*, N.Y. TIMES, May 3, 1945, *available at* http://www.nytimes.com/learning/general/onthisday/big/0502.html#article.

45. Paula Branca-Santos, *Injustice Ignored: The Internment of Italian-Americans During World War II*, 13 PACE INT'L L. REV. 151, 164-65 (2001).

46. Jerre Mangione, *Concentration Camps–American Style*, *in* UNA STORIA SEGRETA: THE SECRET HISTORY OF ITALIAN AMERICAN EVACUATION AND INTERNMENT DURING WORLD WAR II 117, 118–19 (Lawrence DiStasi ed., 2001) ("Some had been arrested because of their close ties with

Italian civilians were either paroled or released unconditionally. . . . The rest of the civilians, about one-hundred hard-core admirers of the Fascist regime, remained in internment until the end of the war."[47] None of these detainees were actual fighters, but were thought to be dangerous to U.S. interests and were not released or repatriated until the end of the overall war in Europe, well after the liberation of Italy.[48]

It appears that the U.S. government believed it was lawful to detain Italians who it thought were still a danger within the larger on-going conflict, even though the conflict with Italy had ceased. As a result, any requirement to repatriate was linked to a broader view of hostilities as long as the detainees were deemed likely to engage in the continuing conflict. This view has gained modern support, even in relation to NIACs.[49]

The second post-WWII incident significant to the customary detention and repatriation principles is based on the U.S. Supreme Court's decision in *Woods v. Miller*.[50] In *Woods*, the issue was the reach of Congress's "war power" after the President issued an official proclamation declaring that hostilities had ceased[51] as it related to controlling housing and rents.[52] The Court held that even though it was 1948, almost three years after the fighting had officially ended (though formal peace treaties had not been signed),[53] Congress could still exercise its war powers to "'remedy the evils which have arisen from [the war's] rise and progress' and continues for the duration of that emergency."[54] Then, citing *Fleming v. Mohawk Wrecking & Lumber Co.*,[55] the Court stated that the war power was "adequate to support the preservation of rights created by wartime legislation."[56]

In making its decision, the Court argued:

> Since the war effort contributed heavily to that deficit, Congress has the power even after the cessation of hostilities to act to control the forces that

---

their native countries; some because they were members of pro-Axis organizations . . . some because they . . . had in their possession radios or weapons forbidden to them. Others were interned because they were known to have opposed American intervention in the war.").

47. *Id.* at 131 n.7.
48. *Id.* at 118, 131 n.7.
49. CORN ET AL., *supra* note 26, at 353 (arguing that detainees in NIACs can be held until "hostilities terminate or [the detainee] is no longer a threat").
50. 333 U.S. 138 (1948).
51. Cessation of Hostilities of World War II, 12 Fed. Reg. 1 (Jan. 1, 1947).
52. *Woods*, 333 U.S. at 140–41.
53. Treaty of Peace with Japan, Sept. 8, 1951, 136 U.N.T.S. 45; Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 29 I.L.M. 1186, *available at* http://usa.usembassy.de/etexts/2plusfour8994e.htm.
54. *Woods*, 333 U.S. at 141 (quoting Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 161 (1919).
55. 331 U.S. 111 (1947).
56. *Woods*, 333 U.S. at 141.

> a short supply of the needed article created. If that were not true, the Necessary and Proper Clause would be drastically limited in its application to the several war powers. The Court has declined to follow that course in the past. We decline to take it today. The result would be paralyzing. It would render Congress powerless to remedy conditions the creation of which necessarily followed from the mobilization of men and materials for successful prosecution of the war.[57]

It appears from these two examples that the U.S. application of the customary detention authority allows continued detention beyond the end of hostilities with specific Parties to the conflict, at least where the detainees are considered to be dangerous and potentially willing to reenter the fight. Further, it appears that there is no domestic law preclusion to the continued exercise of "war powers," at least by Congress in the case of a declared war, long after the hostilities have been officially proclaimed completed.

