

## NO WAY OUT: THE CURRENT MILITARY COMMISSIONS MESS AT GUANTANAMO

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### I. INTRODUCTION

On January 22, 2009, President Barack Obama declared that he would close the detention center at Guantanamo Bay, Cuba within one year.<sup>1</sup> More than ten years later, the United States Department of Defense, as of this writing, is seeking funding from Congress to build hospice care facilities at the detention camp, preparing to keep the site open for another twenty-five years.<sup>2</sup> The current U.S. President has expressed his unequivocal support for keeping Guantanamo Bay open, at one point promising to fill it up with more people.<sup>3</sup> Now that the era of executive mercy has ended, a disturbing reality confronts scholars and other Americans who had been thinking of Guantanamo Bay as merely another sad chapter in our history. The human rights abuses inherent in indefinite detention that characterized the War on Terror remain unresolved, and will likely be as much a part of our future as our past.

Although Supreme Court cases that have been hailed as victories for detainees appeared at first to balance need to enforce their constitutional rights with the goal of holding accountable those who have committed atrocities, developments in the law during President Obama's tenure eroded the possibility of achieving either aim. Because of these developments, using the judiciary as a means of escape from Guantanamo is practically impossible in all but the most clear-cut instances. Consequently, the minute the executive branch shifted its approach to detainee adjudication, nearly every potential avenue for enforcing the fundamental right to freedom for the men still locked up there was foreclosed. Ironically, this

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<sup>1</sup> *Obama Signs Order to Close Guantanamo Bay Facility*, CNN (Jan. 22, 2009), <http://www.cnn.com/2009/POLITICS/01/22/guantanamo.order/index.html>.

<sup>2</sup> Carol Rosenberg, *Guantanamo Bay as a Nursing Home*, N.Y. TIMES (Apr. 27, 2019), <https://www.nytimes.com/2019/04/27/us/politics/guantanamo-bay-aging-terrorism-suspects-medical-care.html>.

<sup>3</sup> Scott Neuman, *Trump Signs Order to Keep Prison at Guantanamo Bay Open*, NPR (Jan. 31, 2018), <https://www.npr.org/sections/thetwo-way/2018/01/31/582033937/trump-signs-order-to-keep-prison-at-guantanamo-bay-open>.

development, devastating as it is to those in detention, is equally ruinous for the possibility of holding terrorists accountable. In this Comment I will use the lens of plea bargaining to elucidate how exactly the legal and practical developments of the past decade have defeated the opportunity for justice and closure for both detainees and for the victims of terrorist attacks. By looking at the incredible pressures to submit a guilty plea that would be present even for a hypothetical innocent detainee (were a plea bargain made available), we can see that the military commissions offer no hope of uncovering truth or advancing justice and instead provide incentives for fabrication and false testimony.

Part II of this Comment will discuss the slow evolution of the right of Guantanamo detainees to the writ of habeas corpus and the development of the military commissions over the course of two presidential administrations. This section will clarify how habeas corpus went from a promising option for detainees to the false promise that it is now. Part III of this Comment will look at the specific factors that create much more intense pressure to plead guilty in the military commissions system than in Article III courts. Parts IV and V will explain how legal and logistical hurdles that have come up in recent years have complicated the possibility of proceeding through the military commissions for detainees who do choose to enter guilty pleas, as well as for those who prefer to proceed to trial. These sections will demonstrate the pressure detainees face to plead guilty rather than go to trial, before looking at the practical impossibility of actually arranging a plea agreement that does not include testimony against another detainee as a condition. This analysis will illustrate that the military commissions system has become so mangled by legal and political issues that have intensified over the last few years that it cannot produce justice for detainees or for those harmed in the acts of terrorism of which the detainees are accused. Section VI, the Conclusion, will suggest that the only practical solution to this problem is to bring the detainees to the United States for trials in Article III courts.

