

Ludecke's Lengthening Shadow: The Disturbing Prospect of War Without End

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Wars have typically been fought against proper nouns (Germany, say) for the good reason that proper nouns can surrender and promise not to do it again. Wars against common nouns (poverty, crime, drugs) have been less successful. Such opponents never give up. The war on terrorism, unfortunately, falls into the second category.¹

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Particularly when the war power is invoked to do things to the liberties of people . . . the constitutional basis should be scrutinized with care. . . . I would not be willing to hold that war powers may be indefinitely prolonged merely by keeping legally alive a state of war that had in fact ended. I cannot accept the argument that war powers last as long as the effects and consequences of war, for if so they are permanent²

INTRODUCTION

The “war” on terrorism may never end.³ At a minimum, it shows no signs of ending any time soon. Although this reality is an unpleasant one for many civil libertarians today, it is also difficult to refute. Just what *will* mark the conclusion of hostilities? It seems unlikely that there is an entity whose “surrender” would mark an obvious “end” of combat. Even if there were such an entity, there do not appear to be clearly identifiable objectives that allow for the successful completion of the conflict. There is no physical territory to conquer, no clear leadership structure to topple, no Reichstag over which to fly a foreign flag.

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1. Grenville Byford, *The Wrong War*, FOREIGN AFF., July/Aug. 2002, at 34, 34.

2. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146-147 (1948) (Jackson, J., concurring).

3. For what appears to be the earliest authoritative assertion of this proposition after the September 11 attacks, see Bob Woodward, *CIA Told To Do “Whatever Necessary” To Kill Bin Laden; Agency and Military Collaborating at “Unprecedented” Level; Cheney Says War Against Terror “May Never End.”* WASH. POST, Oct. 21, 2001, at A1.

Acceptance of the present conflict's potential openendedness, however, only generates another, more intractable, question: if the fight against terrorists truly is a "war" for constitutional purposes,⁴ as the Supreme Court has now effectively held it to be, then what is the impact on the President's war powers – those extreme prerogatives that the Constitution (or Congress) only authorizes the Executive to exercise during times of war? Does the possible indeterminacy of the war on terrorism necessarily allow the President to continue to invoke, potentially forever, authority unavailable during peacetime? This question is simple to frame, but the answer is hardly obvious.

The duration of presidential war powers during the war on terrorism was one of the many issues left unresolved – and largely unaffected – by the Supreme Court in the trilogy of terrorism decisions handed down at the end of its 2003 Term. Nevertheless, since the Court in *Hamdi v. Rumsfeld*⁵ affirmed, however tentatively, the President's wartime authority to detain "enemy combatants," resolution of this issue may soon become unavoidable.

According to the Supreme Court's 1948 decision in *Ludecke v. Watkins*⁶ – the last authoritative precedent on the subject – the "war" does not end when the fighting stops. The President may continue to exercise various of his war powers until either he or Congress formally terminates hostilities, and, in some cases, even after that. *Ludecke* appears to stand for the dramatic

4. Although this proposition is debatable, for the purpose of analyzing the question of when wars end, I accept as correct the Administration's position that the conflict with al Qaeda is a war within the meaning of the Constitution. Indeed, there is at least some support for the proposition that congressional authorization for the use of force is determinative of the constitutional question. The Supreme Court appeared to embrace this logic, however implicitly, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), and some of the Administration's staunchest defenders in the academy have made this proposition the core element of their defense. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); Curtis A. Bradley & Jack L. Goldsmith, Rejoinder, *The War on Terrorism, International Law, Clear Statement Requirements, and Constitutional Design*, 118 HARV. L. REV. 2683 (2005).

But in challenging Bradley and Goldsmith's arguments, the critics of their position, see, e.g., Ryan Goodman & Derek Jinks, Reply, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653 (2005); Cass R. Sunstein, Reply, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005); Mark Tushnet, Reply, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673 (2005), have generally neglected one of the questions at the core of this article: if the war against terrorism really is a war, then what? Is it really the case that Congress can authorize the potentially indefinite use of the war powers? Even if the congressional authorization for the use of military force is determinative of the question whether the conflict against terrorism is truly a "war" for constitutional purposes, might not the limitlessness of the authorization *itself* raise a constitutional problem?

5. 542 U.S. 507 (2004) (plurality opinion).

6. 335 U.S. 160 (1948).

proposition that, in determining when a war “ends” for constitutional purposes, it is irrelevant whether fighting actually has ceased. All that matters is whether the political branches have formally acknowledged as much.⁷ At least with regard to the precise issue presented in *Ludecke* – the President’s authority to detain and summarily deport German nationals under the Alien Enemy Act of 1798⁸ – the formal termination of World War II did not come until enactment of legislation on October 19, 1951,⁹ nearly six and one-half years after Germany’s unconditional surrender.

Others long have explored in great detail the equally significant topic of who gets to say when a war is over.¹⁰ This article’s primary focus is on the altogether different problem of what happens if no one – neither Congress nor the President – ever formally terminates the President’s authority to use military force against terrorist groups such as al Qaeda. Given the ongoing threat terrorism poses and will continue to pose in the foreseeable future,¹¹ and in light of the Supreme Court’s recognition that a “war” is underway against these entities, it stands to reason that neither political branch will be much inclined to declare the war “over” any time soon, even if the on-the-ground reality is that the “enemy” is no longer able to continue fighting. Who would ever want to declare its termination, even if success seemed to be at hand? Imagine the disastrous political (and psychological) consequences of a successful terrorist attack after a declaration that the war has “ended.”

7. In this regard, one scholar has argued that “the detention of al Qaeda and Taliban prisoners is no more indefinite than the detention of prisoners in any war; it will continue until the entities to which they owe allegiance cease to fight.” Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213, 1224 n.45 (2005). This argument completely elides the distinction made in *Ludecke*, for the war powers may continue to be exercised, under extant case law, until the political branches *formally acknowledge* that “the entities to which [the detainees] owe allegiance cease to fight.” That is to say, the determinative legal question is *not* whether those fighting against the United States in the “war on terrorism” have ceased to do so. The question is whether the U.S. government has formally recognized as much. Whether the terrorists have actually ceased fighting is, for constitutional purposes, entirely beside the point.

8. 50 U.S.C. §§21-24 (2000).

9. Act of Oct. 19, 1951, ch. 519, 65 Stat. 451; *see* United States *ex rel.* Jaeger v. Carusi, 342 U.S. 347 (1952) (*per curiam*).

10. *See, e.g.*, Edward S. Corwin, *The Power of Congress To Declare Peace*, 18 MICH. L. REV. 669 (1920); Theodore French, *The End of the War*, 15 GEO. WASH. L. REV. 191 (1947); Note, *Judicial Determination of the End of the War*, 47 COLUM. L. REV. 255 (1947). For two more recent takes on the problem, *see* John Alan Cohan, *Legal War: When Does It Exist, and When Does It End?*, 27 HASTINGS INT’L & COMP. L. REV. 221 (2004), and Mark W. Mosier, Comment, *The Power To Declare Peace Unilaterally*, 70 U. CHI. L. REV. 1609 (2003). *See also* John M. Hagan, Note, *From the XYZ Affair to the War on Terror: The Justiciability of Time of War*, 61 WASH. & LEE L. REV. 1327 (2004).

11. *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1029 (2004).

A fair reading of *Ludecke* and its precursors suggests that the President may continue to use many of his war powers, including the two most significant powers presently claimed by the Bush administration – the power to detain “enemy combatants” and the power to try unlawful combatants in military tribunals – indefinitely. Nothing in *Hamdi*, *Hamdan*, or any of the Court’s other terrorism decisions speaks to the contrary. If anything, the *Hamdi* plurality implicitly (and Justice Thomas’s dissent explicitly) accepted the validity of most of the deference-based principles underlying *Ludecke*. Since *Ludecke*, courts have had very little to do with adjudicating inter-branch debates over the temporal extent of the war power,¹² and it is hard to see any reversal of this trend in *Hamdi*, *Rumsfeld v. Padilla*,¹³ *Rasul v. Bush*,¹⁴ or any of the myriad decisions since.¹⁵ Instead, when the Bush administration asserts that it is entitled to detain suspected “enemy combatants” until the “end of hostilities,” the extant case law supports that position, and it places no clear limits on the duration of the detention.

Terrorism will pose a threat to our nation for years, even decades, to come.¹⁶ However, the war powers the Constitution vests in Congress and the President were never meant to operate indefinitely.¹⁷ Whether or not the conflict against terrorism is a “new” kind of war, the President’s authority to conduct traditional, temporary wars should not be accepted as justifying the permanent exercise of the war powers.¹⁸ Courts should require a more active – and more frequent – role for Congress in reauthorizing presidential

12. Questions relating to justiciability have often served as barriers to judicial resolution of the merits of cases involving war powers issues. For a recent discussion, along with citations to archetypal cases, see LOUIS FISHER, PRESIDENTIAL WAR POWER 272-274 (2d rev. ed. 2004).

13. 542 U.S. 426 (2004).

14. 542 U.S. 466 (2004).

15. Indeed, in none of the decisions in detention cases handed down since the Supreme Court’s June 2004 opinions has any court paid significant attention to the indefiniteness problem. See, e.g., *Padilla v. Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005), *rev’d*, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 126 S. Ct. 1649 (2006); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), *and Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005), *on appeal sub nom. Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. denied*, 2007 U.S. LEXIS 3783 (U.S. Apr. 2, 2007); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004); *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev’d*, 415 F.3d 33 (D.C. Cir. 2005), *rev’d*, 126 S. Ct. 2749 (2006).

16. See, e.g., NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 361-364 (2004).

17. For example, in a Civil War-era case, the Supreme Court noted that the powers associated with martial law were never meant to operate indefinitely. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866) (“As necessity creates the rule, so it limits its duration . . .”).

18. This article owes much to the scholars of and scholarship on the “never-ending emergency.” See, e.g., Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1389-1391 (1989).

use of force, and in the absence of express congressional action courts should impose their own limits.

The congressional force authorizations approved in recent years have included sweeping delegations of military authority to the President. Since courts have traditionally found inter-branch disputes in this arena to be non-justiciable, the only real boundary on delegation has concerned duration, which has been limited historically by some combination of legislative text, which set explicit or implicit terms of expiration, and political reality.¹⁹ The best defense against presidential excess in the use of the war powers, at least before the War Powers Resolution, was a veto-proof congressional supermajority. Theoretically, the War Powers Resolution scaled this requirement back to a mere majority, since it purports to require only a concurrent resolution to terminate hostilities initiated by the President,²⁰ but this mechanism has never been used. And when Congress *has* authorized hostilities, as is the case in the war on terrorism, a veto-proof supermajority is still required to terminate the action, whether directly or indirectly. As John Hart Ely so astutely put it, "Decisions on war and peace are tough, and more to the point they're politically risky. Since 1950 Congress has seen little advantage in making them, either without or within the framework of the War Powers Resolution."²¹

Indeed, as Ely and countless others have argued, in the post-Vietnam era the effectiveness of political checks on the war power is questionable, at best. Most scholars have sided with Harold Koh's conclusion that the lack of

19. Here I part company rather decisively with Professors Bradley and Goldsmith, who argue not only that there is a distinction between "limited" and "broad" authorizations for the use of force, but that, historically, there have been *no* substantive limits on "broad" authorizations for the use of force. See Bradley & Goldsmith, *Congressional Authorization and the War on Terrorism*, *supra* note 4, at 2072. That assertion is not accurate. Broad authorizations have traditionally had *fewer* limits, but have hardly been limitless. When Congress declared war against Germany and Japan in December 1941, did it authorize *any* use of military force against *any* foreign nation for *any* purpose? Of course not.

20. See 50 U.S.C. §1544(c) (2000). Following *INS v. Chadha*, 462 U.S. 919 (1983), this provision may well be invalid as an unconstitutional legislative veto. For thorough and intriguing analyses of the issue, see Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 129-133 (1984), and Daniel E. Lungren & Mark L. Krotoski, *The War Powers Resolution After the Chadha Decision*, 17 LOY. L.A. L. REV. 767 (1984). Of course, even if §1544(c) is unconstitutional under *Chadha*, §1544(b), which terminates the use of force by virtue of congressional *inaction*, does not raise the same separation-of-powers issues as those presented in *Chadha*.

21. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 52 (1993); see John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379 (1988). Ely's primary example, the Gulf of Tonkin Resolution, provides a surprisingly apt analogy to the Authorization for Use of Military Force. I consider this issue in more detail in Section IV.A., *infra*.

political willpower is a central reason why the President “almost always wins in foreign affairs.”²² However ineffectual checks on presidential war power are generally, it is hard to envision how political checks could have any force whatsoever in the specific context of terrorism. How can any member of Congress, of any ideological stripe, vote to end the conflict against terrorism while terrorism remains a threat?²³

Given this reality, it is no wonder that Justice Souter openly wondered at oral argument in *Hamdi* whether authorizations for use of military force should have less force after a certain period of time.²⁴ Taking up Justice Souter’s question, this article argues that the answer must be yes – force authorizations without immediately obvious objectives must have time limits. Such limits are necessary both to delineate more clearly the boundaries of presidential assertions of “wartime” authority in combating such poorly defined enemies and to avoid the political inertia problem so thoroughly documented by the academy. Otherwise, the indeterminacy of the war on terrorism will only naturally result in permanent presidential war powers, an outcome appropriately feared by the Founders and guarded against in the Constitution.

With a time limit in place, Congress might well decide to reauthorize hostilities. In such a situation, the need for periodic reauthorization would make it more likely that Congress would assess both whether it remains appropriate for the President to continue to exercise such power and what the terms should be. A broad delegation of power immediately after a damaging attack should not be presumed to remain in effect indefinitely; continuing congressional review of the situation is always desirable.²⁵

22. See Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1291 (1988).

23. Recall that the only two members of Congress who voted against the Gulf of Tonkin Resolution lost their bids for re-election. See ELY, WAR AND RESPONSIBILITY, *supra* note 21, at 19.

24. Transcript of Oral Argument at 32-35, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-6696.pdf [hereinafter *Hamdi* Argument Transcript].

25. Of course, if a majority of Congress (but less than two-thirds) wanted to end a war that the President wished to continue, Congress could exercise its spending power, but such an approach would still require the President’s signature on the spending legislation, leaving the constitutional issue very much where it started. See, e.g., Peter Raven-Hansen & William C. Banks, *From Vietnam to Desert Shield: The Commander in Chief’s Spending Power*, 81 IOWA L. REV. 79 (1995); Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833 (1994). But, to reiterate, my focus here is *not* on hypothetical inter-branch conflicts over the termination of a war, but on the altogether distinct problem of an apathetic Congress reluctant actively to terminate a war. As an analogy, consider the difficulties the Bush administration encountered in trying to convince Congress to reenact the sunsetted provisions of the USA PATRIOT Act, and the equal difficulties civil liberties

Affirmative legislative action is far preferable in this context to silent acquiescence.²⁶ Mandatory reauthorization would help provide a way around many – if not most – of the political pitfalls that have undermined the effectiveness of the War Powers Resolution. Most significantly, it would reverse the inertia that currently requires significant congressional initiative to terminate hostilities.

Under my proposal, congressional action would be required, after a certain period of time, to continue the war. One can only imagine what the congressional debate would have sounded like in 1968 if Congress had needed to reauthorize the Gulf of Tonkin Resolution. In today's context, it seems doubtful that a reauthorization of the use of force against al Qaeda could be anywhere near as broad as the Authorization for Use of Military Force (AUMF) passed in the week after the September 11 attacks.²⁷ Would a statute requiring such a reauthorization be unconstitutional? The answer, as I suggest below, is a resounding “no.” The basic idea – sunsets for war powers – is pretty simple, but its potential ramifications are far-reaching. The central goals of this article are to demonstrate the necessity, the constitutionality, and the potential effectiveness of such temporal limitations on the war power.

This article begins with an analysis of the various situations in which the Supreme Court has upheld exercises of presidential war powers after the cessation of hostilities, culminating with the decision in *Ludecke*. As Part I demonstrates, a series of earlier cases,²⁸ beginning with four post-Civil War decisions,²⁹ laid the groundwork for *Ludecke*. Part I traces the path from these cases to the *Ludecke* Court's conclusions that presidential war powers must necessarily survive the actual end of hostilities, and that Congress or the

groups had in trying to repeal them even before they expired. See, e.g., Chris Mooney, *A Short History of Sunsets: Will the Sun Ever Set on the Patriot Act or the Bush Tax Cuts?*, LEGAL AFF., Jan./Feb. 2004, at 67.