III. REPATRIATION AND AFGHANISTAN

Detention has been a major part of military operations in Afghanistan from the very beginning. Some initial detainees were taken to Guantanamo, and the rest remain in detention in Afghanistan. For those in Afghanistan, the procedures have changed many times, but currently include the use of Detainee Review Boards to assess the continuing need to detain.[58] These boards can order continued detention, release, or transfer into the Afghan criminal system.[59] For detainees in Guantanamo, applying repatriation law is not as clear. As Bellinger and Padmanabhan state, "The traditional international armed conflict paradigm, featuring prisoners of

---

57. *Id.* at 142–43 (citations omitted). However, Justice Jackson, in his concurrence, stated:

> No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures. Always, as in this case, the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed.
>
> Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinized with care.

Id. at 146–47 (Jackson, J., concurring).

58. *See* Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, ARMY LAW., June 2010, at 9, 11.

59. *Id.* at 29.

war detained until the end of hostilities, breaks down in a conflict of indefinite, and potentially unending, duration, with actors not entitled to combatant status under international law."[60]

A. Applying the Law

The difference in positive authority in IAC and NIAC, analyzed to some degree above, pervades the Guantanamo detention and repatriation question. Decisions about how to classify the detainees[61] and how to classify the conflict have important impacts on whether repatriation is determined by IAC law, NIAC law, or customary principles. In a recent speech by U.S. Department of Defense General Counsel Jeh Johnson, he clarified who the United States believes falls under the coverage of the AUMF.[62] Johnson said:

> We have publicly stated that our enemy consists of those persons who are part of the Taliban, al-Qaeda or associated forces, a declaration that has been embraced by two U.S. Presidents, accepted by our courts, and affirmed by our Congress. We have publicly defined an "associated force" as having two characteristics: (1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners.[63]

To the extent that these are the people against whom the U.S. military can use lethal force, and hence detain, it is these groups that must be considered when discussing repatriation after the "end of the war" in Afghanistan.

1. Geography

An initial consideration is the impact of geography on the armed conflicts in which the United States is currently engaged. Resolution of this issue will undoubtedly have a significant impact on the requirement to repatriate detainees at the end of hostilities. There has been active discussion lately on the issue of geography and the "hot" battlefield as it

---

60. John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 202 (2011).
61. Geoffrey S. Corn, *Enemy Combatants and Access to Habeas Corpus: Questioning the Validity of the Prisoner of War Analogy*, 5 SANTA CLARA J. INT'L L. 236, 248–52 (2007).
62. Authorization for the Use of Military Force, S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001).
63. Jeh Johnson, Gen. Counsel, U.S. Dep't of Def., Speech at Oxford Union, Oxford University (Nov. 30, 2012) (footnotes omitted), *available at* http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/.

applies to the ability to target and detain in the fight against terrorists.[64] In President Obama's speech, he stated that the war would be over in Afghanistan by the end of 2014, but said nothing about the state of continuing hostilities in Pakistan, Yemen, or other locations where the United States is currently engaged in armed conflict. To the extent that the armed conflict ends in Afghanistan, what effect might that have on the United States' ability to engage and detain terrorists?

It is likely that the question of geography will be resolved in such a way that it will not bind hostilities with transnational actors to specific geographic locations. Historical armed conflicts have consistently been threat driven and not geographically constrained.[65] Robert Chesney seems to contemplate just such a resolution when he argues that "[t]here will soon be no circumstance in which it is undisputed both that there is an armed conflict and that the United States is a Party"[66] and that this circumstance will cause us to adjust our views of the fight against terrorists.[67] In fact, looking into the future, Chesney hypothesizes:

> Congress might specifically state that the resulting availability of detention authority does not depend on the continuation of U.S. involvement in conflict in Afghanistan, but rather depends on the continuing existence of hostilities between the United States and the statutorily identified group as to which a given detainee is linked.[68]

Geography, however, still plays a significant role to the extent that Taliban detainees in Guantanamo could make the argument that their fight was only in Afghanistan, and therefore, when hostilities end there, their fight is over. This argument will be further developed below, but shows that geography will continue to play a role going forward.

---

64. Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone*, 161 U. PA. L. REV. (forthcoming 2013); Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT'L L. & POL'Y 101, 130 (2010) ("However, when such an attack occurs in areas outside the traditional, geographically limited 'hot' battlefield, reasonable people disagree on whether the operation is or should be covered by the law of armed conflict.").

65. Geoffrey S. Corn, *Geography of Armed Conflict: Why It Is a Mistake To Fish for the Red Herring*, 89 INT'L L. STUD. 254, 259 (2013).

66. Robert Chesney, *Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, MICH. L. REV. (forthcoming 2013) (manuscript at 38) (citations omitted), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2138623.