## II: GUANTANAMO'S BEGINNINGS: GAINING THE RIGHT TO A TRIAL

The detention center at Guantanamo Bay has a long history, but for the purposes of this Comment, it came into use as a place to house detainees of the War on Terror. Throughout the Bush and Obama administrations, the site served as a temporary home for 780 men.<sup>4</sup> Because the legal history of Guantanamo Bay is long and complex, this

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<sup>4</sup> *Guantanamo: Facts and Figures*, HUM. RTS. WATCH (Mar. 30, 2017), <https://www.hrw.org/video-photos/interactive/2017/03/30/guantanamo-facts-and-figures>.

Comment will break down the detention center's history by administration.

*A. The Bush Years*

On September 11, 2001, the United States was shaken by a terrorist attack of a magnitude never seen before on American soil.<sup>5</sup> The culprit was swiftly identified as a radical Islamist terrorist organization colloquially known as al-Qaeda.<sup>6</sup> Exactly one week later, on September 18, 2001, Congress passed and the President signed the Authorization for the Use of Military Force (AUMF).<sup>7</sup> The scope of this legislation was vast, stating 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.<sup>8</sup>

Shortly thereafter, the President released a Military Order entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,"<sup>9</sup> which formed the groundwork for the policy of detaining "enemy combatants" in off-shore facilities, one of which was the detention camp at Guantanamo Bay.<sup>10</sup> This established some basic parameters for detainee treatment and put in place the principle that those detainees who face trial would be tried by military commission.<sup>11</sup>

A series of Supreme Court cases created the foundation of what legal protections are afforded to detainees at Guantanamo Bay. *Rasul v. Bush*<sup>12</sup> was crucial in establishing due process rights for detainees at Guantanamo and clarified that detainees at Guantanamo Bay are entitled to the right of habeas corpus so that they can challenge the factual basis for their detention.<sup>13</sup> *Rasul* was the beginning of a struggle between the judiciary and the other two branches of government. After *Rasul*, the executive

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<sup>5</sup> See *Terrorist Attacks in the U.S. or Against Americans*, INFOPLEASE, <https://www.infoplease.com/world/disasters/man-made/terrorist-attacks-in-the-us-or-against-americans> (last visited June 1, 2019).

<sup>6</sup> *Hedges v. Obama*, 724 F.3d 170, 173 (2d Cir. 2013).

<sup>7</sup> *Id.*

<sup>8</sup> Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

<sup>9</sup> 66 Fed. Reg. 57,833 (Nov. 13, 2001).

<sup>10</sup> Aaron J. Jackson, *Habeas Corpus in the Global War on Terror*, 65 A.F. L. REV. 263, 276-77 (2010).

<sup>11</sup> 66 Fed. Reg. 57,833 (Nov. 13, 2001).

<sup>12</sup> *Rasul v. Bush*, 542 U.S. 466 (2004).

<sup>13</sup> *Id.* at 480-81.

branch changed its procedures, creating the Combatant Status Review Tribunals (CSRTs) in an attempt to provide the process due to detainees so as to circumvent the need for habeas petitions.<sup>14</sup> As different habeas cases for detainees worked their way through the judicial system, Congress stepped in and passed the Detainee Treatment Act of 2005 (2005 DTA), which explicitly denied the right of habeas corpus to detainees at Guantanamo.<sup>15</sup> In the years to follow, *Hamdan v. Bush* (Hamdan I)<sup>16</sup> declared the CSRTs as insufficient under the Geneva Convention's standards, and held that detainees who had begun their habeas petitions prior to the passage of the 2005 DTA would be able to continue forward with their cases.<sup>17</sup> *Boumediene v.*

*Bush*<sup>18</sup> was the final chapter in the habeas saga, granting all detainees a right to habeas review. *Boumediene* also held that the 2005 DTA did not provide the level of procedural protection that would substitute for habeas review.<sup>19</sup> From this point forward, even those detainees who had been deemed "unlawful enemy combatants" by the CSRTs would be able to challenge their detention in the federal courts.<sup>20</sup>

### B. The Obama Years

Before coming into office, President Barack Obama ran on a platform of change.<sup>21</sup> Included in such a promise was the closing of Guantanamo Bay.<sup>22</sup> Early on, this looked achievable.<sup>23</sup> On January 22, 2009, he enacted an executive order demanding the closure of Guantanamo Bay within one year of the Order's execution.<sup>24</sup> To implement the order, the Attorney General created an entity called the Guantanamo Review Task Force, along

<sup>14</sup> Jackson, *supra* note 10, at 277.