26. For a more eloquent exposition of this point in a related context, see Ackerman, *supra* note 11, at 1047-1049. Professor Ackerman disfavors repeated reauthorizations of emergency powers by a bare majority, insisting instead on increasing super-majorities. See *id.* at 1048. For reasons I elaborate upon below, however, his “supermajoritarian escalator” is less appropriate in this context because, *inter alia*, it raises more constitutional problems as applied to the extraterritorial use of military force than it does in the context Ackerman is concerned with, domestic emergency powers.

27. Pub. L. No. 107-40, 115 Stat. 224 (2001) (*codified at* 50 U.S.C. §1541 note (Supp. III 2003)).

28. A key to the Court's pre-*Ludecke* jurisprudence is its post-World War I decision in *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919), which I discuss in detail in Section I.B.

29. *McElrath v. United States*, 102 U.S. 426 (1880); *The Protector*, 79 U.S. (12 Wall.) 700 (1871); *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493 (1871); *United States v. Anderson*, 76 U.S. (9 Wall.) 56 (1870).

President would eventually step in to formally terminate the conflict and the President's use of powers based upon it.

Courts have reaffirmed the President's nearly unchallengeable authority to exercise his war powers *until* that point, even when the "end" came years after the actual cessation of hostilities. In the interim, not only could the President continue to resort to his war powers, but the passage of time had no effect on their potency. Justice Frankfurter's opinion for the *Ludecke* majority is by far the broadest endorsement of this view, suggesting that the core concern of this article – what happens to war powers when wars don't end – is a nonjusticiable political question.

Part I concludes with the various responses to *Ludecke*, both by courts and by academics, suggesting that, while the merits of the Court's approach may be controversial, there is a consensus on the essence of its holding. Wars would not and do not end, for purposes of American constitutional law, until either Congress or the President says so. At least some presidential war powers are therefore available for a potentially indefinite period even after the actual end of hostilities. Although other academic discussions have focused on the debate over which branch may end a war (and how they may do so), Part I suggests that, when these cases are read together, *Ludecke* emerges both as the most important and the most disturbing. The 5-4 majority in *Ludecke* vitiated the requirement, stated in the earlier cases, that for war powers to have force after the end of fighting, the congressional statutes delegating such authority must clearly evince Congress's intent to allow for post-hostilities operation. After *Ludecke*, Congress need not be the least bit specific in delegating war powers to the President for those powers to continue to operate until the war formally "ends." All that matters is the existence of some broadly defined mandate, of which the AUMF is the perfect example.

Part II moves on to the Supreme Court's decision in *Hamdi*, and why it, read together with *Ludecke*, has ominous implications for the duration of presidential powers to fight the "war" on terrorism. Even now, three years after the *Hamdi* decision, it is hard to assess properly the long-term importance of the plurality's vaguely-worded due process mandate to lower courts. But, at least for the present, the Court has clearly allowed the use of the war powers on U.S. citizens detained as suspected terrorists, without providing any guidance as to how long such powers may be exercised, or whether the authority will wane with the passage of time. Given Justice Souter's insistence at oral argument on some clarification regarding the potential duration of the conflict, the absence of any discussion of this problem in the four opinions issued in *Hamdi* is surprising. Although the *Hamdi* Court clearly carved out a role for the federal judiciary in reviewing the meaning and scope of the AUMF, such review is largely meaningless, Part II concludes, if the President may resort to the Authorization ad infinitum.

Part III begins by suggesting why *Hamdi* is so dangerous as a precedent, at least when read together with *Ludecke*. Sunsets would be one possible solution to this problem. Part III next takes up, and attempts to rebut, the arguments that sunsets would be either unconstitutional or ineffective. The constitutionality of sunsets on the war powers flows from Congress's long-recognized authority to place substantive limitations on the President's powers at the *outset* of a congressionally authorized war.³⁰ The question of effectiveness is somewhat more complicated, because sunsets are worthless if they turn out to be unenforceable, and modern American history is rife with examples of presidents exceeding the scope of their substantive war powers, only to have courts do little if anything to stop them. As one obvious example, consider President Nixon's unauthorized bombing of Cambodia and Laos during the Vietnam War.³¹ Nevertheless, even where Congress had initially authorized hostilities (thus placing the issue outside the War Powers Resolution's termination provisions), a sunset would move congressional failure to reauthorize hostilities out of Justice Jackson's "twilight zone," and into the classification where the President's power is at its "lowest ebb."³² Part III suggests that in such a case courts would be far more likely – and far more able – to intervene than in the absence of such a measure, since continued presidential war-making would be in conflict with legislation passed by Congress.

It is not enough to recognize that the rationale behind *Ludecke* raises serious difficulties in the current situation. Rather, to prevent potential future executive resort to permanent war powers in this (and other) wars that may never end, Congress must carve out a far more assertive role for itself in re-authorizing the use of military force than it has thus far. In the post-Vietnam era, where congressional force authorizations have replaced formal declarations of war, and, more importantly, where wars do not have clearly identifiable "beginnings" and "ends," more participation and more accountability, not less, must be the obligation of all three branches of

30. Indeed, Bradley and Goldsmith themselves cite two recent examples where Congress placed express time limits on use of force authorizations. See Bradley & Goldsmith, *supra* note 4, *Congressional Authorization and the War on Terrorism*, at 2077 & nn.126-127 (citing Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, §6, 97 Stat. 805, 806-807 (1983) (imposing an eighteen-month limitation on the use of force); Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, §8151(b)(2)(B), 107 Stat. 1418, 1476 (1993) (imposing a five-month limitation on funding for the use of force in Somalia)).

31. See ELY, *WAR AND RESPONSIBILITY*, *supra* note 21; Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?*, 157 MIL. L. REV. 180 (1998); Rodric B. Schoen, *A Strange Silence: Vietnam and the Supreme Court*, 33 WASHBURN L.J. 275 (1994).

32. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

government.³³ Sunsets on presidential uses of force are an elegant and straightforward means of implementing this mandate.

I. THE ROAD TO – AND THROUGH – *LUDECKE*

Although they arise infrequently, questions about when and how wars end have come before U.S. courts in nearly every major American military conflict.³⁴ The discussion in this article, however, focuses on the three periods during which these questions were most persistent: the aftermath of the U.S. Civil War, World War I, and World War II. Most of the cases discussed are more directly related to the question of *when* wars end than on what happens when the political branches have said nothing. In trying to answer the former question, courts have invariably considered the scope of the government's war powers until (and after) hostilities formally ceased.

A. *The Civil War and the "Suppression of the Rebellion"*

It was not long after the attack on Fort Sumter that federal courts were first confronted with legal questions turning on when the conflict between the Union and the Confederacy actually began, and what legal status it would have. The earliest significant decision came from the U.S. Circuit Court in Washington, D.C., in June 1861, when that court concluded that the debate over when the war began was a political question, not to be passed upon by the judicial branch.³⁵ But the Supreme Court declared in the *Prize Cases* in 1863 that even though *whether* a state of war existed between the North and South was a political question,³⁶ courts had to have a role, particularly after

33. The focus of this article is on situations in which Congress authorizes the use of the armed forces to conduct hostilities, and on when that authorization must naturally, whether by its own terms or by common sense, cease to have force. The separate (and undeniably important) issue of congressional authority with regard to unilateral presidential war-making – when the President commits troops without any congressional action whatsoever – is beyond the scope of this article. Cf. Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972); Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637 (2000).

34. See French, *supra* note 10, at 191 (“Almost from the beginning of the nation cases have arisen which involve the question of the duration of war after actual fighting has ceased.”); cf. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236 (1796) (“A right to make peace, necessarily includes the power of determining on what terms peace shall be made. A power to make treaties must of necessity imply a power, to decide the terms on which they shall be made. A war between two nations can only be concluded by treaty.”).

35. See *The Tropic Wind*, 28 F. Cas. 218, 220-221 (C.C.D.D.C. 1861) (No. 16,541a).

36. The *Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863) (“Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court

the fighting ended in 1865, in resolving disputes turning on *when* a state of war existed.

The first such case to come before the Supreme Court, *United States v. Anderson*,³⁷ involved the Abandoned or Captured Property Act of 1863,³⁸ which allowed persons claiming to be the owner of property abandoned or captured under the Act to press their claim in the United States Court of Claims until two years after the “suppression of the rebellion.”³⁹ The question in *Anderson* was when the two-year claims period expired. Writing for a unanimous Court, Justice Davis concluded that, for purposes of the Act, the rebellion was “suppressed” on August 20, 1866, when President Johnson issued a proclamation to that effect.⁴⁰

This conclusion was buttressed by an 1867 statute that used August 20, 1866, as the reference point from which to add three additional years to an 1864 statute setting salaries for non-commissioned officers.⁴¹ Rejecting the notion that Congress could have intended the claims period to begin on the day formal hostilities ceased,⁴² Davis seized on the proclamation date:

must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.”); *see also* *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1366-67 (Fed. Cir. 2004) (citing this discussion from the *Prize Cases*), *cert. denied*, 545 U.S. 1139 (2005). For an overview of the importance of the *Prize Cases* and their centrality to modern debates over the war powers, *see* Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 177-180 (2004). *See also* PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW* 811-819 (2d ed. 2005).

37. 76 U.S. (9 Wall.) 56 (1870).

38. Act of Mar. 12, 1863, ch. 120, 12 Stat. 820. For a summary of the Act, *see United States v. Klein*, 80 U.S. (13 Wall.) 128, 137 (1872). The issue of rights to Confederate property, and the scope of the various Confiscation Acts, was one of the more frequently litigated questions arising out of the war. *See generally* DANIEL W. HAMILTON, *THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR* (2007); Harry N. Scheiber, *Property Rights Versus “Public Necessity”: A Perspective on Emergency Powers and the Supreme Court*, 28 J. SUP. CT. HIST. 339, 350-354 (2003).

39. Abandoned or Captured Property Act of 1863, §3, 12 Stat. at 820.

40. *Anderson*, 76 U.S. (9 Wall.) at 69-70. President Johnson had earlier proclaimed, on April 2, 1866, that armed resistance had ceased everywhere except in Texas, and the August 20 proclamation asserted that resistance had ended in Texas, as well. *See id.* at 70.

41. Act of Mar. 2, 1867, ch. 145, §2, 14 Stat. 422, 422 (continuing the effect of an 1864 statute “for three years from and after the close of the rebellion, as announced by the President of the United States by proclamation, bearing the date the twentieth day of August, eighteen hundred and sixty-six.”).

42. *See Anderson*, 76 U.S. (9 Wall.) at 70 (“[D]id Congress mean, when it passed the statute in question, that the Union men of the South, whose interests are especially cared for by it, should, without any action by Congress or the Executive on the subject, take notice of the day that armed hostilities ceased between the contending parties, and if they did not present their claims within two years of that time, be forever barred of their recovery? The inherent difficulty of determining such a matter, renders it certain that Congress did not intend to impose

As Congress, in its legislation for the army, has determined that the rebellion closed on the 20th day of August, 1866, there is no reason why its declaration on this subject should not be received as settling the question wherever private rights are affected by it. That day will, therefore, be accepted as the day when the rebellion was suppressed, as respects the rights intended to be secured by the Captured and Abandoned Property Act.⁴³

Importantly, the *Anderson* Court did not pass on whether statutes deriving from sources of wartime authority could continue to operate after August 20, 1866. Instead, the Court was only concerned with how, in the narrow class of cases arising out of the Abandoned or Captured Property Act, the phrase “suppression of the rebellion” should be interpreted.

One year later, in *Stewart v. Kahn*,⁴⁴ the Court upheld a controversial 1864 statute that suspended statutes of limitations in state courts in all cases in which the war had made service of process or arrest impossible.⁴⁵ The Court found the statute valid and went on to consider whether the statute of limitations began running once the fighting ended.

Justice Swayne, writing for the Court, observed that the war power did not cease once hostilities did. Instead, “It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.”⁴⁶ While *Anderson* had concluded that the rebellion was finally “suppressed” on August 20, 1866, at least for purposes of the Abandoned or Captured Property Act, *Stewart* held that, even after the war was over, statutes enacted to deal with wartime problems could still have application for some period thereafter.

Stewart was followed by *The Protector*,⁴⁷ a case in which the Court was confronted with the five-year statute of limitations in section 34 of the Judiciary Act of 1789. *The Protector* raised the specific question of whether the statute of limitations had expired in the case at hand. The Court had previously held that the period was tolled for the entire duration of the war, and that the tolling necessarily extended beyond the end of fighting. In *The Protector*, however, it had to resolve exactly when the tolling began and

on this class of persons the necessity of deciding it for themselves.”).

43. *Id.* at 71.

44. 78 U.S. (11 Wall.) 493 (1871).

45. Act of June 11, 1864, ch. 118, 13 Stat. 123. In an earlier case, *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532 (1868), the Court had held that the statute of limitations for filing appeals under section 34 of the Judiciary Act was tolled for the duration of the war.

46. *Stewart*, 78 U.S. (11 Wall.) at 507.

47. 79 U.S. (12 Wall.) 700 (1871).

ended. Chief Justice Chase, departing from the logic of *United States v. Anderson*, concluded:

Acts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and the close of the late civil war, that it would be difficult, if not impossible, to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken.⁴⁸

Critically, because “the war did not begin or close at the same time in all the States,” the Court looked to when hostilities began and ended in each of the specific states. In *The Protector*, the lawsuit at issue was filed in Alabama, against which President Lincoln imposed a blockade on April 27, 1861, and in which President Johnson declared resistance at an end on April 2, 1866. Thus, by the time the appeal before the Court was filed, on May 17, 1871, the five-year statute of limitations had run.⁴⁹

Since *Anderson* limited itself to the terms of the Abandoned or Captured Property Act, *The Protector* was not in conflict with it. Instead, read together, the cases suggest a point that later courts would expand on – that the date on which a war ends for purposes of the war power may turn both on the specific power at issue and on the place where the power is exercised. Thus, for Civil War cases in which state courts were concerned, as they were in *The Protector*, the Court looked to when the war ended in those states. Further, *Stewart* held that even the legal end of the war would not necessarily terminate all of the government’s wartime authority. Together, the trio of cases constitutes an important, but not necessarily transparent, set of precedents.

The last Civil War-related case raising questions about the effect of wartime laws after the end of hostilities was *McElrath v. United States*,⁵⁰ an 1880 appeal from the Court of Claims. At issue in *McElrath* was an 1866 statute that provided that “no officer in the military or naval service shall in time of peace, be dismissed from service except upon and in pursuance of the

48. *Id.* at 701-702.

49. *See id.* at 702. Had the Court followed *Anderson* and accepted August 20, 1866, as the end of the war throughout the nation, the statute would not have run. Thus, the choice of date proved dispositive.

50. 102 U.S. 426 (1880).

sentence of a court-martial to that effect, or in commutation thereof.”⁵¹ On June 19, 1866, Lieutenant Thomas L. McElrath had been dismissed from military service without a court-martial, and the suit addressed the question whether the date of his dismissal was “in time of peace” for purposes of the statute. The elder Justice Harlan, writing for the Court, invoked both *Anderson* and *The Protector* to support the conclusion that a *national* “time of peace” did not exist until August 20, 1866. Thus, the 1866 statute had no force on the date McElrath was dismissed.⁵² Without much in the way of discussion, the *McElrath* Court concluded that *Anderson*, not *The Protector*, had the better of the argument about the date on which the war ended, since *Anderson* dealt with a statute of national application, as opposed to *The Protector*, where the facts were specific to Alabama.

Of the four war-duration cases to come before the post-Civil War Court, only *Stewart* even implicitly reached the extent of presidential war powers after the “suppression of the rebellion.” All agreed, generally without argument, that there was no constitutional concern with exercising various war powers until the *legal* end of the war, regardless of the actual state of military affairs at the time. Most of the debate turned only on what the legal date actually was. Although the Supreme Court was, in each of the four cases discussed above, concerned only with the interpretation of specific acts of Congress, the principle was clear: where Congress tied the exercise of a power to the existence of a state of war, the termination of the state of war would turn largely, if not entirely, on the actions of the political branches.

The Court ducked the thornier question first raised in *Ware v. Hylton*,⁵³ whether a war could only be concluded by a treaty, by relying on the distinction between foreign and domestic wars, since no treaty could end the Civil War.⁵⁴ This distinction came before the Court again in the one significant war-duration case to arise between the Civil War and World War I. In *J. Ribas y Hijo v. United States*,⁵⁵ a case arising out of the Spanish-

51. Act of July 13, 1866, ch. 176, §5, 14 Stat. 90, 92.

52. *McElrath*, 102 U.S. at 437-439; *see also id.* at 438 (“Since peace, in contemplation of law, could not exist while rebellion against the national government remained unsuppressed, the close of the rebellion and the complete restoration of the national authority, as announced by the President and recognized by Congress, must be accepted as the beginning of the ‘time of peace,’ during which the President was deprived of the power of summarily dismissing officers from the military and naval service.”).