67. *See id.* at 45. ("[The government] might carry on with its current approach to detention and lethal force . . . , reasoning that it will be able to ride out the increasing legal friction described above without encountering resistance of a kind that actually upends policy or practice. Those hopes would likely be dashed, however.").

68. *Id.* at 53.

2. Galeb Nassar al-Bihani

The question of release and repatriation for a Guantanamo detainee was clearly raised in the case of *Al-Bihani v. Obama*. Al-Bihani was a member of the 55th Arab Brigade, fighting against the Northern Alliance in Afghanistan in 2001.[69] He was issued a weapon and assigned to be a cook,[70] though he did perform guard duty from time to time.[71] He surrendered with other members of his unit to the Northern Alliance[72] and was then handed over to U.S. forces and moved to Guantanamo.[73]

Al-Bihani sought habeas corpus relief in federal courts, arguing that for him, hostilities had ceased and that he should be repatriated. As stated in the government brief:

> Al-Bihani nevertheless insists that . . . the "relevant conflict" in which he was captured ended long ago—perhaps "as early as December 2001," but that in any event no later than May 2005, when the United States recognized the Karzai government in Afghanistan. According to al-Bihani, he was captured as part of an international conflict between two sovereign governments: the United States and the Government of Afghanistan (then controlled by the Taliban). Once the United States recognized the new Afghan Government, he claims, the international conflict ended.[74]

In response, the government relied on two assertions to confirm al-Bihani's detention. In its brief, the Department of Justice argued that the United States had a right to continue to detain al-Bihani because "the conflict in which al-Bihani was captured ha[d] not ended."[75] The government argued that "the 'relevant conflict' [with respect to al-Bihani] [was] the conflict against the joint forces of al-Qaida, the Taliban, and associated forces, and hostilities in that conflict continue."[76] Additionally, the brief relied on the fact that "the Department of Defense, through its

---

69. Al-Bihani v. Obama, 590 F.3d 866, 869 (D.C. Cir. 2010).
70. *Id.*
71. Brief for Appellees at 8, Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010) (No. 09-5051).
72. *Id.* at 11.
73. *Al-Bihani*, 590 F.3d at 869.
74. Brief for Appellees, *supra* note 71, at 33.
75. *Id.* at 32.
76. *Id.* at 36–37. The government further asserted in its brief:
    > The *Hamdi* plurality made clear that the detention of individuals fighting on behalf of the Taliban "for the duration of the conflict in which they were captured, is so fundamental and accepted an incident of war as to be an exercise" of the "necessary and appropriate" force authorized by the AUMF.

    Id. at 49.

Administrative Review Board (ARB) process, determined that al-Bihani remain[ed] a threat."[77] The government asserted that "case law as well as the laws of war recognize that detainees may be held for the duration of the conflict, without judicial second-guessing as to whether a given individual remains a threat to return to the battlefield."[78] In other words, not only is the conflict in which al-Bihani was involved still on-going, but there is sufficient evidence to determine that, if released, he would return to the fight.

In response to these arguments, the court determined:

> That the Conventions use the term "active hostilities" instead of the terms "conflict" or "state of war" found elsewhere in the document is significant. It serves to distinguish the physical violence of war from the official beginning and end of a conflict, because fighting does not necessarily track formal timelines. The Conventions, in short, codify what common sense tells us must be true: release is only required when the fighting stops.[79]

In other words, the conflict is not over for al-Bihani, and he cannot be released until the end of hostilities.

B. The End of Hostilities

The decision in *Al-Bihani* emphasized the importance of determining the end of hostilities as a precursor to repatriation. The earlier Supreme Court case of *Hamdi* held the same thing: "It is a clearly established principle of the law of war that detention may last no longer than active hostilities."[80]

Though both President Bush and President Obama have said they would detain fighters in the GWOT indefinitely,[81] both administrations have argued that detentions generally can last only until the end of hostilities. However, in *Al-Bihani*, the government asserted:

> [T]he time at which hostilities are at an end is a matter for the political branches and not the courts. . . . the Court recognized that war does not necessarily end with a cease-fire order; rather, war "may be terminated by

77. *Id.* at 47.
78. *Id.* at 46.
79. Al-Bihani v. Obama, 590 F.3d 866, 874 (D.C. Cir. 2010).
80. Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004).
81. Mortlock, *supra* note 35, at 396–97 (citations omitted).