<sup>15</sup> *Id.*

<sup>16</sup> Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

<sup>17</sup> *Id.* at 567, 573–74. This case also called into question for the first time whether or not conspiracy could be tried as a war crime. *Id.* at 563–64. Because the case was not dispositive on the issue, I do not discuss it in this Comment. For more on this matter, see *infra* Part III.

<sup>18</sup> Boumediene v. Bush, 553 U.S. 723 (2008).

<sup>19</sup> *Id.* at 733.

<sup>20</sup> See generally Boumediene, 553 U.S. 723.

<sup>21</sup> Farah Stockman, *Candidates Hold Stances on Guantanamo*, BOS. GLOBE (May 11, 2008), [http://archive.boston.com/news/nation/articles/2008/05/11/candidates\\_hold\\_stances\\_on\\_guantanamo](http://archive.boston.com/news/nation/articles/2008/05/11/candidates_hold_stances_on_guantanamo).

<sup>22</sup> *Id.*

<sup>23</sup> *Close the Guantanamo Bay Detention Center*, POLITIFACT <https://www.politifact.com/truth-o-meter/promises/obameter/promise/177/close-the-guantanamo-bay-detention-center> (last visited Jan. 11, 2019) (collecting articles from 2009 to 2017 tracking the history of Obama's progress on closing the detention center).

<sup>24</sup> *Obama Signs Order to Close Guantanamo Bay Facility*, *supra* note 1.

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with a senior-level Review Panel to determine the “disposition” of each detainee.<sup>25</sup> These entities, which were made up of “career professionals” from different agencies charged with national security and intelligence, examined information related to each individual detainee before making final judgments that separated detainees into four categories.<sup>26</sup> In its final report on January 22, 2010, the Guantanamo Review Task Force determined that 126 detainees could safely be transferred outside the United States; 44 could be prosecuted in federal court or the military commissions; 30 Yemeni detainees could be transferred conditionally, due to security concerns in their home country; and 48 detainees were simply “too dangerous to transfer but not feasible for prosecution.”<sup>27</sup> After the initial determinations by the Guantanamo Review Task Force, the President signed Executive Order 13567, which set up regular hearings called Periodic Review Boards (PRBs) to reassess the fates of the detainees not cleared for transfer or prosecution.<sup>28</sup>

During this time, Congress also worked to clear up uncertainty around the future of Guantanamo and the military commissions leftover from the Bush administration. Congress amended military commission procedures in the Military Commission Act of 2009 (“2009 MCA”) to reflect a new set of rights for detainees when challenging their detention in federal court.<sup>29</sup> The 2009 MCA also introduced the term “unprivileged enemy belligerents,” which served to replace “unlawful enemy combatants.”<sup>30</sup> In 2010, Congress passed new rules for the military commissions, barring judges from granting credit for time served when sentencing defendants convicted of war crimes.<sup>31</sup>

While Congress and President Obama formally implemented legislation to guide the military commissions, the United States District Court for the District of Columbia (“D.C. District Court”) and the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit Court”) ironed out the contours of how the historic *Boumediene* decision would be understood. Although the newfound ability for detainees to

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<sup>25</sup> U.S. DEP’T OF JUSTICE ET AL., Final Report: Guantanamo Review Task Force, at i (2010) [hereinafter Guantanamo Final Report].

<sup>26</sup> Guantanamo Final Report, *supra* note 25, at i–ii.

<sup>27</sup> Guantanamo Final Report, *supra* note 25, at ii.

<sup>28</sup> Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for the Use of Military Force, Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011).

<sup>29</sup> See Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574 (2009).

<sup>30</sup> *Id.* at 2575.