53. 3 U.S. (3 Dall.) 199 (1796).

54. *See, e.g., Anderson*, 76 U.S. (6 Wall.) at 70 (“In a foreign war, a treaty of peace would be the evidence of the time when it closed, but in a domestic war, like the late one, some public proclamation or legislation would seem to be required to inform those whose private rights were affected by it, of the time when it terminated, and we are of the opinion that Congress did not intend that the limitation in this act should begin to run until this was done.”).

55. 194 U.S. 315 (1904).

American War, the Court was confronted with the question whether a damage claim against the United States for seizure of a ship during the war was cognizable because the ship had not been returned to its owners until well after the cessation of hostilities. Justice Harlan, writing for the Court, held that it was not, because “[a] state of war did not, in law, cease until the ratification in April, 1899, of the treaty of peace.”⁵⁶ Thus, the domestic/foreign distinction was again preserved, at least for the time being. After World War I, however, because of the Senate’s refusal to ratify the Treaty of Versailles, the Court would struggle with the question of just how and when the war ended, and what war powers President Wilson could exercise in the interim.

B. World War I: Hamilton and the “War Emergency” Theory

*Hamilton v. Kentucky Distilleries & Warehouse Co.*⁵⁷ was the most significant of the Court’s pre-*Ludecke* decisions on the duration of presidential war powers, and it was the first case raising such issues to come before the Court after World War I.⁵⁸ *Hamilton* arose out of the War-Time Prohibition Act,⁵⁹ enacted by Congress on November 21, 1918, ten days after the armistice with Germany brought fighting to a close. Specifically, the Act provided that, after June 13, 1919, and

until the conclusion of the present war and thereafter until the termination of demobilization, the date of which shall be determined and proclaimed by the President of the United States, . . . it shall be unlawful to sell for beverage purposes any distilled spirits, and during said time no distilled spirits held in bond shall be removed therefrom for beverage purposes except for export.⁶⁰

The consolidation of two different suits challenging the War-Time Prohibition Act,⁶¹ *Hamilton* involved four arguments against the statute, two of which

56. *Id.* at 323. For an interesting and insightful decision in a case arising after the treaty was concluded, see *In re Cadwallader*, 127 F. 881 (8th Cir. 1904).

57. 251 U.S. 146 (1919).

58. For a survey of some of the various pre- and post-*Hamilton* lower court decisions addressing similar questions, see Manley O. Hudson, *The Duration of the War Between the United States and Germany*, 39 HARV. L. REV. 1020, 1039-1041 (1926).

59. Act of Nov. 21, 1918, ch. 212, 40 Stat. 1045.

60. *Id.* §1, 40 Stat. at 1046. During the same period, the Act also prohibited the use of “grains, cereals, fruit, or other food product” to make “beer, wine, or other intoxicating malt or vinous liquor for beverage purposes.” *Id.*

61. *Hamilton* itself came out of the Western District of Kentucky, and was consolidated, on appeal, with *Dryfoos v. Edwards*, 284 F. 596 (S.D.N.Y. 1919).

went to its temporal application – whether the Act became void before the suits were brought because the war emergency passed, and whether, by its own terms, it expired prior to the initiation of the suits.⁶² Justice Brandeis, writing for the Court, relied largely on the Civil War-era precedents to dispose of the second argument, and he also observed that no authoritative proclamation or statute had yet declared the war to be at an end. Not only had mobilization not terminated, but the war itself had not concluded for purposes of the Act.⁶³ To the first contention, that the court was in a position to suggest that the war emergency was over – and that Congress no longer had the authority even to enact the statute on November 21, 1918 – Brandeis, after recapping the strongest version of arguments in favor of finding the war emergency to be at an end, penned the opinion’s critical passage:

Conceding, then, for the purposes of the present case, that the question of the continued validity of the War-Time Prohibition Act under the changed circumstances depends upon whether it appears that there is no longer any necessity for the prohibition of the sale of distilled spirits for beverage purposes, it remains to be said that on obvious grounds every reasonable intendment must be made in favor of its continuing validity, the prescribed period of limitation not having arrived; that to Congress in the exercise of its powers, not least the war power, upon which the very life of the nation depends, a wide latitude of discretion must be accorded; and that it would require a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued.⁶⁴

Observing that no peace treaty had yet been signed, that the government still exercised its wartime control of the railroads, “that other war activities have not been brought to a close, and that it can not even be said that the man power of the nation has been restored to a peace footing,” the Court was “unable to conclude that the act has ceased to be valid.”⁶⁵

62. The Court also considered – and rejected – arguments that the Act violated the Fifth Amendment, and that it was abrogated by the adoption of the Eighteenth Amendment. *See Hamilton*, 251 U.S. at 154-158, 163-164.

63. *See id.* at 165-167. Importantly, Brandeis conflated the treaty/proclamation distinction from the Civil War cases, concluding that “[i]n the absence of specific provisions to the contrary the period of war has been held to extend to the ratification of the treaty of peace *or* the proclamation of peace.” *Id.* at 165 (emphasis added).

64. *Id.* at 163.

65. *Id.*

This passage from *Hamilton* is as remarkable as it is unprecedented. According to Justice Brandeis, there *could* be cases where Congress no longer had the power to enact legislation like the War-Time Prohibition Act, even though, as the Court held later in the opinion, the war clearly was not over. But such cases must be “clear,” and “every reasonable intendment” must be given to upholding the validity of the statute. It was not that the continued existence of the war emergency *vel non* was a political question; instead, the Court determined *for itself* that the emergency was still very much active, albeit with significant deference to the actions of the political branches, or the lack thereof. Brandeis did not suggest the specific criteria by which the Court reached such a conclusion, but he looked to a host of factors, including the various other war powers the national government was still exercising, and, most importantly, the absence of any congressional statute or presidential proclamation formally acknowledging the cessation of hostilities, as evidence that the crisis had not abated.

What *Hamilton* suggests, then, is a distinction between the formal, legal end of hostilities, and the passing of the war emergency. Determinations of the former were left to the political departments, but the courts could, under Justice Brandeis's argument, have a role in ascertaining the latter.⁶⁶ That Congress and the President had not yet declared the war to be at an end was an important consideration for the *Hamilton* Court in deciding that the war emergency had not passed, but it was not, by itself, dispositive.

It is important, also, to situate *Hamilton* in its proper context. The case was argued on November 20, 1919, just one day after the Senate voted against ratification of the Treaty of Versailles. Owing to the urgency of the questions presented, the decision was handed down on December 15, 1919, just twenty-

66. For an interesting and largely similar take on courts' authority to review questions arising out of the war emergency, see *Techt v. Hughes*, 128 N.E. 185 (N.Y. 1920) (Cardozo, J.). Considering whether provisions of a pre-war treaty with Germany could govern a property dispute, then-Judge Cardozo concluded that:

President and Senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts. The treaty of peace itself may set up new relations, and terminate earlier compacts, either tacitly or expressly. . . . But until some one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government unrevealed, the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally, en bloc. Their part it is, as one provision or another is involved in some actual controversy before them, to determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace.

Id. at 192 (citing *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)); *see also* *Clark v. Allen*, 331 U.S. 503, 508-09 (1947) (discussing this passage).

five days after argument. Based on these facts, some have suggested that the timing helps explain why the Court retreated somewhat from the *Ware v. Hylton* principle that wars could only be ended by treaty.⁶⁷ But the fact that no formal termination to the war was reasonably imminent by the time the Court heard argument in *Hamilton* is equally important in another respect: faced with war powers that could potentially be exercised indefinitely (with a legal end to the war nowhere in sight), the Court refused to endorse a per se rule deferring to the two political branches so long as neither had yet declared hostilities at an end.

Instead, in distinguishing between the end of the war and the passing of the war emergency, Justice Brandeis suggested a role for courts in reviewing the necessity of wartime legislation. Admittedly, the review was emphatically deferential, but the notion that courts could have any role whatsoever in reviewing whether circumstances continued to justify the operation of wartime legislation was a significant step, and one in many ways contrary to the existing precedents.

A series of cases followed on *Hamilton*'s heels, both in time and in principle. The first was *Jacob Ruppert, Inc. v. Caffey*,⁶⁸ argued the same day as (and decided three weeks after) *Hamilton*. In *Caffey*, the Court extended *Hamilton* to uphold the Volstead Act's technical amendments to the War-Time Prohibition Act.⁶⁹ As Justice Brandeis concluded, "For the reasons set forth in [*Hamilton*], the [War-Time Prohibition Act] was and remained valid as against the plaintiff and had not expired. For the same reasons section 1 of title 1 of the [Volstead Act] was not invalid, merely because it was new legislation."⁷⁰

The Supreme Court's 1920 decision in *Kahn v. Anderson*,⁷¹ and its 1923 holding in *Commercial Trust Co. v. Miller*,⁷² were also significant.⁷³ *Kahn*

67. See Mosier, *supra* note 10, at 1619.

68. 251 U.S. 264 (1920).

69. Volstead Act, ch. 85, §1, 41 Stat. 305, 305 (1919). The Act was passed over President Wilson's veto on October 28, 1919. See *Caffey*, 251 U.S. at 280, 282-284.

70. *Caffey*, 251 U.S. at 281-282.

71. 255 U.S. 1 (1920).

72. 262 U.S. 51 (1923).

73. There were other related Supreme Court decisions, but they mostly addressed *Hamilton*'s implementation rather than its principles. In *Block v. Hirsh*, 256 U.S. 135 (1921), the Court set out the extent to which legislative findings of emergency in passing a post-hostilities measure based on the war emergency were entitled to significant deference. Three years later, in *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924), the Court remanded to the District of Columbia Supreme Court the factual inquiry whether the war emergency necessitating the District of Columbia Rent Control Act of 1921 had passed, noting that "[a] law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed." *Id.* at 547-548. *Sinclair* was significant because, even though *Block* had suggested that legislative findings of

was a habeas petition brought by an imprisoned soldier challenging the constitutionality of his court martial for murdering another imprisoned soldier. Under Article 92 of the 1916 Articles of War, servicemen could not be court-martialed for any murder committed within the territorial United States “in time of peace.” Following *Hamilton* and *McElrath*, Chief Justice White’s opinion for the Court concluded that “that qualification signifies peace in the complete sense, officially declared,” looking largely to how the language manifested the legislative intent to preserve jurisdiction until the war had formally come to an end.⁷⁴

By 1923, when *Miller* came before the Court, both Congress and the President had formally declared World War I to be at an end.⁷⁵ In *Miller*, the Court was faced with the question whether the Trading With the Enemy Act of 1917,⁷⁶ a “provision for the emergency of war,”⁷⁷ could continue to have force even after the end of the war had been formally proclaimed. Justice McKenna wrote for a unanimous Court that it could, for, even after the war had formally ended:

Many problems would yet remain for consideration and solution, and such was the judgment of Congress, for it reserved from its legislation the Trading with the Enemy Act and amendments thereto, and provided that all property subject to that act shall be retained by the United States “until such time as the Imperial German government . . . shall have . . . made suitable provision for the satisfaction of all claims.”⁷⁸

In other words, because Congress had intended for the powers delegated under the Trading With the Enemy Act to have force until the Germans

emergency were entitled to deference, the deference was not absolute. As Justice Holmes wrote for the Court, “a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared.” *Id.* at 547.

74. *Kahn*, 255 U.S. at 10.

75. Congress so declared in a Joint Resolution passed on July 2, 1921. Act of July 2, 1921, ch. 40, 42 Stat. 105. President Harding also issued a proclamation to that effect on August 25, 1921, upon the formal signing of the United States’ separate peace treaty with Germany. See Proclamation, 42 Stat. 1939. The peace treaty, appended to the proclamation, was formally ratified by the Senate on October 18, and ratifications were exchanged on November 11. Besides being the third anniversary of the Armistice, the last date is also significant as the date on which some have argued the war truly did “end” for purposes of the war powers. See, e.g., Hudson, *supra* note 58, at 1045.

76. Ch. 106, 40 Stat. 111, *codified as amended at* 50 U.S.C. app. §§1-44 (2000).

77. *Miller*, 262 U.S. at 57.

78. *Id.* (quoting Trading With the Enemy Act of 1917, §5).

“made suitable provision for the satisfaction of all claims,” the only issue was whether that condition had been met, a question not raised in *Miller*.

The theme running through the four post-World War I Supreme Court decisions discussed here, along with the various decisions of lower courts upholding other wartime measures after the armistice,⁷⁹ was that the critical factor was congressional intent. *Hamilton* established, at least for the time being, that courts could review whether the necessity justifying the legislation had passed, even if the war had not formally ended, but that review turned largely on what Congress intended. Once it was *clear* that Congress intended for particular delegated powers to have force until, and in some cases after, the war formally came to an end, the courts’ work was done.

C. The War Powers After World War II: The Pre-Ludecke Decisions

To fully understand the extent to which *Ludecke* represented a decisive break from *Hamilton* and its progeny, it is important to survey the pre-*Ludecke* cases that immediately followed the end of World War II. The Third Reich formally surrendered to the Allies on May 8, 1945, shortly after Berlin fell. Japan surrendered on August 16, 1945, although the surrender was not made official until September 2, 1945, when it was formally accepted onboard the USS *Missouri*.

In re Yamashita,⁸⁰ the first war-related case to come before the Court after the end of World War II,⁸¹ was also one of the more controversial. *Yamashita* was an application for leave to file a petition for writs of habeas corpus and prohibition on behalf of a Japanese general convicted of war crimes by a U.S. military tribunal in the Philippines.⁸² Although *Yamashita* has met with

79. For a survey of some of the lower court cases, see French, *supra* note 10, at 194 n.20, and Hudson, *supra* note 58, at 1039-1044. See also *First Nat’l Bank of Pittsburgh v. Anglo-Oesterreichische Bank*, 37 F.2d 564, 567 (3d Cir. 1930); *In re Sutherland*, 23 F.2d 595 (2d Cir. 1928).

80. 327 U.S. 1 (1946).

81. In November 1945, in *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945), the Court upheld the New York mortgage moratorium law based on the legislative findings of emergency, distinguishing *Castleton Corp. v. Sinclair*, 264 U.S. 543 (1924). But as much as *Hahn* was a post-war emergency case, it dealt with an economic emergency unrelated to the war, since the mortgage moratorium in issue had been in place in New York since 1933. It is, nevertheless, an interesting early indication of Justice Frankfurter’s view on the limited role that courts should play in inquiring into the basis for emergency legislation. See *Hahn*, 326 U.S. at 234-235; see also Note, *Judicial Determination of the End of the War*, *supra* note 10, at 264-265 (discussing *Hahn*).

82. Specifically, *Yamashita*, the so-called “Tiger of Malaya,” was alleged to have violated the laws of war by not *preventing* men under his command from committing various atrocities during the war. He was not accused of participating in atrocities or of ordering others to commit them. See *Yamashita*, 327 U.S. at 5-7.

significantly less criticism from contemporary scholars than *Ex parte Quirin*,⁸³ the critiques have been no less harsh.⁸⁴ At the core of the Court's controversial decision was its analysis of the nature of the charges against General Yamashita⁸⁵ and the extent to which the tribunal comported with the procedural protections afforded by the 1920 Articles of War and various international treaties.⁸⁶ Holding that the tribunal was lawfully established, that Yamashita was properly before it, and that none of the charges or procedural aspects of his trial raised constitutional concerns, the Court dismissed the application and denied the writs.⁸⁷

One of Yamashita's arguments is of special relevance here. He urged that, to whatever extent that *Quirin* established the validity of military tribunals during wartime, the power to try combatants for violations of the laws of war could no longer have force when hostilities were no longer ongoing. In response, Chief Justice Stone invoked the Court's Civil War precedents and its decision in *Kahn*:

The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced.

We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government. In fact, in most instances the practical administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial.⁸⁸

83. 317 U.S. 1 (1942).

84. See, e.g., John M. Ferren, *General Yamashita and Justice Rutledge*, 28 J. SUP. CT. HIST. 54 (2003); Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 150-156 (2006).

85. On the importance of *Yamashita* in the context of command responsibility for war crimes, the legal principle for which it stood, see Bruce D. Landrum, Note, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293 (1995).

86. See *Yamashita*, 327 U.S. at 7-25.

87. *Id.* at 25-26.

88. *Id.* at 12 (citation omitted).