> treaty or legislation or Presidential proclamation. Whatever the modes, its termination is a political act."[82]

Hence, in *In re Territo*, the court did not second guess the political branches when the repatriation of an Italian soldier was still not accomplished by 1946.[83]

At the end of WWII and the Korean conflict, the end of hostilities was signaled by various signed agreements either establishing a peace or at least ending open hostilities.[84] In the fight with terrorists, however, this is not likely to be the pattern. Jonathan Hafetz has written:

> [The government] has also refused to acknowledge any constraints on the length of the conflict. While armed conflicts are by nature of uncertain duration, the war on terror is different in that it lacks any objectively identifiable criteria to determine its endpoint, creating the potential for a more permanent form of military detention. In an international armed conflict, the Third Geneva Convention requires the prompt release and repatriation of prisoners of war following the cessation of active hostilities. In a war against terrorist organizations, no such requirement exists, and it is unrealistic to expect a state to declare a cessation of active hostilities if even sporadic terrorist attacks can be used to justify the continued existence of armed conflict.[85]

Without the prospect of a signed agreement or formal end of hostilities, the President's proclamation in his State of the Union address may be the closest the United States comes to a formal declaration that the armed conflict in Afghanistan is over.[86] Alternatively, Bellinger and

---

82. Brief for Appellees, *supra* note 71, at 34.
83. *In re* Territo, 156 F.2d 142, 145 (9th Cir. 1946).
84. *See* Armistice Agreement for the Restoration of the South Korean State (July 27, 1953); Instrument of Surrender (Sept. 2, 1945) (Japan); Act of Military Surrender (May 7, 1945) (Germany).
85. Jonathan Hafetz, *Military Detention in the "War on Terrorism": Normalizing the Exceptional After 9/11*, 112 COLUM. L. REV. SIDEBAR 31, 42–43 (2012), http://www.columbialawreview.org/military-detention-in-the-war-on-terrorism/.
86. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2124 (2005). Bradley and Goldsmith argue:

> The proper approach here, we believe, is to apply the traditional law-of-war rule in a way that takes account of both its underlying purpose and the novel features of the war on terrorism. The traditional rule is premised on the possibility of an identifiable end of the conflict, either by formal peace treaty, armistice agreement, or even by attrition or exhaustion. This is the premise that the war on terrorism—the end of which is difficult to imagine right now—calls into question.

Id.; Bellinger & Padmanabhan, *supra* note 60, at 202. Bellinger and Padmanabhan state:

> As a general matter, conflicts with nonstate actors will not end with the signing of a formal surrender document on a battleship. Low-intensity hostilities may continue for

Padmanabhan offer three possible views of determining the end of hostilities with a non-state actor: 1) if the conflict also includes a state actor, when the hostilities end for the state forces, it also ends for the non-state forces; 2) impose a time limit on detention; and 3) "terminate detention authority over individual fighters when they no longer pose a threat to the security of the state."[87] As asserted in the beginning of this Article, some combination of these views is probably the best possible solution.

If the President's declaration does signal a factual end of the conflict, that will present an opportunity for the detainees in Guantanamo to raise the issue of the end of hostilities. As Chesney states:

> The overwhelming majority of Guantanamo habeas cases concern persons who were captured in Afghanistan, captured fleeing from Afghanistan, or captured in more remote locations where they allegedly were engaged in activities linked to the hostilities in Afghanistan (such as recruiting fighters to go there). And so long as U.S. forces continue to be engaged in overt combat operations in Afghanistan—so long as the condition specified by the Supreme Court in *Hamdi* continues to obtain—these cases are largely incapable of providing the occasion for testing the outer boundaries of the LOAC model.[88]

This position was echoed in the government's brief to deny a rehearing for al-Bihani. In response to al-Bihani's argument that the conflict, as it applied to him, was over, the Government asserted, "It is difficult to argue that the conflict with the Taliban and al Qaeda in Afghanistan is over when, as the panel noted, there are over 34,000 U.S. troops and a total of 71,030 Coalition troops in Afghanistan engaged in active hostilities against those very same enemies."[89] Once those troops have been withdrawn, however, the government may have a more difficult argument to make. The potential effect of this withdrawal is significant. Almost all of the initial habeas petitions from Guantanamo had direct ties to Afghanistan.[90]

> generations, especially if a proliferation of nonstate groups operating under separate commands makes a total end to fighting difficult. The result is that a norm that requires release and repatriation only upon cessation of active hostilities may lead to life imprisonment. Such a result may be an unduly harsh consequence of involvement with a nonstate group.