<sup>31</sup> U.S. DEP’T OF DEF. MANUAL FOR MILITARY COMMISSIONS § 1113(d)(1) (2010) (“Any period of confinement included in the sentence of a military commission begins to run from the date the sentence is adjudged. . . .”).

challenge their detention through the federal court system initially produced many successful habeas petitions in the D.C. District Court,<sup>32</sup> the success of Guantanamo habeas petitions on the whole was short-lived. In *Al-Adahi v. Obama*, the D.C. Circuit Court reversed the lower court's holding that al-Adahi was not part of al-Qaeda and that he should be released.<sup>33</sup> Although *Al-Adahi* did not explicitly change the government's standard of proof needed to justify his continued detention, the D.C. Circuit Court was careful to note that the "some evidence" standard had been applied in numerous habeas cases before Guantanamo and that *Boumediene* had left open the question of what the lowest constitutional standard might be.<sup>34</sup> Subsequent district court decisions denied release of detainees much more frequently, and appeared to employ a much more deferential standard to the government's evidence.<sup>35</sup> Between the *Al-Adahi* decision on July 13, 2010 and October 12, 2011, all but one habeas petition heard in the D.C. District court was denied. This sole petition granted was ultimately reversed by the D.C. Circuit court.<sup>36</sup> This trend has continued into the present, with one Circuit Judge in 2018 going so far as to say that "when it comes to Guantanamo, this court has reversed each and every recent grant of habeas relief it has considered on the merits,"<sup>37</sup> and adding that "the en banc court has reason to consider whether we have faithfully implemented *Boumediene*."<sup>38</sup>

The year 2011 proved to be important for the legal landscape surrounding Guantanamo Bay. Through the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 ("NDAA 2011"), Congress specifically prohibited the use of defense funds to transfer detainees from Guantanamo Bay to the United States or to build U.S. facilities to house them.<sup>39</sup> This move effectively foiled any plan to try the alleged 9/11

<sup>32</sup> Twenty out of thirty-four habeas petitions between 11/20/08 and 7/8/2010 were successful. Mark Denbeaux et al., No Hearing Habeas: D.C. Circuit Restricts Meaningful Review 5 (2012) (unpublished manuscript), <https://ssrn.com/abstract=2145554>.

<sup>33</sup> *Al-Adahi v. Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010).

<sup>34</sup> *Id.* at 1104.

<sup>35</sup> See Denbeaux et al., *supra* note 32, at 6; *Latif v. Obama*, 666 F.3d 746, 748 (D.C. Cir. 2011) (quoting *Almerfed v. Obama*, 654 F.3d 1, 6 (D.C. Cir. 2011)) ("To meet its burden, 'the government must put forth credible facts demonstrating that the petitioner meets the detention standard, which is then compared to a detainee's facts and explanation.'").

<sup>36</sup> Denbeaux et al., *supra* note 32, at 4.

<sup>37</sup> *Qassim v. Trump*, No. 18-5148, 2018 U.S. App. LEXIS 22579, at \*4 (D.C. Cir. Aug. 14, 2018) (Tatel, J., concurring).

<sup>38</sup> *Id.*

<sup>39</sup> Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032 (transfer of detainees); 124 Stat. 4137 (2011) (transfer of detainees); *Id.* § 1034 (facilities).

conspirators in an Article III federal court.<sup>40</sup> On December 31, 2011, Congress passed the National Defense Authorization Act (“NDAA 2012”).<sup>41</sup> Section 1021(a) of the Act finally codified the authorization for detention of “covered persons” that the courts had been reading into the AUMF for years.<sup>42</sup> Additionally, Section 1021(b) cleared up confusion about whether or not the standard for “unprivileged enemy belligerents,” subject to *trial* by military commission, are defined in exactly the same way as those who are subject to military *detention*. The section states that a “covered person” is:

- (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
- (2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.<sup>43</sup>

Because this definition is not identical to the one given for an “unprivileged enemy belligerent” in the 2009 MCA,<sup>44</sup> this Comment will use the older term “unlawful enemy combatant” to refer to detainees who meet the above definition.

During the remaining years of his presidency, President Obama continued to voice his dedication to closing Guantanamo.<sup>45</sup> Although President Obama failed to close Guantanamo Bay, and grant detainees sufficient legal rights to challenge their detentions, more than 200 men were transferred out of the detention center during Obama’s presidency.<sup>46</sup>

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<sup>40</sup> For an analysis of how this act interacted with other law to affect this result, see David J.R. Frakt, *Prisoners of Congress: The Constitutional and Political Clash Over Detainees and the Closure of Guantanamo*, 74 U. PITT. L. REV. 179, 221 (2012).