Chief Justice Stone's opinion for the Court in *Yamashita* has been severely castigated, both in the forceful dissents of Justices Murphy and Rutledge in the case itself⁸⁹ and in the academic literature ever since.⁹⁰ But what is important here is the subtle but crucial step *away* from the World War I-era precedents. All of the post-World War I cases dealt with statutes in which Congress's intent to allow post-hostilities operation was clear, whether through explicit language, as in the case of the Trading With the Enemy Act or War-Time Prohibition Act, or through language previously interpreted to allow such effect, such as the "in time of peace" wording in Article 92 of the 1916 Articles of War at issue in *Kahn*. *Yamashita*, by contrast, was based on congressional authority that was vague at best, and that manifested no explicit intent to allow for operation after the cessation of hostilities.⁹¹ The Court found plenty of implicit support in history and precedent, but the switch from express congressional approval to inferred intent was as silent as it was unsupported by earlier case law, and it would become crucial by the time of *Ludecke*.

89. See *id.* at 26-41 (Murphy, J., dissenting); *id.* at 41-81 (Rutledge, J., dissenting). Justice Rutledge's dissent, easily one of the most compelling opinions he ever produced, has been characterized as "one of the Court's truly great – and influential – dissents." Ferren, *supra* note 84, at 65. Rutledge wrote,

The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply.

Yamashita, 327 U.S. at 81 (Rutledge, J., dissenting).

90. See Ferren, *supra* note 84; see also Alpheus Thomas Mason, *Inter Arma Silent Leges: Chief Justice Stone's Views*, 69 HARV. L. REV. 806, 831-838 (1956) (summarizing the holding in *Yamashita* and the problems with the Court's methodology); David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2064-2068 (2003) (same); Landrum, *supra* note 85 (same).

91. Much of the reliance on implicit congressional intent was borrowed from the *Quirin* Court's strained (albeit necessary) reading of the Articles of War that has been detailed elsewhere. See, e.g., *Padilla v. Hanft*, 389 F. Supp. 2d 678, 686-688 (D.S.C. 2005), *rev'd*, 423 F.3d 386 (4th Cir. 2005); see also *Padilla v. Rumsfeld*, 352 F.3d 695, 715-716 (2d Cir. 2003), *rev'd on other grounds*, 542 U.S. 426 (2004); Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL'Y REV. 153, 168 n.85 (2004). For other, more detailed discussions of the Court's controversial decision, see MICHAEL DOBBS, *SABOTEURS: THE NAZI RAID ON AMERICA* (2004); LOUIS FISHER, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW* (2003); PIERCE O'DONNELL, *IN TIME OF WAR: HITLER'S TERRORIST ATTACK ON AMERICA* (2005); Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteurs' Case*, 89 MIL. L. REV. 59 (1980); David J. Danelski, *The Saboteurs' Case*, 21 J. SUP. CT. HIST. 61 (1996); and Carl Tobias, *Detentions, Military Commissions, Terrorism, and Domestic Case Precedent*, 76 S. CAL. L. REV. 1371, 1392-1401 (2003).

Unlike *Yamashita*, the two other important pre-*Ludecke* decisions fit more comfortably in the mold of the post-World War I opinions. In *Fleming v. Mohawk Wrecking & Lumber Co.*,⁹² the Court was called on to decide, *inter alia*, whether the First War Powers Act of 1941,⁹³ which authorized the President to redistribute functions of executive agencies at his discretion, no longer had force due to its twin provisions limiting the authority under the Act to “matters relating to the conduct of the present war”⁹⁴ and to a period expiring six months after “the termination of the war.”⁹⁵ Justice Douglas, writing for the Court, concluded that the Act still applied, citing *Hamilton* and *Stewart* for the conclusion that “[w]hatever may be the reach of [the war] power, it is plainly adequate to deal with problems of law enforcement which arise during the period of hostilities but do not cease with them. No more is involved here.”⁹⁶

Similarly, one year later, in *Woods v. Cloyd W. Miller Co.*,⁹⁷ the Court was confronted with the constitutionality of the Housing and Rent Act of 1947,⁹⁸ which extended parts of the Emergency Price Control Act of 1942,⁹⁹ even though President Truman had proclaimed hostilities at an end on December 31, 1946. The Court had already sustained emergency rent control laws as properly incident to the war power,¹⁰⁰ and *Fleming* established that Truman’s proclamation was not conclusive of whether the war power could still be exercised – the proclamation itself stipulated that “a state of war still exists.”¹⁰¹ Thus, the Court held that the constitutionality of the 1947 statute “follows a fortiori” from *Hamilton*, *Fleming*, and *Stewart*, for the deficit in housing necessitating the statute was largely caused by the “war effort.” As Justice Douglas reasoned, “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 a short supply of the needed article created.”¹⁰²

92. 331 U.S. 111 (1947).

93. Act of Dec. 18, 1941, ch. 593, 55 Stat. 838.

94. *Id.* §1.

95. *Id.* §401.

96. *Fleming*, 331 U.S. at 116. The *Fleming* Court thus did not reach the question when the “termination of the war” took place, since, for its purposes, it had not yet occurred.

97. 333 U.S. 138 (1948).

98. Act of June 30, 1947, ch. 163, 61 Stat. 193.

99. Act of Jan. 30, 1942, ch. 26, 56 Stat. 23.

100. *See, e.g.*, *Bowles v. Willingham*, 321 U.S. 503 (1944).

101. Proclamation 2714, *Cessation of Hostilities of World War II*, 12 Fed. Reg. 1 (Jan. 3, 1947), 61 Stat. 1048; *see Fleming*, 331 U.S. at 116.

102. *Woods*, 333 U.S. at 142-143; *see also id.* at 146 (Frankfurter, J., concurring) (concluding that the result was compelled by *Hamilton* and *Caffey*). It is for this proposition that *Woods* is still a staple of most surveys of American constitutional law. *See, e.g.*, KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 236-237 (15th ed. 2004).

Two passages from *Woods* not central to its holding are nonetheless worthy of highlighting. First, Justice Douglas, writing for the majority, responded to arguments that the decision had onerous implications for the continuing exercise of the war power:

We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and the Tenth Amendments as well. There are no such implications in today's decision. We deal here with the consequences of a housing deficit greatly intensified during the period of hostilities by the war effort. Any power, of course, can be abused. But we cannot assume that Congress is not alert to its constitutional responsibilities. *And the question whether the war power has been properly employed in cases such as this is open to judicial inquiry.*¹⁰³

Justice Douglas was probably responding to Justice Jackson, who, in a separate concurring opinion, raised the dangerous specter of potentially indefinite authority under the guise of “war power”:

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 the 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.¹⁰⁴

Although Jackson nevertheless concluded that the “war power” justified federal rent control on the facts before the Court in *Woods*, he reasserted that he would not allow war powers to be indefinitely exercised merely because the political departments kept the state of war “legally alive.” In his words, “I cannot accept the argument that war powers last as long as the effects and

103. *Woods*. 333 U.S. at 143-144 (emphasis added).

104. *Id.* at 146-147 (Jackson, J., concurring).

consequences of war, for if so they are permanent”¹⁰⁵ Both Douglas’s and Jackson’s concerns would prove well-founded.

D. The Evisceration of Ludecke and Hamilton

At the core of the Supreme Court’s decision in *Ludecke* was the Alien Enemy Act of 1798, an often overlooked but unmistakably sweeping statute that provides, *inter alia*, that:

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies.¹⁰⁶

105. *Id.* at 147.

106. 50 U.S.C. §21 (2000). The statute was enacted between the notorious Alien and Sedition Acts. *See* Act of July 6, 1798, ch. 66, 1 Stat. 577 (codified as amended at 50 U.S.C. §§21-24). The Act has been amended only once, during World War I, to extend its scope to women. *See* Act of Apr. 16, 1918, ch. 55, 40 Stat. 531. As Chief Justice Rehnquist points out, though they were not so detained, a majority of the individuals detained in Japanese internment camps during World War II, because they were not U.S. citizens, could also have been held under the Alien Act. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 209-211 (1998). This only underscores the massive overbreadth problems inherent in the Act, and I agree entirely with Professor Sidak that

The Alien Enemy Act is a harsh statute aimed at a harsh problem, a statute whose execution by the President has the potential seriously to infringe upon individual liberty in the United States during wartime. The mechanism for controlling that risk to liberty is neither judicial review nor congressional oversight once the delegation of emergency powers to the President has occurred. Rather, the only significant safeguard is presented *ex ante* in the formal requirement that, unless the United States has been or is about to be invaded, the emergency powers of the Alien Enemy Act may be delegated to the President only after Congress has issued a formal declaration of war.

J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U.L. REV. 1402, 1424 (1992). And yet, as I explore elsewhere, courts have long entertained challenges to the threshold question of whether detainees are, in the first instance, “enemy aliens.” *See* Stephen I. Vladeck, *Enemy Aliens, Enemy Property, and Access to the Courts*, 11 LEWIS & CLARK L. REV. (forthcoming 2007); *see also* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 GREEN BAG 2D 39 (2005).

Almost all of the hundreds of cases challenging the Act that came before the courts during World War I and World War II turned on the meaning of the terms “natives, citizens, denizens, or subjects.”¹⁰⁷ But when certiorari was granted in an Alien Enemy Act case for the first time in April 1948 in *Ludecke*,¹⁰⁸ the Court was confronted not only with the facial constitutionality of the statute, but also with the extent of its post-hostilities operation. Kurt Ludecke was a German national ordered removed from the United States on January 18, 1946, by which time it had been over eight months since Germany had surrendered, and almost as long since it had ceased to be a legal entity.

Writing for a sharply divided 5-4 majority, Justice Frankfurter first concluded that the Alien Enemy Act precluded judicial review of the removal order, for “[t]he very nature of the President’s power to order the removal of all enemy aliens rejects the notion that courts may pass judgment upon the exercise of his discretion.”¹⁰⁹ Moving on to the argument that the President’s power under the Act terminated with the cessation of hostilities, Frankfurter noted that “[w]ar does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops.”¹¹⁰

Backtracking significantly from *Hamilton*, even while citing it, Frankfurter continued: “Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.”¹¹¹ In one of the opinion’s most critical passages, the majority dismissed in a footnote the centrality of *explicit* legislative intent in

107. For an insightful overview of the Act and its history, see Sidak, *supra* note 106. For a representative sampling of the extensive and largely overlooked Alien Enemy Act case law, see *United States ex rel. Zeller v. Watkins*, 167 F.2d 279 (2d Cir. 1948); *United States ex rel. Kessler v. Watkins*, 163 F.2d 140 (2d Cir. 1947); *United States ex rel. Hack v. Clark*, 159 F.2d 552 (7th Cir. 1947); *United States ex rel. Schlueter v. Watkins*, 158 F.2d 853 (2d Cir. 1946); *Citizens Protective League v. Clark*, 155 F.2d 290 (D.C. Cir. 1946); *McCoy v. United States ex rel. Umecker*, 144 F.2d 354 (8th Cir. 1944); *United States ex rel. D’Esquiva v. Uhl*, 137 F.2d 903 (2d Cir. 1943); *United States ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898 (2d Cir. 1943); *De Lacey v. United States*, 249 F. 625 (9th Cir. 1918); *Ex parte Risse*, 257 F. 102 (S.D.N.Y. 1919); *Ex parte Fronklin*, 253 F. 984 (N.D. Miss. 1918); and *Ex parte Graber*, 247 F. 882 (N.D. Ala. 1918).

108. Curiously, the Court rejected the petition for a writ of certiorari on January 12, 1948, the first time it was filed, *Ludecke v. Watkins*, 332 U.S. 853 (1948) (mem.), but it granted a petition for rehearing, vacated the denial, and took the case on April 5. *Ludecke v. Watkins*, 333 U.S. 865 (1948) (mem.).

109. *Ludecke v. Watkins*, 335 U.S. 160, 164 (1948).

110. *Id.* at 167.

111. *Id.* at 169.

interpreting whether wartime statutes should have post-hostilities effect, even though that issue had been crucial to the *Hamilton* Court: “[W]hen the life of a statute is defined by the existence of a war,” Frankfurter wrote in *Ludecke*, “Congress leaves the determination of when a war is concluded to the usual political agencies of the Government.”¹¹² Because “the political branch of the Government has not brought the war with Germany to an end,” the Court concluded that its role was limited:

It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come. These are matters of political judgment for which judges have neither technical competence nor official responsibility.¹¹³

Justice Frankfurter's broad opinion drew dissents penned by Justice Black and by Justice Douglas. While Justice Douglas's dissent discussed due process, Justice Black focused entirely on Justice Frankfurter's interpretation of the Act as allowing for post-hostilities operation. Although Black agreed that the Alien Enemy Act was an unmistakably broad grant of power to the President,

this 1798 statute, unlike statutes passed in later years, did not expressly prescribe the events which would for statutory purposes mark the termination of the “declared” war or threatened invasions. In such cases, we are called on to interpret a statute as best we can so as to carry out the purpose of Congress in connection with the particular right the statute was intended to protect, or the particular evil the statute was meant to guard against.¹¹⁴

Black next relied on the legislative history of the statute to support the proposition that the Act was meant only to prevent alien enemies within the United States “from extending aid and comfort to an enemy country while

112. *Id.* at 169 n.13.

113. *Id.* at 170 (footnote omitted). For an intriguing discussion of a post-World War II British case raising the same issue, and yielding the same result, see *Recent Case*, 95 U. PA. L. REV. 416 (1947) (discussing *R. v. Bottrill; ex parte Kuechenmeister*, 62 T.L.R. 579 (Ct. App. 1946)). In England, Parliament had long since given the King the unilateral authority to determine, except where the context required otherwise, when statutes having only wartime operation would cease to have force. See *Termination of the Present War (Definition) Act*, 8 & 9 Geo. 5, c. 59 (Eng.).

114. *Ludecke*, 335 U.S. at 176 (Black, J., dissenting) (citations omitted).

dangers from actual fighting hostilities were imminently threatened.”¹¹⁵ But because of the German surrender, “German aliens could not now, [even] if they would, aid the German Government in war hostilities against the United States.”¹¹⁶ Thus, the entire basis for the Act no longer provided justification for its operation.

Justice Black hit the nail on the head in pointing out the flaws in Justice Frankfurter’s argument, but he did not fully trace out the meaning of the Court’s holding in precedential terms. Indeed, Justice Frankfurter’s opinion for the majority should be seen for what it is: the silent evisceration of *Hamilton*. In *Hamilton*, building on the Civil War precedents, the Court had established that some form of explicit congressional intent is the touchstone for the judiciary in inquiring into the post-hostilities operation of the war power. Yet not only was there no showing in *Ludecke* of explicit intent for the Alien Enemy Act to continue to have effect after the end of fighting, but the argument that fulfilling the purpose of the Act required enforcing it even after hostilities had ended was laughable on its face, as Justice Black repeatedly highlighted. The whole purpose of the Alien Enemy Act was to prevent alien enemies from providing aid to their country of origin. But how could any German-American still be providing aid to the nonexistent Nazi government in 1948?

Had the Court relied on the logic of *Hamilton*, it stands to reason that the Alien Enemy Act would have been regarded as the type of statute that, under Justice Brandeis’s rationale, did not need to remain in effect once the war emergency justifying it – the military threat from Germany – had passed. Instead, the Court turned *Hamilton* on its head, holding not only that statutes could *implicitly* have post-hostilities operation, but also that, in such a case, courts had no business whatsoever in deciding whether the basis for the legislation had less force after the fighting had ended. The former point was enough of a stretch, but the latter suggested that courts could not even question whether a wartime statute could be read to have post-hostilities operation. That, according to Justice Frankfurter, was a political question.¹¹⁷

As much as *Ludecke* turned its back on its precursors, it also suggests an ominous conclusion that Part III of this article traces out in more detail: once

115. *Id.* at 177.

116. *Id.*

117. What is perhaps most surprising about *Ludecke*, given its precursors, is the absence of Justice Jackson’s voice. Despite his eloquent concurring opinion in *Woods* just four months earlier, expressing concern about sanctioning indefinite resort to the war powers, *see supra* text accompanying notes 104-105, Jackson is missing from both of the *Ludecke* dissents. Indeed, his would have been a fifth vote *against* the continuing operation of the Act (along with Justices Black, Douglas, Murphy, and Rutledge). Instead, and inexplicably, he sided with the majority.

Congress passes a wartime statute, that statute continues to have force, and the powers it confers continue to have operation, until the *political* branches say otherwise, and courts cannot intervene to the contrary. Thus, applied to the problem of a potentially indefinite war, *Ludecke* undeniably – and unfortunately – produces an open-ended war power, no matter when the fighting actually stops.

E. *Ludecke's History*

The Court stepped back from *Ludecke's* potential abyss in 1952 when, in *United States ex rel. Jaeger v. Carusi*,¹¹⁸ it held that the Act of Congress of October 19, 1951, recognizing the “end of the war” with Germany,¹¹⁹ had formally concluded President Truman’s authority under the Alien Enemy Act. In the four years between *Ludecke* and *Jaeger*, hundreds (if not thousands) of alien “enemies” were removed from the United States, and others were kept in preventive detention. That was *Ludecke's* direct impact. But its legacy – how it was received in the academy, how subsequent courts received the decision, and how it is remembered today – is just as important.