Id.

87. Bellinger & Padmanabhan, *supra* note 60, at 230-31.
88. Chesney, *supra* note 66, at 18.
89. Response to Petition for Rehearing and Rehearing En Banc at 4, Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010) (No. 09-5051).
90. Chesney, *supra* note 66, at 46 (citations omitted). Chesney notes:

Given the likelihood of troop withdrawal and the unlikelihood of a formal signed agreement signaling the end of hostilities with any of the current Parties to the armed conflict, it is interesting to speculate how the law might treat current Guantanamo detainees who might renew or make claims about their required repatriation. Based on the foregoing law and analysis, it seems logical to presume that the President's determination that hostilities have concluded between specific Parties to an armed conflict and the corresponding withdrawal of troops from the area of conflict create a presumption that detainees from that conflict should be repatriated. This presumption may be overcome on an individual basis by a finding that a released and repatriated fighter will return to the battle. Specific application to the Taliban and al-Qaeda will be discussed below.

1. Taliban

With respect to the Taliban, it seems clear that the Taliban with whom the United States is in conflict within the borders of Afghanistan are quite isolated from other fighting groups, such as the Taliban in Pakistan.[91] In other words, they appear to be present only in Afghanistan and are not engaged in conflict with the United States from anywhere else. To the extent that this is factually true, the President's declaration may de facto signal an end of hostilities with the Taliban.

To the extent that the United States is currently engaged in a NIAC with the Taliban contained within the borders of Afghanistan, the withdrawal of troops from that geographic region may signal a de facto cessation of hostilities with that Party to the conflict. Even if the United States leaves various uniformed advisers in Afghanistan to assist the Afghan National Army in their fight with the Taliban,[92] that action is unlikely to equate to a continuation of armed conflict.

> The first round of Guantanamo habeas decisions depended in almost every instance on the existence of a meaningful tie to ongoing hostilities in Afghanistan, as did the Supreme Court's 2004 decision in *Hamdi*. Indeed, Justice O'Connor in *Hamdi* was at pains to caution that at some point in the future this baseline condition making LOAC relevant could unravel. The declining U.S. role in combat operations in Afghanistan goes directly to that point.

Id.

91. Ben Brumfield, *Who Are the Pakistani Taliban?*, CNN (Oct. 17, 2012, 12:22 PM), http://www.cnn.com/2012/10/17/world/asia/pakistan-taliban-profile ("They are not 'the Taliban' that the U.S. forces have been at war with in Afghanistan, according to a Pakistani analyst.").

92. State of the Union, *supra* note 1, at 8 President Obama said, "We're negotiating an agreement with the Afghan Government that focuses on two missions: training and equipping Afghan forces so that the country does not again slip into chaos and counterterrorism efforts that allow us to pursue the remnants of Al Qaida and their affiliates." *Id.*

Therefore, any Guantanamo detainees who are detained solely on the basis of their association with the Taliban in Afghanistan should gain the presumption of repatriation. This presumption could be overcome by a showing that an individual detainee would likely return to the fight in some other way or with some other Party to an existing armed conflict. But pending that showing, the United States would be required to repatriate Taliban detainees.

2. Al-Qaeda

The effect of the President's statement and subsequent withdrawal of troops from Afghanistan has a significantly different effect on those at Guantanamo who are detained because of their relationship to al-Qaeda. This position is echoed by Jonathan Hafetz:

> Since 9/11, the United States has relied on the continued existence of the armed conflict in Afghanistan to mask the broad implications of a global war on terror. But the U.S. decision to apply a war paradigm to al Qaeda and other terrorist groups will not terminate with the conflict in Afghanistan or with U.S. participation in that conflict. To the contrary, the United States' approach suggests that it will continue to apply a war paradigm to other regions, such as the Horn of Africa and Yemen, and to other "associated" organizations, such as Al Qaeda in the Arabian Peninsula (AQAP). The risk is that the United States will claim it is in a perpetual state of armed conflict, with one terrorist organization replacing another as the enemy and one region supplanting another as the focus of operations.[93]