<sup>41</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011).

<sup>42</sup> *Id.* § 1021(a).

<sup>43</sup> *Id.* § 1021(b).

<sup>44</sup> Military Commissions Act of 2009, Pub. L. No. 111-84, § 948(a)(7), 123 Stat. 2574, 2575 (2009) (defining an “unprivileged enemy belligerent” as someone who: “(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.”).

<sup>45</sup> See generally *Close the Guantanamo Bay Detention Center*, POLITIFACT: OBAMETER, <https://www.politifact.com/truth-o-meter/promises/obameter/promise/177/close-the-guantanamo-bay-detention-center> (last visited Oct. 14, 2019) (collecting articles from 2009 to 2017 tracking the history of Obama’s progress on closing the detention center).

<sup>46</sup> See *A History of the Detainee Population*, N.Y. TIMES: GUANTANAMO DOCKET, <https://www.nytimes.com/interactive/projects/guantanamo> (last visited Oct. 14, 2019).

This small victory left only forty-one detainees remaining in Guantanamo when President Trump came into office in the fall of 2016.<sup>47</sup>

III: THE PRESSURE TO PLEAD IN THE MILITARY COMMISSIONS:  
ANALYZING THE FACTORS THAT IMPEDE GUANTANAMO DETAINEES IN  
SECURING FREEDOM

Examining the current situation at Guantanamo Bay through the lens of plea bargaining may seem an odd choice, considering that far more detainees have secured release from the island through transfer than through entering into plea agreements with the military commissions.<sup>48</sup> This Comment, however, uses this framework because transfer is an option that becomes available only when offered by the government within the PRB process, which is completely discretionary.<sup>49</sup> It may be because of the discretion the executive branch has in choosing to employ the PRBs at all that some observers claim they have ceased functioning as they did previously since President Trump has come into office.<sup>50</sup> Examining the shortcomings of Guantanamo by looking at the pressure on a hypothetically innocent detainee to plead guilty also provides a simple way to understand the severity of the injustice inherent in the present system. It should be noted, however, that the pressure to plead does not necessarily imply a means of effecting a plea, as some detainees have learned after attempting to enter plea bargains and failing to secure the assent of the government.<sup>51</sup>

In order to understand the specific factors that would lead a

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<sup>47</sup> *Id.*

<sup>48</sup> See Andrea Harrison, *Periodic Review Boards for Law-of-War Detention in Guantanamo*, 24 ILSA J. INT'L & COMP. L. 541, 572 (2018).

<sup>49</sup> *About the Periodic Review Board*, U.S. DEP'T OF DEF. PERIODIC REV. SECRETARIAT, <https://www.prs.mil/About-the-PRB> (last visited Oct. 14, 2019).

<sup>50</sup> See Annie Himes, *Two PRB Reviews and Two No-Shows as Detainees Continue to Opt Out*, HUM. RTS. FIRST (May 28, 2019) ("Since 2017, no PRB review has cleared a detainee for release or transfer. The five detainees cleared for transfer under the Obama administration—two through the PRB process and three by the PRB's predecessor, the Guantanamo Review Task Force—have yet to leave Guantanamo because a PRB determination does not guarantee release. Furthermore, the Trump administration dismantled the State Department's infrastructure for carrying out transfers."), <https://www.humanrightsfirst.org/blog/two-prb-reviews-and-two-no-shows-detainees-continue-opt-out>.

<sup>51</sup> See, e.g., Carol Rosenberg, *Fired War Court Overseer Says He Was Exploring Plea Deals in 9/11, USS Cole Cases*, MIAMI HERALD (Mar. 22, 2018), <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article206477629.html>; Carol Rosenberg, *Pentagon Prosecutors Seek Trial of 3 Guantanamo Prisoners for Indonesia Bombings*, N.Y. TIMES (Apr. 10, 2019), <https://www.nytimes.com/2019/04/10/us/politics/pentagon-guantanamo-indonesia-bombings.html> [hereinafter Rosenberg-Pentagon Prosecutors].