Academically, the initial response to *Ludecke* was mixed. Some commentators invoked various aspects of Justice Black’s and Justice Douglas’s dissents to argue that, though its motives were understandable, the *Ludecke* majority erred in construing the Alien Enemy Act to continue to have force after the fighting had stopped.¹²⁰ Typical of this position was the view of one student that “merely because it is no longer practical to remove alien enemies during a ‘shooting war,’ we cannot allow the power to remove to become a power to punish. It becomes so when the removal is made after the alien enemy is no longer dangerous.”¹²¹

Discussion of the opinion predominantly centered on the Court’s constitutional holding and on Justice Douglas’s dissent grounded in due process. Indeed, one of the early commentaries made no reference at all to the question of whether the Alien Enemy Act could continue to operate so long after Germany had ceased to pose a threat.¹²² In general, these

118. 342 U.S. 347 (1952) (per curiam).

119. Joint Resolution To Terminate the State of War Between the United States and the Government of Germany, ch. 519, 65 Stat. 451 (1951). The war with Japan formally ended on April 28, 1952, the date on which the peace treaty became effective, as so proclaimed by President Truman. See Proclamation No. 2974, *Termination of the National Emergencies Proclaimed on September 8, 1939, and May 27, 1941*, 66 Stat. C31-C32.

120. See, e.g., John David Roeder, Comment, 27 N.C. L. REV. 238, 243 (1949); Recent Case, 17 GEO. WASH. L. REV. 578, 581-582 (1949).

121. Roeder, *supra* note 120, at 243.

122. See Charles E. Millikan, Jr., Case Note, 22 S. CAL. L. REV. 307 (1949).

commentators regarded as more pernicious the impact the holding would have on U.S. immigration law and the due process rights of aliens detained pending deportation.

Insofar as the courts were concerned, with the exception of one dissenting opinion,¹²³ *Ludecke* received little more than passing citation in Supreme Court decisions handed down over the following decade. The only decision from the Court since *Ludecke* that has devoted any significant attention to the 1948 decision is the 1959 case of *Lee v. Madigan*.¹²⁴ *Lee*, like *Kahn v. Anderson*, arose out of a court martial conviction under Article 92 of the Articles of War, which withheld court martial jurisdiction for murders committed within the territorial United States “in time of peace.” While serving a sentence in a military correctional facility for one crime, John Lee was convicted of conspiracy to commit murder, a crime committed on June 10, 1949. Whether June 10, 1949, was “in time of peace” was the central question before the *Lee* Court.

Resolution of this question should have been foreordained by *Kahn v. Anderson*. The *Kahn* Court had explicitly interpreted the same language in Article 92 to mean “peace in the complete sense, officially declared,”¹²⁵ and *Ludecke* had rather clearly established that, whatever the state of affairs was as of June 10, 1949, it certainly was not peace in the complete sense. That did not come until at least October 19, 1951, with respect to Germany, or April 28, 1952, with respect to Japan.

Justice Douglas, writing for a 6-2 majority, was unfazed by the precedents, finding neither *Kahn* nor *Ludecke* “dispositive of the present controversy.”¹²⁶

A more particularized and discriminating analysis must be made. We deal with a term that must be construed in light of the precise facts of each case and the impact of the particular statute involved. Congress in drafting laws may decide that the Nation may be “at war” for one purpose, and “at peace” for another. It may use the same words broadly in one context, narrowly in another. The problem of judicial

123. Chief Justice Vinson invoked *Ludecke* in his dissent from the Court’s decision in *Guessefeldt v. McGrath*, 342 U.S. 308 (1952), in which Justice Frankfurter, writing for a 5-3 majority, interpreted section 39 of the Trading With the Enemy Act not as not applying to Germans or Japanese nationals unless they were otherwise ineligible to bring suit under another provision of the Act. According to Chief Justice Vinson, *Ludecke*’s holding with regard to the constitutional civil liberties *vel non* of alien enemies applied with equal force to their property rights, and should have controlled the outcome in *Guessefeldt*. See *id.* at 328-329 (Vinson, C.J., dissenting).

124. 358 U.S. 228 (1959).

125. *Kahn v. Anderson*, 255 U.S. 1, 10 (1920).

126. *Lee*, 358 U.S. at 230.

interpretation is to determine whether “in the sense of this law” peace had arrived. Only mischief can result if those terms are given one meaning regardless of the statutory context.¹²⁷

Justice Douglas distinguished *Kahn* on the ground that in the earlier case both the commission of the offense and the commencement of the trial had predated the Armistice. As for *Ludecke*, the majority suggested that it “belongs in a special category of cases dealing with the power of the Executive or the Congress to deal with the aftermath of problems which a state of war brings and which a cessation of hostilities does not necessarily dispel.”¹²⁸ The Court also distinguished *Hamilton*, *Woods*, and *McElrath*, noting, “Our problem is not controlled by those cases. We deal with the term ‘in time of peace’ in the setting of a grant of power to military tribunals to try people for capital offenses.”¹²⁹

[W]e cannot readily assume that the earlier Congress used “in time of peace” in Article 92 to deny soldiers or civilians the benefit of jury trials for capital offenses four years after all hostilities had ceased. To hold otherwise would be to make substantial rights turn on a fiction. We will not presume that Congress used the words “in time of peace” in that sense. The meaning attributed to them is at war with common sense, destructive of civil rights, and unnecessary for realization of the balanced scheme promulgated by the Articles of War. We hold that June 10, 1949, was “in time of peace” as those words were used in Article 92.¹³⁰

Dissenting, the younger Justice Harlan, joined by Justice Clark, failed to see how the case was distinguishable from *Kahn*, or, indeed, from all of the jurisprudence dating back to the Civil War, holding that the country was not immediately “in time of peace” after the end of hostilities.¹³¹ He had a point. Unless the Court was going to overrule *Kahn*, *Ludecke*, or both, it is hard to see how it could conclude that neither controlled the decision in *Lee*.

One paragraph of the majority opinion in *Lee* makes clear what was really going on. Douglas declared, “We do not write on a clean slate. The attitude of a free society toward the jurisdiction of military tribunals – our reluctance to give them authority to try people for nonmilitary offenses – has a long

127. *Id.* at 230-231 (quoting *United States v. Anderson*, 76 U.S. (9 Wall.) 56, 69 (1870)).

128. *Id.* at 231.

129. *Id.* at 232.

130. *Id.* at 236.

131. *Id.* at 237-240 (Harlan, J., dissenting).

history.”¹³² *Lee* was a backlash, part of a series of opinions written by Justices Douglas and Black that attempted to “fix” some of the more egregious errors committed by the Court in some of the immediate post-war military authority cases.¹³³

But in attempting to fix the errors of the earlier Courts, *Lee* bent over backward so far to “distinguish” all of the earlier precedents, including *Ludecke*, that it is hard to conclude that it ended up anywhere but flat on its back. At most, *Lee* suggests that statutory terms like “in time of peace” should be interpreted, *where possible*, not to bestow military jurisdiction over civilian offenses. As a general rule, however, it is hard to believe that it has any force. Writing shortly afterwards, one commentator even suggested that “the impact of the decision will not [even] permeate other statutes containing a termination clause ‘in time of peace.’”¹³⁴

Leaving aside the open question of how an “in time of peace” provision might be interpreted today, to which *Lee*, at best, only suggests the resolution, the Court in *Lee* expressed no view on the continuing validity of its decision in *Ludecke*, or on the validity of the principles behind the 1948 decision. After *Lee*, *Ludecke* still controlled – and, to this day, still controls – how courts approach wartime statutes that do not speak explicitly, or even implicitly, to their post-hostilities operation. The Warren Court had a chance to put its imprint on Justice Frankfurter’s opinion in *Lee*; instead, it distinguished the earlier case, leaving it as intact, if not more so. For over half a century, *Ludecke* remained on the books, unchallenged by any court, and unstudied by almost all scholars of the war powers.¹³⁵

132. *Id.* at 232.

133. For further amplification of this point, see John F. Trask, Recent Decision, *United States Deemed To Be in Time of Peace Three Years Before Effective Date of Japanese Peace Treaty*, 36 U. DET. L.J. 490, 490-492 (1959). Douglas and Black were responsible for all three of the other major Supreme Court decisions of the era rejecting claims of military authority over nonservicemen. See *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). The trilogy of Warren Court military authority cases (*Lee*, *Reid*, and *Toth*) demonstrated just how bitterly divided the Court had been after World War II, and how the slightest changes in the Court’s membership altered the course of the doctrine.

134. Trask, *supra* note 133, at 492. As another commentator put it, “A reversal or an affirmance of the *Kahn* case would be preferable to the instant decision which introduces uncertainty into the traditional concept of peace.” Clifton S. Carl, Note, 33 TUL. L. REV. 668, 672 (1959).

135. Indeed, there is nary a cite to *Ludecke* in Edward S. Corwin’s masterwork on presidential power. See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1984* (5th rev. ed. 1984).

II. THE SHADOWS OF *HAMDI* AND *LUDECKE*

Only days after the September 11 attacks Congress passed the Authorization for Use of Military Force (AUMF).¹³⁶ In exceedingly vague terms (although the Bush Administration had sought even broader language),¹³⁷ the AUMF provided:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.¹³⁸

The breadth of this authorization is striking. Compare, for example, the statute Congress enacted one year later approving the use of military force against Iraq, in which it authorized the President to use the U.S. military “as he determines to be necessary and appropriate in order to – (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.”¹³⁹ The 2001 authorization to combat terrorism was, deliberately,¹⁴⁰ cast much wider; no mention was made of where the “war” would be fought, nor does the statute suggest when or how the authorization might expire. By contrast, the Iraqi authorization sets two implicit, but identifiable, conditions for assessing whether the authorization is no longer necessary: the cessation of a threat from Iraq, and the enforcement of all U.N. Security Council resolutions.

A. *Hamdi and the War Power I: The Fourth Circuit's Approach*

Acting pursuant to the AUMF, President Bush deployed troops to Afghanistan in the fall of 2001. Shortly thereafter, Yaser Esam Hamdi was

136. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. §1541 note (Supp. III 2003)).

137. See Vladeck, *supra* note 91, at 185 & n.184.

138. Authorization for Use of Military Force §2(a), 115 Stat. at 224.

139. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, §3(a), 116 Stat. 1498, 1501 (codified at 50 U.S.C. §1541 note (Supp. III 2003)).

140. See Douglas J. Feith, Op-Ed, *A War Plan That Cast a Wide Net*, WASH. POST, Aug. 7, 2004, at A21.

turned over to U.S. authorities by the Northern Alliance.¹⁴¹ After being transferred first to the U.S. Naval Station at Guantánamo Bay, Cuba and later to a stateside naval brig, Hamdi brought a habeas petition in the U.S. District Court for the Eastern District of Virginia, which the U.S. Court of Appeals for the Fourth Circuit eventually dismissed on January 8, 2003.¹⁴² Two core findings were central to the court's decision in *Hamdi III*. First, the AUMF authorized the President to detain Hamdi as a so-called "enemy combatant" until the end of the fighting. Second, Hamdi's detention did not violate his due process rights under the Fifth Amendment, any other applicable constitutional protection, or any guarantee of international law. Though I and myriad others have detailed the former holding (and its flaws) in some detail,¹⁴³ part of Hamdi's argument was that, to whatever extent his detention had been lawful at some prior point, by the time his case was before the Fourth Circuit, over a year after his initial capture, his continued confinement no longer comported with domestic or international law, and thus could no longer be sustained as a valid exercise of the President's authority under the AUMF.

Citing *Ludecke* and the Supreme Court's 1897 decision in the *Three Friends*,¹⁴⁴ the Fourth Circuit dismissed Hamdi's argument out of hand:

Whether the timing of a cessation of hostilities is justiciable is far from clear. The executive branch is also in the best position to appraise the status of a conflict, and the cessation of hostilities would seem no less a matter of political competence than the initiation of them. In any case, we need not reach this issue here. The government notes that American troops are still on the ground in Afghanistan, dismantling the terrorist infrastructure in the very country where Hamdi was captured and engaging in reconstruction efforts which may prove dangerous in their own right. Because under

141. For the background, see *Hamdi v. Rumsfeld*, 542 U.S. 507, 509-512 (2004) (plurality opinion). See also Vladeck, *supra* note 91, at 181-184.

142. *Hamdi v. Rumsfeld (Hamdi III)*, 316 F.3d 450 (4th Cir. 2003), *rev'd*, 542 U.S. 507 (2004). The district court never formally ruled on the merits of the habeas petition – the Fourth Circuit dismissed the petition on an interlocutory appeal from the district court's order to the government to produce more supporting evidence. See *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002), *rev'd*, 316 F.3d 450 (2003).

143. See, e.g., Vladeck, *supra* note 91, at 182-187.

144. 166 U.S. 1 (1897). In the *Three Friends*, the Court reaffirmed a point that largely followed from the *Prize Cases*, 67 U.S. (2 Black) 635 (1863), that "it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed." 166 U.S. at 63.

the most circumscribed definition of conflict hostilities have not yet reached their end, this argument is without merit.¹⁴⁵

Concurring in the Fourth Circuit's decision not to rehear the case en banc, Judge Wilkinson, one of the authors of the decision in *Hamdi III*, concisely stated the *Ludecke*-based argument: "It would be an intrusive venture into international relations for an inferior federal court to declare a cessation of hostilities and order a combatant's release when an American military presence remained in the theater of combat" ¹⁴⁶ Thus, the fact that its holding might empower the government to hold Hamdi indefinitely did not much bother the Fourth Circuit.

*B. Hamdi and the War Power II: The Court "Make[s]
Everything Come Out Right"*¹⁴⁷

The absence of any concerns over the potentially indefinite sanction approved by the Fourth Circuit's decision was clearly on the mind of Justice Souter at oral argument before the Supreme Court. Specifically, in one exchange with then-Deputy Solicitor General Paul Clement, Souter raised the following point: "I will assume for the sake of argument that [the AUMF authorized Hamdi's detention] when it was passed. It doesn't follow, however, that it is adequate for all time."¹⁴⁸ Justice Souter then asked:

Is it reasonable to think that the, that the authorization was sufficient at the time that it was passed, but that at some point, it is a Congressional responsibility, and ultimately a constitutional right on [Hamdi's] part, for Congress to assess the situation and either pass a more specific continuing authorization or at least to come up with the conclusion that its prior authorization was good enough. Doesn't Congress at some point have a responsibility to do more than pass that resolution?¹⁴⁹

145. *Hamdi III*, 316 F.3d at 476 (citations omitted).

146. *Hamdi v. Rumsfeld (Hamdi IV)*, 337 F.3d 335, 341 n.1 (4th Cir. 2003) (Wilkinson, J., concurring in denial of rehearing en banc). Why the release of an American citizen would constitute an "intrusive venture into international relations" is unclear.

147. See *Hamdi*, 542 U.S. at 576 (Scalia, J., dissenting) (criticizing Justice O'Connor's plurality opinion as "an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions.").

148. *Hamdi* Argument Transcript, *supra* note 24, at 31.

149. *Id.* at 32.

Responding that over 10,000 troops were still deployed in Afghanistan, Clement suggested that, were Congress to pass such a specific reauthorization, the President would either cooperate with it, or he would be back before the Court in Justice Jackson's third category from *Steel Seizure*¹⁵⁰ – where his powers are at their “lowest ebb.”¹⁵¹ Souter continued to press the issue. “Is it not reasonable,” Souter asked, “to at least consider whether that resolution needs, at this point, to be supplemented and made more specific to authorize what you are doing?”¹⁵² Clement's response is telling: “I can't imagine that the rule is that the executive somehow suffers if Congress doesn't fill the breach. Because the last word from Congress is that – that all necessary and appropriate force is authorized.”¹⁵³

Given this interchange at argument, the absence of almost any reference whatsoever to concerns over the duration of the war powers in the four different opinions in the Court's decision in *Hamdi*, including Justice Souter's dissent,¹⁵⁴ is surprising. Two of the opinions are particularly significant here: the plurality opinion, authored by Justice O'Connor, and Justice Thomas's lone, but important, dissent.

Consider, first, the plurality. Writing for herself, Chief Justice Rehnquist, and Justices Kennedy and Breyer, Justice O'Connor's opinion contained two central holdings: first, that Hamdi's detention was at least facially authorized by the AUMF;¹⁵⁵ and second, that Hamdi should be entitled to challenge the government's determination that he is an “enemy combatant” before a neutral decisionmaker, with various procedural due process protections, including an evidentiary burden higher than the “some evidence” standard championed by the government and sustained by the Fourth Circuit.¹⁵⁶ “Plainly, the ‘process’ Hamdi has received is not that to which he is entitled under the Due Process Clause.”¹⁵⁷

150. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

151. *Hamdi* Argument Transcript, *supra* note 24, at 33.