Department of Defense General Counsel Jeh Johnson has the following view about al-Qaeda:

> [T]here will come a tipping point . . . at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.[94]

---

93. Hafetz, *supra* note 85, at 42–43.

94. Johnson, *supra* note 63. Johnson also made the following observation:

> We cannot and should not expect al Qaeda and its associated forces to all surrender, all lay down their weapons in an open field, or to sign a peace treaty with us. They are

To Johnson, this occurrence will signal the end of the armed conflict with al-Qaeda and begin a "counterterrorism effort against *individuals* who are the scattered remnants of al Qaeda, or are parts of groups unaffiliated with al Qaeda, for which the law enforcement and intelligence resources of our government are principally responsible."[95] At that point, the armed conflict with al-Qaeda will be over and hostilities will have ceased.

C. No Longer a Threat

The cessation of hostilities between Parties to a conflict is a key factor in determining the time to repatriate, but it is not the only factor. International law also takes into consideration the future dangerousness of the detainee. Guantanamo detainee cases, including *Basardh v. Obama*[96] and *Al-Ginco v. Obama*,[97] support the assertion that whether the detainee is a continuing threat is one of the factors to be considered before the detainee is released.[98] On the other hand, in its brief in *Al-Bihani*, the United States asserted that the "authority to detain [was] not dependent upon a showing of future danger. The Supreme Court made clear in *Hamdi* that the detention of individuals is authorized for the duration of the conflict, and does not depend upon a judicial determination that the individual constitutes an ongoing or future threat."[99] It is as of yet unclear what position the government will ultimately take on this issue, but the law seems to be clear that a nation can require a finding that the detainee is no longer a threat prior to release or repatriation.

Mortlock agrees with this approach and points out that detention is "intended to prevent enemy combatants from returning to the battlefield."[100] States should not be required to repatriate an individual

---

> terrorist organizations. Nor can we capture or kill every last terrorist who claims an affiliation with al Qaeda.

Id.

95. *Id.*
96. 612 F. Supp. 2d 30 (D.D.C. 2009).
97. 626 F. Supp. 2d 123 (D.D.C. 2009).
98. Mortlock, *supra* note 35, at 398–401.
99. Brief for Appellees, *supra* note 71, at 19.
100. Mortlock, *supra* note 35, at 397 (citations omitted). Mortlock goes on to argue:

> [T]he key to a more reasonable detention policy in contemporary conflict, therefore, is to determine how the rule for traditional armed conflicts may be applied to the war on terrorism in a manner that serves this purpose. Instead of focusing on the war effort at large, or even the fight against extremism, the United States should apply the same membership standard used to determine whether to detain enemy combatants in the first place, asking whether the individual is a member of al Qaeda, the Taliban, or associated forces.

Id.

who is almost certainly going to return to the battlefield and engage in armed conflict once again with the repatriating state.

The process for this determination has already been completed for the Guantanamo detainees in response to an Executive Order by President Obama,[101] and a continuous review process is already in place.[102] The fact that the authority to continue detention is being determined on an individual basis[103] lends credence to the assertion that the determination to release can or should also be based on a similar individual basis.

1. Taliban

Given the self-proclaimed "end of the war" in Afghanistan by the end of 2014, the United States needs to begin now to ascertain to whom the presumption of repatriation applies and then begin to assess future dangerousness. Mortlock proposes using a "membership" test, based on recent Court decisions to determine whether the presumption should be overcome.[104] Under his theory, if the detainee continues to be part of the Taliban, al-Qaeda, or associated forces, the presumption of repatriation could be overcome.

Membership seems a much more workable theory for al-Qaeda, as will be discussed below, than for the Taliban. It appears that membership in the Taliban did not necessarily require that one took up arms in hostilities. It is conceivable that there may be detainees who would like to continue their association with the Taliban as a religious organization or political party, but not participate in armed conflict with the United States or the government of Afghanistan. In that case, those individuals should not be detained based simply on their membership.