Guantanamo detainee to make a plea bargain in spite of their guilt or innocence, it is necessary to understand both how pleading works in the domestic system and what specific circumstances about Guantanamo exacerbate these pressures. Thus, this section will start by outlining the pressures to agree to a plea bargain that influence defendants in the civilian criminal justice system before explaining how those pressures are heightened in the military commissions system used to try Guantanamo Bay detainees.

*A. Plea Bargaining in Article III and State Courts*

Plea bargaining in the United States' criminal justice system functions according to predictable principles. Professor Albert W. Alschuler describes this system as one of both "cost bargaining" and "odds bargaining."<sup>52</sup> "Cost bargaining," from the perspective of a hypothetical prosecutor, is the choice to make a bargain the defendant would find desirable for the purpose of saving on costs at trial.<sup>53</sup> "Odds bargaining," on the other hand, is more relevant to this Comment's analysis, as it is defined as the mechanism by which a prosecutor determines what offer to make, while the defendant determines whether such an offer would be favorable enough for him to take.<sup>54</sup> Odds bargaining can, therefore, be said to be the calculus that a given prosecutor and defendant must engage in when negotiating plea deals. As such, it is based on the odds of conviction at trial and the likely sentence the defendant would get if convicted at trial.<sup>55</sup> Alschuler gives the example of a negotiation in which there is a fifty-fifty chance that the defendant is convicted of a crime that will likely result in a ten-year sentence.<sup>56</sup> In accordance with such odds, a rational prosecutor would therefore offer the defendant a plea offer of five years.<sup>57</sup> Given that prosecutors in these situations often wish to make plea-offers as desirable as possible, however, Alschuler posits that a plea offer of less than five years would likely be the result.<sup>58</sup>

Operating within the framework of this foundational concept of odds bargaining are a number of factors that influence the defendant's decision to accept a plea bargain—even in cases where the defendant is innocent.<sup>59</sup>

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<sup>52</sup> Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919, 919 (2015/2016).

<sup>53</sup> Alschuler, *supra* note 52, at 919–920.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> See Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1119–20 (2008)

Most relevant to the case of Guantanamo detainees are the “trial tax,” the reduced threat of reputational damage, and the practice of overcharging.<sup>60</sup> Even for innocent defendants, all of these factors contribute in varying ways to the desirability of plea-bargaining in the civilian system.<sup>61</sup> When considering the far less predictable and more legally complex system that Guantanamo Bay detainees act within, these factors play a more significant role.

An important aspect of the pressure to plead guilty is referred to as the “trial tax,” which is the practice of imposing longer sentences on those who are found guilty after exercising their right to a trial than on those who plead guilty.<sup>62</sup> While it is possible to think of this as a reward for pleading rather than as a penalty for going to trial, this distinction is difficult to defend conceptually,<sup>63</sup> as even Justice Anthony Kennedy has suggested that sentencing guidelines are written to be harsher than necessary in order to leave room for plea bargaining.<sup>64</sup> Advocates of the plea bargaining process suggest that defendants who plead guilty are simply receiving the benefit of a shorter sentence in exchange for their cooperation.<sup>65</sup> That said, such a benefit is only conceivable as an alternative to the longer sentence the defendant would receive after a trial. Thus, disentangling reward from penalty is not an easy feat.<sup>66</sup> Arguments that insist the longer sentence is proper, while the shorter is a break, require acceptance of a puzzling idea: more than ninety percent of all defendants<sup>67</sup> deemed guilty end up receiving inappropriately light sentences, while only a tiny minority receive the “correct” one.<sup>68</sup> Even those proponents who advocate for the position

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(stating thesis that guilty pleas are often the “least-bad option” even for innocent defendants).

<sup>60</sup> See *infra* Part III B.

<sup>61</sup> See Bowers, *supra* note 59.

<sup>62</sup> Bowers, *supra* note 59, at 1158.

<sup>63</sup> Steven P. Grossman, *An Honest Approach to Plea Bargaining*, 29 AM. J. TRIAL ADVOC. 101, 109 (2005).

<sup>64</sup> *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006)) (“[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes.”)