152. *Id.* at 34.

153. *Id.* The exchange continued for a short period, but the gist of it was clear. Justice Souter questioned whether the AUMF could properly be read as such a potentially indefinite authorization, and Deputy Solicitor General Clement argued that it had to be, absent some congressional action to the contrary.

154. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 539-554 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

155. *Id.* at 516-524 (plurality opinion).

156. *Id.* at 524-539.

157. *Id.* at 538.

In concluding that Hamdi's detention was facially authorized by the AUMF, the plurality briefly considered the argument that the AUMF could not continue to authorize Hamdi's confinement forever:

If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life.¹⁵⁸

Yet, despite acknowledging the possibility, the plurality found this potential outcome undisturbing in light of the then-present reality, that is, the ongoing nature of the fighting in Afghanistan:

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. The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF.¹⁵⁹

Given that the AUMF did not speak to any specific location, the reliance on active combat operations in Afghanistan seems troubling. Would the AUMF really no longer have force if the fighting in Afghanistan were over but the U.S. military were pursuing terrorist cells in some other country, perhaps Pakistan or Indonesia? As the most ardent supporters of the Bush administration argued from the beginning, the "war on terror" has never been a war against Afghanistan.¹⁶⁰ In the *Padilla* case, for example, the government argued that the AUMF extended to the stateside seizure and detention of a U.S. citizen "enemy combatant," a position also pursued in the

158. *Id.* at 520.

159. *Id.* at 521 (citations omitted).

160. *See, e.g.*, Feith, *supra* note 140.

case of Ali Saleh Kahlah Al-Marri, a Qatari national held, like Hamdi and José Padilla, at a South Carolina navy brig.¹⁶¹

Indeed, reliance on the status of hostilities in Afghanistan as a barometer for assessing the AUMF's continuing force seems to do more violence than justice to the Act's plain language. Nevertheless, though the plurality nowhere cited *Ludecke*, the influence of that earlier case is unmistakable. Apparent in the discussion is the assumption that, *at least* until fighting had come to an end, the President's resort to the war powers is beyond reproach. The Court may have questioned the specific application of the war powers to the detention of Hamdi through its analysis of the AUMF and 18 U.S.C. §4001(a), but there was no question as to the continuing vitality of the war powers, nor was there any suggestion that with the lapse of time any aspect of the President's authority under the AUMF had necessarily atrophied.

Ludecke's presence is all the more evident in Justice Thomas's dissent. Citing the 1948 case explicitly, Thomas took issue with the plurality's argument above that the detention power might actually end with the cessation of hostilities. To him, the power to detain, even *after* the cessation of hostilities, was clearly part of the government's war powers, and thus could not even be qualified in the manner in which the plurality sought to impose limits.¹⁶²

Although Justice Thomas was the lone vote to affirm the Fourth Circuit's decision below, his opinion adds at least an uncounted fifth vote to the plurality's various conclusions about the President's facial authority to detain Hamdi, and it supports the view that the potential indefiniteness of the detention raised no constitutional concerns.¹⁶³

161. For the background of *Al-Marri*, see *Al-Marri v. Rumsfeld*, 360 F.3d 707, 708 (7th Cir.), *cert. denied*, 543 U.S. 809 (2004). See also *Al-Marri v. Hanft*, 378 F. Supp. 2d 673 (D.S.C. 2005).

162. See *Hamdi*, 542 U.S. at 587-590 (Thomas, J., dissenting).

163. This counting of the votes in *Hamdi* has been employed by the government in its briefs in another terrorism-related case. See Consolidated Return to Petition and Memorandum of Law in Support of Cross-Motion To Dismiss, Swift *ex rel.* Hamdan v. Rumsfeld, No. C04-0777RSL (W.D. Wash. Aug. 6, 2004) (on file with author). But such counting is irreconcilable with *Marks v. United States*, 430 U.S. 188 (1977), which held that an opinion must command the votes of five Justices concurring in the result in order to have force. As the D.C. Circuit would later write, "*Marks* is workable – one opinion can be meaningfully regarded as 'narrower' than another – only when one opinion is a logical subset of other, broader opinions. In essence, the narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc); see also *id.* at 782 ("If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.").

C. Hamdi's Immediate Implications

Hamdi's immediate implications were pretty clear, at least for Hamdi himself. Faced with having to meet an evidentiary burden higher than "some evidence," the government understandably entered into negotiations with Hamdi's counsel to agree upon conditions for his release,¹⁶⁴ ultimately reaching an agreement in late September 2004.¹⁶⁵ For Hamdi, at least, the possibility that the Supreme Court's decision could ultimately allow the government to keep him confined indefinitely is now moot.

Hamdi's implications are less clear in Al-Marri's case and in the dozens of now-pending suits brought by non-citizen detainees held at Guantánamo Bay, Cuba. In *Rasul v. Bush*, the Supreme Court concluded that U.S. courts have statutory jurisdiction to entertain habeas petitions brought by Guantánamo detainees, but it said nothing whatsoever as to the type or nature of claims the detainees will be able to press on habeas review.¹⁶⁶

Notwithstanding the controversial Military Commissions Act of 2006,¹⁶⁷ and the subsequent decisions by the D.C. district court¹⁶⁸ and the D.C. Circuit¹⁶⁹ concluding that the Suspension Clause did not protect the detainees

See generally United States v. Rodriguez-Preciado, 399 F.3d 1118, 1139-1141 (9th Cir.) (Berzon, J., dissenting) (summarizing the *Marks* rule), *as amended*, 416 F.3d 939 (9th Cir. 2005).

164. *See* Philip Shenon, *U.S. Signals End to Legal Fight Over an "Enemy Combatant,"* N.Y. TIMES, Aug. 13, 2004, at A10; *see also* Editorial, *The Hamdi Back Flip*, WASH. POST, Aug. 12, 2004, at A22.

165. *See* Agreement (Sept. 17, 2004), attached to Motion To Stay Proceedings, No. 2:02CV439 (E.D. Va. Sept. 24, 2004), *available at* <http://notablecases.vaed.uscourts.gov/2:02-cv-00439/docs/70223/0.pdf>; *see also* Editorial, *Freeing Mr. Hamdi*, WASH. POST, Sept. 24, 2004, at A24; Editorial, *Imploding Terror Cases*, L.A. TIMES, Sept. 28, 2004, at B12.

Whether conditioning a citizen's release from detention on his self-expatriation is unconstitutional (in violation of the Citizenship Clause of the Fourteenth Amendment, presumably) is an interesting question that remains open today, especially in light of the Supreme Court's jurisprudence, which has consistently and uniformly struck down other forms of involuntary expatriation. *See, e.g., Vance v. Terrazas*, 444 U.S. 252 (1980); *Afroyim v. Rusk*, 387 U.S. 253 (1967); *Nishikawa v. Dulles*, 356 U.S. 129 (1958).

166. 542 U.S. 466 (2004). In the decision below, the D.C. Circuit had held both that it lacked jurisdiction and that, even if it did not, the detainees enjoyed no constitutional rights that they could litigate via habeas. *See Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom. Rasul*, 542 U.S. 466.

167. Pub. L. No. 109-366, 126 Stat. 2600.

168. *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9 (D.D.C. 2006).

169. *Boumediene v Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. denied*, 2007 U.S. LEXIS 3783 (U.S. Apr. 2, 2007).

and that preclusion of habeas jurisdiction was therefore constitutional,¹⁷⁰ the detainees may – and probably do – have various rights under both domestic and international law that they should be able to vindicate via habeas.¹⁷¹ But it is far less clear whether they are entitled to any Fifth Amendment protections, particularly the bar on indefinite detention that courts have read into that constitutional provision.¹⁷² Even when the Supreme Court held in 2001 that the Fifth Amendment bars the potentially indefinite detention of deported aliens pending their removal from the country, its discussion of the constitutional limits on such detention plainly excluded terrorism. As Justice Breyer wrote for the Court in *Zadvydas v. Davis*, the majority’s discussion did not “consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.”¹⁷³

Indeed, even without that qualification, *Zadvydas* does not bolster the due process arguments available to the Guantánamo detainees. The *Zadvydas* Court limited its ruling to aliens who had entered the United States, as opposed to those who had not. Distinguishing the Supreme Court’s controversial 1953 decision in *Shaughnessy v. United States ex rel. Mezei*,¹⁷⁴ the Court noted that in *Mezei* the detainee’s “presence on Ellis Island did not count as entry into the United States. Hence, he was ‘treated,’ for constitutional purposes, ‘as if stopped at the border.’ And that made all the difference.”¹⁷⁵ Without question, the Guantánamo detainees are, at most, in

170. For a more detailed argument against the reading of the Suspension Clause adopted in *Hamdan* and *Boumediene*, see Stephen I. Vladeck, *The Suspension Clause as a Structural Right*, 62 U. MIAMI L. REV. (forthcoming 2008). See also *Boumediene*, 476 F.3d at 995-998 & n.3 (Rogers, J., dissenting).

171. See *R. (on the application of Abbasi and another) v. Sec’y of State for Foreign and Commonwealth Aff.*, [2002] All E.R. (D) 70 (Nov.), at ¶¶ 59-66, available at http://www.courtservice.gov.uk/judgmentsfiles/j1354/abassi_judgment.htm; see also Luisa Vierucci, *Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to Which Guantánamo Bay Detainees Are Entitled*, 1 J. INT’L CRIM. JUST. 284 (2003) (surveying the various provisions of international law applicable to the Guantánamo detainees).

172. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (“Freedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that [the Fifth Amendment’s Due Process] Clause protects.”); see also David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003 (2002).

173. *Zadvydas*, 533 U.S. at 696.

174. 345 U.S. 206 (1953).

175. *Zadvydas*, 533 U.S. at 693 (quoting *Mezei*, 345 U.S. at 213, 215).

the same legal category as was Ignatz Mezei, at least with regard to their entry status.¹⁷⁶

The Supreme Court has only recently finally retreated somewhat from its harsh stance in *Mezei*, deciding, in *Clark v. Suarez Martinez*, that its reading of the Immigration and Nationality Act in *Zadvydas* also applies to inadmissible aliens.¹⁷⁷ But *Suarez Martinez* is a statutory rather than a constitutional decision. As Justice Scalia wrote for the Court, the entire result turned on the majority's disinclination to draw a distinction between the reading of 8 U.S.C. §1231(a)(6) adopted in *Zadvydas*, which limited its holding only to admissible aliens, and the reading of the same language as applied to inadmissible aliens. Specifically, "because the statutory text provides for no distinction between admitted and nonadmitted aliens, we find that it results in the same answer."¹⁷⁸

Assuming for the moment, then, that there simply are no due process limits on the *duration* of the confinement of the Guantánamo detainees, *Hamdi's* immediate implications are fairly clear: if the detainees have rights that they can assert in habeas petitions, those rights do not reach the length of their confinement, whether thus far or potentially.¹⁷⁹ At least with regard to the detention power, it is not clear that the President cannot continue to hold the detainees (assuming that their detention is otherwise lawful) until the "end of hostilities," whenever that may be.

D. Ludecke and Hamdi's Darker Meaning

In a letter to the editor shortly after news became public that the government was soon to release Hamdi, Kenneth Roth, Director of Human Rights Watch, suggested that, because of the government's admission that "the Taliban has pretty much been decimated[.]. . . all the Taliban detainees now held at Guantánamo Bay, Cuba, should also be released."¹⁸⁰ Roth's

176. This point suggests why the pending *Al-Marri* case is significant, for, unlike the Guantánamo detainees, there is no tenable argument that Al-Marri, captured in Illinois, has not "entered" the United States. Nevertheless, the one court to reach Al-Marri's claims on the merits thus far has sustained the government's detention authority, without reaching the ancillary due process questions. See *Al-Marri v. Hanft*, 378 F. Supp. 2d 673 (D.S.C. 2005).

177. *Clark v. Suarez Martinez*, 543 U.S. 371 (2005).

178. *Id.* at 379.

179. Contrast the unavailability of this argument to the Guantánamo detainees with its clear availability to Al-Marri. Surely, no court will hold anytime soon that Al-Marri has been detained for so long that his detention violates the Fifth Amendment. But if he is confined for a decade or more, such an argument could eventually become colorable, following the logic of *Zadvydas*.

180. Kenneth Roth, Letter to the Editor, "Enemy Combatants," or Prisoners of War?, N.Y. TIMES, Aug. 16, 2004, at A14.

argument, that international law requires repatriation of combatants once the war has ended, is correct on its face. Unfortunately, these combatants may be detained, absent some other legal defect, *at least* until the war has ended, and *when* the war has ended is a political question, at least under *Ludecke*.

This lacuna is one reason that *Hamdi* is dangerous. In holding that the AUMF authorized Hamdi's detention, the *Hamdi* plurality interpreted a use of force authorization as an independent substantive grant of war powers, a issue never before explicitly reached by the Supreme Court.¹⁸¹ Further, in holding that Hamdi could lawfully be detained until the "end of hostilities," the Court hid in plain view its approval of the government's position that Hamdi, and, by implication, the Guantánamo detainees, could be detained indefinitely.

Hamdi's darkest implications, however, come out when its analysis is placed side-by-side with *Ludecke*. Like the Alien Enemy Act, the AUMF is a wartime statute without any specific qualifications as to its duration, or any meaningful triggers for its expiration. The only limit on its operation and application is the existence of a "war," and, regardless of the role courts may play in adjudicating challenges thereto, *Hamdi* seems to recognize that now, and for the indefinite future, we are, indeed, at war.¹⁸²

181. *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), a largely forgotten case from the War of 1812, suggests that such authorizations *cannot* include substantive grants of independent powers. See Vladeck, *supra* note 36, at 159-160 (discussing *Brown*). After *Hamdi*, though, *Brown* can no longer be so read. See Ingrid Brunk Wuerth, *The President's Power To Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567 (2004) (discussing *Brown* and its modern relevance in the context of the jurisprudence arising out of the War of 1812).

182. For the first subsequent ruling focusing on the importance of this holding in *Hamdi*, see *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005). The decision in *Khalid* is sweeping. Echoing the D.C. Circuit's now-vacated *Al Odah* decision, the court held that there is no viable legal theory on which Guantánamo detainees may possibly prevail in a habeas petition; in effect, their detention cannot possibly violate the laws, treaties, or Constitution of the United States. See, e.g., *id.* at 329-330.

Leaving aside the limitlessness of such a holding (the possibility, for example, that if one of the petitioners were *tortured*, there would be no Eighth Amendment violation), the decision is notable here for its broad take on the scope of the war: "[T]he Supreme Court interpreted the AUMF to mean that Congress has granted the President the authority to detain enemy combatants for the duration of the current conflict." *Id.* at 319; see also *id.* at 319 n.10 ("[T]he law of war, as it has been adopted over the years by the political branches, permits detention for the duration of the hostilities. If the current conflict continues for an unacceptable duration, inadequacies in the law of 'traditional' warfare may be exposed, requiring a reevaluation of the laws by the *political branches*, not the judiciary.").

The court also highlighted the extent to which the Supreme Court's Afghanistan-centric understanding of the geographic scope of the conflict was badly flawed:

The fact that the petitioners in this case were not captured on or near the battlefields of Afghanistan, unlike the petitioner in *Hamdi*, is of no legal significance

III. THE INDEFINITE WAR PROBLEM AND THE SUNSET SOLUTION

What if the AUMF, as enacted, included a provision mandating its expiration on, say, December 31, 2007? If Congress failed to reenact the Authorization, or passed a watered-down version with less of a blank check, presumably, *something* about the President's exercise of his war powers would change on January 1, 2008. If Congress failed to reenact the Authorization in *any* form, presumably, the President's authority to hold those he has declared to be "enemy combatants" would fall into the lowest category of presidential power described by Justice Jackson in *Youngstown*, if not on January 1, then at some reasonable point thereafter. Or, if Congress altered the nature of the authorization, rendering the President's authority more limited, perhaps detainees would be able to argue, via habeas, that the new Authorization does not apply to them. If the reauthorization only allowed use of U.S. armed forces in certain countries, for example, a detainee picked up elsewhere might have more of a cognizable challenge to the President's authority to hold him. If nothing else, sunsets on the war powers would have a profound effect on the problem identified in Parts I and II, above. The abstraction of the "end of the war" would no longer be such an abstraction, but a concrete reality, a fixed date of reckoning for all involved.