Instead, a genuine inquiry should be made into the potential for the detainee to return to the fight against U.S. forces. Given the fact that the U.S. is pulling its forces out of Afghanistan, that would seem to be a fairly

---

101. Thomas Joscelyn, *34 'High Risk' Guantanamo Detainees Approved for Transfer*, LONG WAR J. (Sept. 24, 2012), http://www.longwarjournal.org/archives/2012/09/34_high_risk_guantan.php#ixzz2MpRkX5Go. Joscelyn writes:

> The Obama administration has released a list of 55 Guantanamo detainees who were approved for transfer by the Guantanamo Bay Review Task Force. The task force, which was authorized by President Obama as one of his first acts in office, completed its work in January 2010. . . . JTF-GTMO determined that 34 of the 55 detainees on the newly-released list were "high risk(s)" who are "likely to pose a threat to the US, its interests, and allies" if freed from custody.

Id.

102. *Id.* (indicating that there have been multiple assessments of risk level).

103. *See* Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 823 (2011).

104. Mortlock, *supra* note 35, at 398–401 (citations omitted).

high bar to meet. Thus, the removal of troops from Afghanistan and the self-proclaimed "end of hostilities" will provide a strong argument that Taliban detainees should be released to the Afghanistan government, provided they will be treated appropriately.[105]

2. Al-Qaeda

Where the cessation of hostilities is much more difficult to detect with al-Qaeda, the future threat analysis seems more easily discerned. Unlike the Taliban, membership in al-Qaeda carries a strong inference of willingness to conduct hostilities.

Concerning repatriation, Johnson states, "At that point we will also need to face the question of what to do with any members of al Qaeda who still remain in U.S. military detention without a criminal conviction and sentence. In general, the military's authority to detain ends with the 'cessation of active hostilities.'"[106] Johnson was careful to say that this would not result in immediate repatriation of all al-Qaeda, but reminded his audience that after World War II, both England and the United States "delayed the release of some Nazi German prisoners of war."[107]

David Mortlock's "membership" approach to release or repatriation may be more useful with this group of detainees.

> In a conflict with a terrorist organization that is unlikely to ever conclude with a formal truce or peace treaty, the traditional model is not practical. Instead, the government must look to the end of hostilities on an individual basis; just as membership determines when an individual qualifies as an enemy combatant, the end of that membership can determine his or her release. Thus, a membership-based model could determine the scope of the government's detention authority as well as the length of time it may detain an enemy combatant, providing a beginning and end to this form of preventive detention.[108]

In a somewhat similar approach, Professors Bradley and Goldsmith propose an individual analysis not based on membership, but solely on a future dangerousness standard.

> These differences suggest that, with respect to the power to detain terrorist combatants outside the conflict in Afghanistan, the end of the conflict

105. *See* ASHLEY S. DEEKS, AVOIDING TRANSFERS TO TORTURE 15-16 (2008), *available at* http://www.cfr.org/terrorism-and-the-law/avoiding-transfers-torture/p16693.
106. Johnson, *supra* note 63.
107. *Id.*
108. Mortlock, *supra* note 35, at 397 (citations omitted).

> should be viewed in individual rather than group-based terms. Under this approach, the question is not whether hostilities have ceased with al Qaeda and related terrorist organizations, but rather whether hostilities have, in essence, ceased with the individual because he no longer poses a substantial danger of rejoining hostilities.[109]

Whether based on a modified membership theory or an individual assessment of dangerousness, the end of hostilities in Afghanistan seems to have little bearing on these determinations. Perhaps if the individual was to be repatriated to Afghanistan there might be some indication that he was out of the fight simply through geographic separation, but that fact alone is unlikely to be enough to conclude that release is prudent or required.

IV. CONCLUSION

President Obama's announcement—that troops would be leaving Afghanistan at the end of 2014 and that the war would be over—is an important factor in the continuing detention of detainees at Guantanamo Bay, Cuba. However, it does not mean that all detainees will be immediately released or repatriated.

For detainees captured in connection with the Taliban, the end of hostilities in Afghanistan creates a presumption that detainees from that conflict should be repatriated. This presumption of repatriation may be overcome on an individual basis by a finding that the individual in question will return to the battle.

In the case of detainees connected with al-Qaeda, the end of hostilities in Afghanistan has little effect and any release or repatriation decision must still be based on a determination that the individual detainee's fight with U.S. troops is over and that he will not return to the fight if released.

The end of the conflict in Afghanistan certainly marks a watershed in America's war on terror, but it means little to detained terrorists. For them, the hostilities continue, and so does their detention.

---

109. Bradley & Goldsmith, *supra* note 86, at 2124.