<sup>65</sup> Brian Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313, 332 (2019) (“There is disagreement over whether plea-trial disparities are plea discounts or trial penalties. Champions of discounts maintain that plea defendants receive rewards for admitting guilt and cooperating. Proponents of penalties argue that trial defendants are unfairly punished for exercising a constitutional right.”).

<sup>66</sup> J. Vincent Aprile II, *Judicial Imposition of the Trial Tax*, 29 CRIM. JUST. 30 (2014).

<sup>67</sup> *Missouri v. Frye*, 566 U.S. 134, 135 (2012).

<sup>68</sup> See Johnson, *supra* note 65, at 332 for a look at the debate between considering this concept as a “trial tax” or a “plea discount.”

that there is a normative value in plea bargaining for innocent defendants in low-stakes cases agree that the reward of the reduced sentence is transformed into the threat of a heavier one in high-stakes cases.<sup>69</sup>

A second motivation that figures prominently in the analysis of why people enter guilty pleas to crimes for which they are innocent is that some categories of defendants simply have less to lose than others.<sup>70</sup> For individuals facing their first-ever criminal charge, there are many serious consequences of a conviction that can reduce the incentive to plead guilty,<sup>71</sup> likely even in scenarios in which the “odds bargaining” calculus would indicate that accepting the plea offer is rational. Among these disadvantages are the threat of deportation for some defendants,<sup>72</sup> loss of the right to vote, loss of eligibility for public benefits, and reduced job opportunities.<sup>73</sup> These factors, however, lose much of their weight when the defendant already has been convicted of a similar crime in the past.<sup>74</sup> This kind of defendant, even when innocent, has much less to lose than a defendant with a clean record and is for that reason much more likely to accept a plea bargain.<sup>75</sup>

Perhaps the single most important factor to consider in looking at a defendant’s choice to accept a plea bargain is the problem of prosecutors “overcharging” defendants. Overcharging is exactly what it sounds like—the common practice of piling on multiple charges that would be difficult to prove at trial for the purpose of extracting a guilty plea for a lesser crime.<sup>76</sup> The effect of overcharging is that both guilty and innocent defendants are influenced to accept plea agreements, not because they seek the “reward” of a reduced sentence, but instead because they are afraid of the harsh sentences that could accompany a guilty verdict for these more severe crimes.<sup>77</sup> As an exercise using simple numbers, we could imagine

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<sup>69</sup> See Bowers, *supra* note 59, at 1157.

<sup>70</sup> Bowers, *supra* note 59, at 1135–1137 (suggesting that most innocent defendants who submit to plea bargains are recidivists charged with low-stakes offenses, and their rational calculus leads them to guilty pleas in part because they have “already suffered most of the corollary consequences that typically stem from convictions”).

<sup>71</sup> See *The Costs and Benefits of Plea Bargains*, JAABLAW.COM, <https://jbabblaw.com/the-costs-and-benefits-of-plea-bargains> (last visited Nov. 17, 2019).

<sup>72</sup> See 8 U.S.C. § 1227(a)(2) (2018) (defining offenses deportable under federal law).

<sup>73</sup> *Fact Sheet—Barriers to Successful Re-entry of Formerly Incarcerated People*, LEADERSHIP CONF. (Mar. 27, 2017), <http://civilrightsdocs.info/pdf/criminal-justice/Re-Entry-Fact-Sheet.pdf>.

<sup>74</sup> Bowers, *supra* note 59, at 1122.

<sup>75</sup> *Id.*

<sup>76</sup> Donald G. Gifford, *Meaningful Reform of Plea Bargaining*, 1983 U. ILL. L. REV. 37, 48 (1983).

<sup>77</sup> See Bowers, *supra* note 59, at 1155–56.

that if the odds of a conviction are only five percent, but the potential sentence is forty years due to overcharging, a rational defendant may accept a plea for two years in prison, even without having committed any crime at all.<sup>78</sup> Because of the incredible stakes present in going to trial with such a high potential sentence, defendants often choose the plea agreement to avoid the risk of trial.<sup>79</sup>

*B. How Legal and Practical Differences between the Military Commissions System at Guantanamo and the Civilian Criminal Justice System Exacerbate the Pressure to Plead*

It is no great insight to suggest that Guantanamo Bay's unique circumstances may impact a detainee in many ways.<sup>80</sup> In this section, this Comment will lay out some of the differences between the military commissions system at Guantanamo Bay and the civilian criminal justice system that cause Guantanamo detainees to experience an increased pressure to plead guilty. The status of detainees under the NDAA and the numerous procedural differences between the military commissions system and the United States criminal justice system exacerbate the already intense pressures to plead for Guantanamo detainees. Additionally, although this factor would remain relevant even after transfer to an Article III court, this Comment's analysis would be incomplete without examining how the pressure to plead is increased by the fact that Guantanamo detainees have already been found guilty in the court of public opinion.