Arguing that combat authorizations should sunset is easy, at least semantically. It makes plenty of practical sense to require Congress and the President to re-ante every so often. Consider, as a contemporary analogy, the

to this conclusion because the AUMF does not place geographic parameters on the President's authority to wage this war against terrorists. Thus it is unmistakable that Congress, like the Supreme Court in *Quirin*, concluded that enemies who have committed or attempted to commit acts of violence outside of the "theatre or zone of active military operations" are equally as "belligerent" as those captured on the battlefield. As the respondents aptly observe, the 9/11 attacks were orchestrated by a global force operating in such far-flung locations as Malaysia, Germany, and the United Arab Emirates. Any interpretation of the AUMF that would require the President and the military to restrict their search, capture, and detention to the battlefields of Afghanistan would contradict Congress's clear intention, and unduly hinder both the President's ability to protect our country from future acts of terrorism and his ability to gather vital intelligence regarding the capability, operations, and intentions of this elusive and cunning adversary.

Id. at 320 (citations omitted). *But see In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) (reaching the opposite conclusions on the same legal questions). On appeal, the D.C. Circuit avoided reaching the merits, concluding that the Military Commissions Act deprived it of jurisdiction over the suits. *See Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. denied*, 2007 U.S. LEXIS 3783 (U.S. Apr. 2, 2007).

sunset provisions of the USA PATRIOT Act.¹⁸³ But there are a number of arguments suggesting that sunsets would not work. First, one could argue that sunsets on the war powers are unconstitutional because they intrude upon the President's constitutional authority as "Commander in Chief." Second, constitutional or not, sunsets might simply be ineffective from a legislative perspective, along many of the same lines identified by the countless scholars who have described, and bemoaned, the ineffectiveness of the War Powers Resolution. Under this argument, many of the same problems of political inertia and legislative aversion to second-guessing presidential warmaking would prevent sunsets, even if they were used, from working the way they were supposed to. Finally, even if sunsets are constitutional, and even if they solve, or at least sidestep, most of the problems inherent in the political process, violations might be exceedingly difficult to remedy in the courts. Building on experience, this contention posits that if courts would not act during Vietnam to curb the President's bombing of Laos and Cambodia, they would not now do so. To these arguments – and the reasons why they are ultimately unavailing – this article now turns.

*A. Substantive Limitations on the War Powers: Why Sunsets
Would Be Constitutional*

Since the earliest chapters of American constitutional history, courts have recognized, in one form or another, Congress's authority to place substantive limits on the President's war power, or at least on its own force authorizations. The landmark early case is, of course, *Little v. Barreme*.¹⁸⁴ At issue in *Little* was the scope of a congressional non-intercourse statute, enacted on February 9, 1799, that authorized the President to seize certain ships during the so-called "Quasi-War" with France, but only if those ships were "bound or sailing to any port or place within the territory of the French Republic."¹⁸⁵ The Secretary of the Navy subsequently issued instructions authorizing seizures of vessels "bound to or from" French ports, and when Captain George Little of the frigate *Boston* captured the *Flying Fish* as it sailed from the French port Jeremie en route to the Danish port of St. Thomas,

183. United and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

184. 6 U.S. (2 Cranch) 170 (1804).

185. Act of Feb. 9, 1799, ch. 2, §5, 1 Stat. 613, 615 (expired 1800) (emphasis added); see also Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1394-1395 (2001) (discussing *Little*).

the master of the *Flying Fish* brought suit claiming that the capture was illegal.¹⁸⁶

Writing for a unanimous Court, Chief Justice Marshall concluded that the capture was indeed illegal, and that the Captain was therefore liable for damages. In his words:

It is by no means clear that the president of the United States whose high duty it is to “take care that the laws be faithfully executed,” and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that the general clause of the first section of the “act, which declares that such vessels may be seized, and may be prosecuted in any district or circuit court, which shall be holden within or for the district where the seizure shall be made,” obviously contemplates a seizure within the United States; and that the 5th section gives a special authority to seize on the high seas, and *limits that authority* to the seizure of vessels bound or sailing to a French port, the legislature seem to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port.¹⁸⁷

The President may have had inherent constitutional authority to make the capture *absent* the 1799 Non-Intercourse Act, but once Congress acted to authorize presidential action – and limit its scope – those limits were both valid and enforceable. Importantly, the Court necessarily, albeit implicitly, rejected the notion that the President could, via his constitutional authority as Commander in Chief, go beyond the substantive limits of the statute.¹⁸⁸

186. *Little*, 6 U.S. (2 Cranch) at 177-179. For an overview of the legal cases arising out of the Quasi-War (and a brief sketch of the factual background), see FISHER, *supra* note 12, at 23-26.

187. *Id.* at 177-178 (emphases added); see also *In re Cooper*, 143 U.S. 472, 500-501 (1892) (restating the central holding of *Little*).

188. Professor John Yoo, among others, has argued that *Little* has no implications whatsoever for the President's inherent constitutional authority. See, e.g., John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 294 n.584 (1996). But *Little* does suggest that in extending military force abroad, the President cannot use his own constitutional authority to bypass limits Congress has enacted. The President may act where Congress has not, and there may be some areas, such as tactical battlefield decisions, into which Congress may not intrude. But where Congress has validly

It is again important to emphasize the distinction between authorized or declared wars and unilateral presidential warmaking. In a recent article, Professor J. Gregory Sidak has argued that *Little v. Barreme*, along with the two other so-called “Quasi-War Cases,” *Bas v. Tingy*¹⁸⁹ and *Talbot v. Seeman*,¹⁹⁰ do not stand for propositions about the constitutional allocation of the war power that are as broad as has been claimed by scholars for decades (and, as Sidak suggests, by the D.C. Circuit in a 2000 decision).¹⁹¹ But Sidak’s central contention is that the cases undercut contemporary arguments against unilateral presidential warmaking.¹⁹² Where, however, Congress has authorized the use of force, and has placed substantive limits on its scope, Sidak appears to agree that *Little v. Barreme* stood, and still stands, for the basic notion that the President does not possess inherent constitutional authority to exceed the substantive limits of the congressional grant.¹⁹³

Few cases since *Little* have so starkly questioned the validity of congressional statutes that place substantive limitations on the war powers. The modern case most directly implicating the broader issue is *Holtzman v. Schlesinger*, in which New York Congresswoman Elizabeth Holtzman and several Air Force officers brought suit to enjoin President Nixon from conducting air operations in Cambodia toward the end of the Vietnam War. The crux of the plaintiffs’ position was that the various statutes passed by Congress authorizing the use of military force in Southeast Asia (and the

acted pursuant to its constitutional authority, *Little* suggests that the President may not exceed the scope of Congress’s delegation to him solely on the basis of his constitutional authority as Commander in Chief. See ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: THE ORIGINS 163-164 (1976). Congress was not *silent* in *Little* as to the President’s authority; by explicitly delineating it, Congress expressly set limits. This point (and this distinction) was reemphasized by Justice Clark in his concurring opinion in *Steel Seizure*. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 660-662 (1952) (Clark, J., concurring in the judgment). For a more detailed development of this argument, especially in light of *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), see Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNAT’L L. & CONTEMP. PROBS. (forthcoming 2007).

189. 4 U.S. (4 Dall.) 37 (1800).

190. 5 U.S. (1 Cranch) 1 (1801).

191. See J. Gregory Sidak, *The Quasi-War Cases – And Their Relevance to Whether “Letters of Marque and Reprisal” Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL’Y 465 (2005). The D.C. Circuit case prompting Professor Sidak’s article is *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), in which the court dismissed, on standing grounds, a suit brought by members of Congress to enjoin President Clinton from conducting bombing operations in Kosovo.

192. See Sidak, *supra* note 191, at 499.

193. *Id.* at 19-20. As Professor Sidak puts it, “Chief Justice Marshall’s statements indicate that, when Congress has spoken, the President must abide by congressional will.” *Id.* at 492.

funding thereof) did not authorize the bombing of Cambodia. The district court, after resolving a number of procedural and jurisdictional questions,¹⁹⁴ agreed.¹⁹⁵ Finding that “Congress did not acquiesce in the Presidential statements that the Indochina war was all of one piece, but rather gave only limited authorization for continued hostilities in Cambodia,”¹⁹⁶ the court declared the bombing to be outside the scope of the war powers delegated by Congress, and it enjoined any continuation of the bombing.¹⁹⁷

After the Second Circuit stayed the decision pending appeal and triggered an unusual public display of Supreme Court infighting over how to proceed with the government’s application for a stay pending appeal,¹⁹⁸ the Court of Appeals reversed the district court on the basis of the political question doctrine: “While we as men may well agonize and bewail the horror of this or any war, the sharing of Presidential and Congressional responsibility particularly at this juncture is a bluntly political and not a judicial question.”¹⁹⁹ Specifically, the court concluded that whether the war had “escalated” beyond the point of the substantive limits of congressional authorization could never be an issue adjudicated by courts. Importantly, however, in reversing the district court on the basis of the political question doctrine, the court ducked, rather than confronted, the propriety of the district court’s conclusions (1) that the bombing exceeded the scope of the war powers delegated to President Nixon, and (2) that in such a case any presidential action beyond the scope of the authorization was unconstitutional.

The central concern for the Second Circuit in *Holtzman* was whether the district court had any role to play in policing the boundary between Congress and the President. The government did not focus on the argument that Congress *could not* bar President Nixon from bombing Cambodia; rather, the government centered its position on the arguments that Congress had not done so when it cut off funding for the bombing, and that, even if it had, any such bar was not judicially enforceable.

194. *Holtzman v. Schlesinger*, 361 F. Supp. 544 (E.D.N.Y. 1973).

195. *Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D.N.Y. 1973).

196. *Id.* at 563.

197. *Id.* at 565-566.

198. Justice Marshall, sitting as Circuit Justice for the Second Circuit, initially voted to grant the stay. *See Holtzman v. Schlesinger*, 414 U.S. 1304 (1973). Taking a second bite at the circuit justice apple, the plaintiffs were able to convince Justice Douglas to dissolve the stay, *see Holtzman v. Schlesinger*, 414 U.S. 1316 (1973), only to have the entire court weigh in and vote with Justice Marshall – and against a dissenting Justice Douglas – to restore Marshall’s initial decision. *See Holtzman v. Schlesinger*, 414 U.S. 1321 (1973); *id.* at 1322 (Douglas, Circuit J., dissenting).

199. *Holtzman v. Schlesinger*, 484 F.2d 1307, 1311 (2d Cir. 1973).

Perhaps the best support for the proposition that Congress can place temporal limits on authorizations for the use of military force, however, comes from practice. Congress has done it before. Two authorizations, in particular, stand out. In 1983, in authorizing the use of American military forces as part of the U.N. peacekeeping force in Lebanon, Congress provided an express time limit on the authorization, stipulating that “[t]he participation of United States Armed Forces in the Multinational Force in Lebanon shall be authorized for purposes of the War Powers Resolution until the end of the eighteen-month period beginning on the date of enactment of this resolution unless the Congress extends such authorization”²⁰⁰ A little over a decade later, in the aftermath of the failed attempt to capture Mohammed Farah Adid, Congress included an analogous five-month limitation on the use of American troops in Somalia as part of the 1994 Department of Defense Appropriations Act.²⁰¹

The Supreme Court’s 2006 decision in *Hamdan*²⁰² also lends substantial support to the analysis I have advanced. In examining the legality of military tribunals established by President Bush by an executive order, the Court relied almost entirely on the extent to which the tribunals did not comport with the substantive and procedural requirements of the Uniform Code of Military Justice. In a critical footnote, Justice Stevens concluded, “Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”²⁰³ *Hamdan* thus dramatically reaffirms the principle animating *Little*’s holding that Congress *does* have the power to interpose substantive limitations upon the President’s war powers.²⁰⁴

The constitutionality of substantive limitations on the war powers cannot be fully explored in this brief analysis of *Little*, *Holtzman*, *Hamdan*, and two contemporary statutes. I rely on these cases and statutes here, rather, to make one important point. In 1804, the Supreme Court appeared to establish that Congress is entitled to set limits on the President’s use of military force, at least *at the time it authorizes the use of force*,²⁰⁵ and no case since has drawn

200. Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, §6, 97 Stat. 805, 807 (1983).

201. Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, §8151 (b)(2)(B), 107 Stat. 1418, 1476 (1993).

202. 126 S. Ct. 2749 (2006).

203. *Id.* at 2774 n.23 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

204. See Vladeck, *supra* note 188.

205. This qualifier is important, for whether Congress could limit the substantive scope of presidential war powers after the fact is a different question from whether it can do so at the outset. Ely chose not to confront “the point at which congressional limitation of the parameters

that authority into serious question. If anything, the Vietnam-era cases, in turning on questions of justiciability rather than constitutional authority, only buttress this point, and footnote 23 in *Hamdan* provides further support. Whether sunsets could work, and whether they could be enforced, are two distinct questions. Whether Congress could implement them in the first place, however, seems beyond dispute, even in Congress's own view.

*B. Political Limitations on the War Powers: Why Sunsets
Would Be Effective*

Placing legislative sunsets on presidential war powers was, in many ways, one of the core principles motivating the War Powers Resolution (WPR). By its terms, it requires the President, after he commits troops to hostilities, to come to Congress within a certain period of time, report on the conduct of hostilities, and receive congressional approval for the continued commitment of those troops.²⁰⁶ The WPR states that at any time Congress may, by concurrent resolution, terminate hostilities.²⁰⁷ Admittedly, the WPR is meant for war of a different type than the one at the center of this article. The WPR was intended to reign in unilateral presidential war making, and not to regulate the scope of wars expressly approved by Congress.

But from the political limitations on the effectiveness of the WPR much can be learned about the political challenges that sunsets would face, and why those challenges would, or at least could, be surmounted. Let us begin with the political limitations. Professor Koh, in describing the failures of the War Powers Resolution, centered on four: "legislative myopia, inadequate

of a war it has previously authorized becomes a violation of the Commander in Chief Clause." ELY, WAR AND RESPONSIBILITY, *supra* note 21, at 143 n.22. But placing substantive limitations in the contemporaneous grant of authority is the more relevant inquiry here, and the less constitutionally dubious. If Congress authorizes war against Germany, it would be difficult to argue that the authorization allows the President to bomb unoccupied England. Nor do even the strongest defenders of the Administration's position – and of the AUMF – so suggest. Instead, as Bradley and Goldsmith argue, Congress has, as a matter of routine, placed substantive limits on authorizations for the use of force. *See, e.g.,* Bradley & Goldsmith, *Congressional Authorization and the War on Terrorism*, *supra* note 4, at 2072–2078 (surveying a number of different historical authorizations for the use of force). Bradley and Goldsmith suggest that Congress has only imposed such substantive limits as part of "limited" authorizations, to be distinguished from "broad" authorizations. *See id.* The distinction is immaterial here, where the question is whether Congress has the constitutional authority to act in this field *at all*.

206. 50 U.S.C. §1544(b).

207. *Id.* §1544(c). *But see supra* note 20.

drafting, ineffective legislative tools, and an institutional lack of political will.”²⁰⁸

Legislative myopia, as Koh describes, is the problem that “Congress legislates to stop the last war.”²⁰⁹ In the context of the WPR, the myopia manifested itself in the Resolution’s narrowness, since it is aimed at “creeping” wars like the one in Southeast Asia, and not at the “short-term military strikes or covert wars of the kind that dominate modern warfare.”²¹⁰ The WPR thus states a rule that has ended up being swallowed by its exceptions.

Sunsets written into authorizations for the use of force, on the other hand, would compel the very deliberation about the use of force that Congress has so rarely undertaken in the past. Whatever powers Congress granted the first time around, with operation limited to a prescribed period of time (which could vary depending on the type of conflict), Congress would have to go back to the table and start over in order to authorize fighting beyond the prescribed time. Thus, Congress would not be legislating the last war so much as it would be legislating the next few months of the current war.

Drafting a sunset clause would be easy: “This Authorization shall not have any force, and shall not be construed in any way as an authorization for the continuing use of military force, after [date].” The Lebanese and Somali authorizations both had clear and easily identifiable time limits. Such a clause would also avoid an uncertainty attributed by some to section 5(b) of the WPR concerning whether the sixty-day clock may begin to run without the filing of a “hostilities report” under section 4(a)(1).²¹¹

A war authorization with a sunset provision would depart most dramatically from traditional statutes by avoiding Koh’s fourth reason for failure of the WPR, the “institutional lack of political will.” The beautiful simplicity of a sunset provision is that all of the obstacles to collective action that have doomed political enforcement of the WPR are inverted. Instead of worrying about the size of the critical mass necessary to withdraw existing authorization (usually far *more* than a majority, as Koh recounts), a sunset would require only a congressional majority to approve its inclusion in a force authorization initially, and the same bare majority to reauthorize the use of force when the sunset period expires, assuming that the President was willing to sign the legislation. Even then, it is not at all clear that the same broad delegation contained in the initial authorization would simply be re-approved,

208. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 123 (1990).

209. *Id.*

210. *Id.* at 124.

211. See Ely, *Suppose Congress Wanted a War Powers Act That Worked*, *supra* note 21, at 1402-1406.

particularly if an election had intervened. Dramatic political repercussions could also result if the alternative scenario developed, in which the President vetoed a use-of-force reauthorization on the ground that it was too confining, triggering a debate about the need for and proper scope of reauthorization.

Professor Bruce Ackerman, in his recent proposal for an "Emergency Constitution," sees this point as the single greatest benefit of emergency powers with mandatory sunsets: "Before each vote, there will be a debate in which politicians, the press, and the rest of us are obliged to ask once more: Is this state of emergency really necessary?"²¹² In the context of the current war in Iraq, this is a powerful question. Politicians who found it difficult to vote against the war at the outset, as almost all did, may find it easier (or at least less politically risky), several years and thousands of casualties later, to take a principled stand on the continued state of war, or at least on setting a timetable for the withdrawal of U.S. troops.²¹³ Even if it is hard to quantify this inversion in the context of the legislative process, it makes logical sense.

By forcing legislators to reconsider the propriety of an initial delegation, sunsets would, in time, require a measure of deliberation otherwise lacking in the political process when statutes are enacted in great haste. The AUMF was passed just three days after September 11. The USA PATRIOT Act was adopted the next month. Neither benefitted from much in the way of debate, yet both have been at the center of extended arguments, within both the courts and the legal academy, in the years since. The PATRIOT Act included several sunset provisions, and the debate about proposed extension of the powers they affected was vigorous and extended. Members of Congress had the opportunity to examine how the law had operated for the intervening four years, and perhaps they did not feel quite the same sense of urgency that they did in 2001.²¹⁴ The AUMF, lacking a sunset provision, has not been subjected to the same kind of additional analysis and debate in Congress. More debate, and more deliberation, in the context of reauthorizing presidential resort to the war powers, can only be a good thing.

212. Ackerman, *supra* note 11, at 1048.

213. In March 2007, both the House and the Senate voted to approve legislation with a target pull-out date. See H.R. 1591, 110th Cong. (2007); Jeff Zeleny & Carl Hulse, *Senate Backs a Pullout Date in Iraq War Bill*, N.Y. TIMES, Mar. 28, 2007, at A1.

214. As just one example, consider the thorough report prepared by the Congressional Research Service summarizing the competing House and Senate bills to reauthorize the USA PATRIOT Act's expiring provisions. See CHARLES DOYLE, CONG. RES. SERV., USA PATRIOT ACT: BACKGROUND AND COMPARISON OF HOUSE- AND SENATE-APPROVED REAUTHORIZATION AND RELATED LEGISLATIVE ACTION (2005), available at <http://www.fas.org/sgp/crs/intel/RL33027.pdf>.

*C. Judicial Limitations on the War Powers: Why
Sunssets Would Be Enforceable*

I have saved the hardest question for last. Sunsets, like the statutes into which they are incorporated, are meaningless if their violation goes unpunished. If a future President ignored the expiration of a use of force authorization, or, more realistically, refused to recognize the substantive differences between the original act and its narrower (or broader) post-sunset iteration, could he be taken to court for it?

Courts have never been eager to resolve inter-branch disputes over the war powers, and their reluctance to restrain the President – what Koh calls “the problem of judicial tolerance” – has generally run deeper in the years since Vietnam. Justiciability grounds – including mootness, ripeness, standing, or the amorphous “political question” doctrine – have provided the basis for dismissal of nearly every lawsuit implicating the separation of war powers since the WPR was enacted.²¹⁵ Why would presidential refusal to abide by a sunset be any different?

The answer, I believe, lies in the way courts framed the political question inquiry during the Vietnam War and since. The Second Circuit’s 1973 ruling in *DaCosta v. Laird*²¹⁶ provides a useful framework for analysis. In *Da Costa*, the court affirmed a lower court ruling that the lawfulness of the U.S. military’s mining of various ports and harbors in North Vietnam was a political question beyond the realm of the court’s authority to review. Judge Kaufman, writing for the court, found a lack of manageable standards to be the central justification for resort to the political question doctrine:

The difficulty we face in attempting to decide this case is compounded by a lack of discoverable and manageable judicial standards. Judge Dooling believed that the case could be resolved by simply inquiring whether the actions taken by the President were a foreseeable part of the continued prosecution of the war. That test, it seems to us, is superficially appealing but overly simplistic. Judges, deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting

215. KOH, *supra* note 208, at 146-148; *see, e.g.*, *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003) (dismissing lawsuit challenging the war against Iraq on the basis of the political question doctrine); *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) (dismissing lawsuit challenging constitutionality of bombing in Kosovo for lack of standing); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990) (dismissing lawsuit challenging first Iraq war for lack of ripeness).

216. 471 F.2d 1146 (2d Cir. 1973); *see also* *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Orlando v. Laird*, 443 F.2d 1039, 1042-1044 (2d Cir. 1971); *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970).

thousands of miles from the field of action, cannot reasonably or appropriately determine whether a specific military operation constitutes an “escalation” of the war or is merely a new tactical approach within a continuing strategic plan. What if, for example, the war “de-escalates” so that it is waged as it was prior to the mining of North Vietnam’s harbors, and then “escalates” again? Are the courts required to oversee the conduct of the war on a daily basis, away from the scene of action? In this instance, it was the President’s view that the mining of North Vietnam’s harbors was necessary to preserve the lives of American [soldiers] in South Vietnam and to bring the war to a close. History will tell whether or not that assessment was correct, but without the benefit of such extended hindsight we are powerless to know.²¹⁷

The “judicially discoverable and manageable standards” test, taken directly from *Baker v. Carr*,²¹⁸ was the central basis for invocation of the political question doctrine in most of the Vietnam-era cases.²¹⁹ Judge Silberman relied on this prong of *Baker* in his concurring opinion in *Campbell v. Clinton*,²²⁰ although Judge Tatel disagreed about the absence of such judicially manageable standards.²²¹

217. *Da Costa*, 471 F.2d at 1155. For a more recent statement of this argument, see *Ange v. Bush*, 752 F. Supp. 509 (D.D.C. 1990). As Judge Lamberth concluded in *Ange*,

By asking the court to determine the constitutionality of the President’s actions, Ange asks the court to delve into and evaluate those areas where the court lacks the expertise, resources, and authority to explore. Ange asks the court to find that the President’s deployment of U.S. forces in the Persian Gulf constitutes “war,” “imminent hostilities,” or even the prelude to offensive war. Time and again courts have refused to exercise jurisdiction in such cases and undertake such determinations because courts are ill-equipped to do so.

Id. at 514.

218. See 369 U.S. 186, 217 (1962) (“Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”).

219. See, e.g., FISHER, *supra* note 12, at 272 & n.30 (citing cases). *But see* Massachusetts v. Laird, 451 F.2d 26, 31 (1st Cir. 1971) (dismissing on political question grounds because of a “textually demonstrable commitment to a coordinate political department” of government).

220. See 203 F.3d 19, 24-26 (Silberman, J., concurring).

221. See *id.* at 37 (Tatel, J., concurring).

But judicially manageable standards would hardly be an issue in the sunset context. Rather than adjudicating whether certain conduct was sufficient to constitute a war, or whether individual tactical decisions were appropriate in furtherance of the war effort, a lawsuit challenging a facial violation of a sunset would present to the court an incontrovertible constitutional confrontation between two branches, with a clear standard for review. The statute, we hope, would be clear about when the sunset would take effect, and a President's decision to continue using the armed forces in 2010 even though the action was only authorized until 2009 would fall into Justice Jackson's "lowest ebb" category from *Youngstown*.

Professor Ackerman put it somewhat more bluntly: "The President's breach of the rule of law will be plain for all to see The court will not be obliged to justify its intervention with complex legalisms. The issue will be clean and clear: Is the country prepared to destroy the rule of law and embark on a disastrous adventure that may end with dictatorship?"²²² I am less convinced that in such a case the tanks will have rolled, but Professor Ackerman's rhetoric highlights the far easier position that courts would find themselves in.

There are, of course, variations on this question that would present tougher legal challenges. If, say, the reenacted authorization were only slightly narrower than the original version, would there be manageable standards to contest actions authorized before the sunset, but unauthorized thereafter? Indeed, one can certainly imagine scenarios in which application of the sunset would raise the very kind of political questions implicating the war powers that courts have consistently shunned for decades. Wars cannot be scheduled like the operations of railroads. Even if a President is barred from using military force after a certain point, he must have some flexibility in securing the peace and extracting troops. Yet just as many cases involving sunset provisions would be far clearer. More to the point, sunsets might make litigation unnecessary. Would a President risk the political capital to deliberately disobey an explicit sunset, when he could likely go to Congress and get some kind of reauthorization – even if it were somewhat watered down?

Thus, sunsets might make war powers questions more nearly judicially enforceable in two respects. First, there would be clearer standards. Second, there might be fewer suits. In either event, courts would be given a far more tangible issue to decide. Asking whether a President exceeded the substantive scope of ambiguous use of force authorizations is a horribly difficult question – one need look no further than *Hamdi* for proof of that. But when the use of force authorization is as explicit as possible as to its temporal operation,

222. Ackerman, *supra* note 11, at 1068.

presidential excesses can only become easier to enforce, either in Article III courts or, should a President ignore a court order enforcing a sunset provision, in the court of public opinion.

D. A Dose of Reality

As with all interesting academic exercises, reality must, at some point, set in. It is hardly likely that Congress will actually be persuaded to include a sunset provision the next time it authorizes the presidential use of military force. As John Hart Ely suggested,

That Congress has lost its intended constitutional position in deciding on war and peace is hardly a new discovery. The usual suggestion, however, has taken the form of a halftime pep-talk imploring that body to pull up its socks and reclaim its rightful authority. That would be terrific, but it seems unlikely to happen.²²³

I, for one, have been guilty of attempting such a pep-talk before.²²⁴

Questions about the temporal scope of use of force authorizations are only just now beginning to invade the legal consciousness. Indeed, except in its debate preceding enactment of the WPR, Congress does not appear even to have thought about the potential problems motivating this article. As noted above, *Ludecke* mostly has been overlooked despite the wave of contemporary scholarship on the World War II-era Supreme Court; *Hamilton*, which by all accounts had the better of the argument, has equally been ignored.

To borrow Ely's metaphor, then, this article is meant more as a pre-game warning than a half-time pep talk. In reference to the war on terrorism, Professor Ackerman concluded that "if we choose to call this a war, it will be endless."²²⁵ True enough. But what are the legal implications of its endlessness? What about the next war? As much as Part I attempted to respond to this first question, Part III attempted to provide an answer to the second.

Sunsets are not perfect, nor are they always appropriate. We need go no further than then-Professor Guido Calabresi's oft-quoted observation that a sunset "gives a tremendous weapon to those who oppose regulation itself; the force of inertia shifts to their side."²²⁶ Thus, my argument should not be read as a broad endorsement of sunsets. The war powers present a unique example of why sunsets are so potentially important. Unlike most other regulatory

223. ELY, WAR AND RESPONSIBILITY, *supra* note 21, at 52.

224. *See* Vladeck, *supra* note 91.

225. Ackerman, *supra* note 11, at 1033.

226. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 61 (1982).

regimes, where the courts usually can be trusted to resolve disputes between the two branches over the meaning and scope of relevant statutes, courts have routinely avoided resolving inter-branch disputes over the scope of the war powers. As a result, courts have not been adequate arbiters when confronted with arguably ambiguous wartime statutes.

Shifting the force of inertia to those who believe wars should be of finite duration, then, cannot be such a bad idea. It may take three or four use of force authorizations as ambiguous as the AUMF before Congress realizes how serious a problem this is, or another series of Supreme Court decisions along the lines of *Ludecke*. Eventually, though, with war so clearly moving away from the traditional nineteenth- and twentieth-century paradigm, congressional enactment of strict temporal as well as substantive limits on the war power may prove to be the most effective way of reining in otherwise unchecked presidential authority, and of providing a real measure of accountability for modern exercises of the war power. If Congress does not adopt this practice, perhaps courts will need finally to rethink their self-imposed reliance on nonjusticiability to avoid deciding such thorny questions. Indeed, with such an apathetic Congress, perhaps a return to the regime envisioned by Justice Brandeis in *Hamilton* would be warranted, with courts deciding whether the “war emergency,” such as it is, has passed. But ideally that choice should be made by Congress in the first instance.

CONCLUSION

It is an odd legalism indeed that wars do not end when they “end.” How many historians would agree that the Civil War ended on August 20, 1866? Or that World War I ended on July 2, 1921? Or that World War II was not over until October 19, 1951? Yet the legal consequences of the formal termination of hostilities are myriad and significant, whether under state, federal, or international law. This legal reality helps explain the careful verbiage employed by President George W. Bush when he landed on the aircraft carrier U.S.S. Abraham Lincoln on May 1, 2003, to declare that “[m]ajor combat operations in Iraq,” rather than the war itself, had ended.²²⁷ Of course, more than four years later, the war in Iraq is not over by any stretch of the imagination.

Capping a statute authorizing the presidential use of military force at a fixed date in the future may have seemed ridiculous to the Seventy-Seventh Congress on December 8, 1941, when it declared war on Japan and Germany. But significantly more time already has elapsed since Congress enacted the

227. Address to the Nation on Iraq from the USS *Abraham Lincoln* (May 1, 2003), 39 WEEKLY COMP. PRES. DOC. 516, 516 (May 5, 2003).

AUMF than between the Declaration of War on Japan and August 16, 1945, when Japan unconditionally surrendered. Are we anywhere close to such a *de facto* end to the war on terrorism today?

Presidential war powers are not to be trifled with. Congress's decision to delegate the authority to use military force is one of its most serious actions, and even though semantics suggest a fundamental difference between the war on terrorism and the war on Japan, the former is far closer to the latter than it is to the war on poverty, the war on drugs, or similar policy initiatives.²²⁸ Even if reasonable minds can disagree on this last point, however, the Supreme Court, at least, has added its voice to the debate.

Make no mistake: *Hamdi* was a key victory for civil libertarians, especially in light of the potential limitlessness of the Fourth Circuit's original position. But international law recognizes the government's ability to hold these detainees only until the end of the war. This is the inescapable, ironic point, for its natural implication is that the Guantánamo detainees may lawfully be held forever. Such indefinite detention may raise due process questions, but no court has yet accepted such a contention from detained enemy combatants, nor do any appear to be seriously considering this argument today, despite the thorough examination being given to the Military Commissions Act and the constitutionality of Congress's attempt to preclude federal jurisdiction. I do not mean to suggest that this entire inquiry is about the detention power. Although we see in the power to detain some of the most important consequences of a potentially indefinite war power, there are countless other areas where the existence of a war grants to the President authority he may not resort to otherwise.²²⁹

Judicial efforts to impose constitutional limitations on the specific powers exercised by the President during such indefinite wars, however, may seem unwise. If courts adjudicating war powers cases have consistently agreed on one thing, it is that, during a war, courts have almost nothing to contribute to the day-to-day tactical and strategic decisions made by the Executive.

228. *But see* Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1871 (2004) ("The Cold War. The War on Poverty. The War on Crime. The War on Drugs. The War on Terrorism. Apparently, it isn't enough to call a high-priority initiative a High-Priority Initiative. If it's really important, only a wimp refuses to call it war, almost without regard to its relationship to the real thing.").

229. As just one example of other Fifth Amendment consequences, the "enemy property doctrine" holds that "the United States does not have to answer under the Takings Clause for the destruction of enemy property." *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1355 (Fed. Cir. 2004), *cert. denied*, 545 U.S. 1139 (2005). The natural assumption underlying the doctrine is that it only applies to acts of war. *See, e.g.*, *United States v. Caltex (Phil.)*, Inc., 344 U.S. 149 (1952); *United States v. Pac. R.R.*, 120 U.S. 227 (1887); *Perrin v. United States*, 4 Ct. Cl. 543 (1868), *aff'd*, 79 U.S. (12 Wall.) 315 (1871). *See generally* Vladeck, *supra* note 106 (summarizing the enemy property doctrine).

The better approach to the problem of unending presidential war powers, and the solution espoused here, is to impose an unavoidable ending date at the outset. At some point, some fixed period of time after hostilities have begun, one of two things must happen: Congress must either affirmatively reauthorize the use of troops (and, concomitantly, the continued executive resort to the war power), or the President must cease hostilities.

This proposal is not meant to undercut the President's authority to fight wars effectively. It is only meant to suggest one way of allowing Congress more of a role in ensuring that a broad delegation, passed in the heat of the moment, is not allowed to become permanent. To proponents of broad theories of executive power, sunsets may seem anathema to fundamental structural principles of American constitutional law. They surely are no more so, however (and probably far less), than war powers of indefinite duration.