Unlike defendants in regular courts, who are entitled to release if either there is not enough probable cause to charge them with a crime or if they are acquitted of a crime,<sup>81</sup> detainees of the War on Terror occupy a unique legal status that makes them subject to indefinite detention, irrespective of their culpability for any triable offense.<sup>82</sup> Their designation

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<sup>78</sup> Note that these numbers are meant to be simple, but they are not representative of situations that most defendants would likely face. Bowers suggests that when the charges are very serious, prosecutors are much less likely to offer lenient sentences. Bowers, *supra* note 59, at 1156.

<sup>79</sup> Bowers, *supra* note 59, at 1158.

<sup>80</sup> The system is so unique, in fact, that it is misleading to refer to the men at Guantanamo as "defendants" because only seven of the forty men currently held there are currently being tried in military commissions. *Guantanamo by the Numbers*, HUM. RTS. FIRST (Oct. 10, 2018), <https://www.humanrightsfirst.org/resource/guantanamo-numbers>. For this reason, we refer to them instead as detainees.

<sup>81</sup> HON. WILLIAM H. ERICKSON ET AL., UNITED STATES SUPREME COURT CASES AND COMMENTS ¶ 5B.02 (Matthew Bender & Co., 65th ed., 2019).

<sup>82</sup> Jonathan Hafetz, *Detention Without End: Reexamining the Indefinite Confinement of Terrorism Suspects Through the Lens of Criminal Sentencing*, 61 UCLA L. Rev. 326, 347 (2014).

as detainees subject to indefinite detention is military in nature, not punitive.<sup>83</sup> For this reason, it lives in a conceptual world distinct from principles of fairness and justice.<sup>84</sup> In order to justify continued detention, the government must show, by a standard of proof that lies between “some evidence” and a “preponderance of the evidence,” that the detainee in question meets the detention standard.<sup>85</sup> This has been articulated as “an individual who was part of or supporting Taliban or al-Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners,” or the modified definition offered by the government that requires that an individual ‘substantially support’ enemy forces.”<sup>86</sup> However, for defendants accused of war crimes, the government must meet a higher bar to secure a conviction, proving the allegations beyond a reasonable doubt.<sup>87</sup> Almost every war crime triable by military commission that is currently considered constitutionally permissible<sup>88</sup> requires at least one overt act that goes beyond being a part of al-Qaeda or the Taliban.<sup>89</sup> This leaves behind a gap: people who likely supported al-Qaeda or the Taliban, but who are not indictable for any war crime. As a consequence, many detainees have been held without charge by the United States government in Guantanamo Bay and other sites since 2002.<sup>90</sup> Because of this odd legal status, a person could be charged and acquitted by a military commission, but may nonetheless continue to meet the definition of an NDAA detainee, and thus would remain subject to continued detention under the AUMF.<sup>91</sup>

Though it is outside the scope of this Comment to discuss the numerous procedural differences between the system of military commissions and the civilian criminal justice system, many legal scholars

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<sup>83</sup> See *id.*, at 332 (discussing the “nonpunitive” nature of confinement at Guantanamo and suggesting the application of criminal sentencing principles to improve fairness in the system).

<sup>84</sup> See *id.*

<sup>85</sup> *Al-Adahi v. Obama*, 613 F.3d 1102, 1103–1104 (D.C. Cir. 2010).

<sup>86</sup> *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010).

<sup>87</sup> See *Comparison of Rules and Procedures in Tribunals that Try Individuals for Alleged War Crimes*, U.S. DEP’T OF DEF. OFFICE OF MIL. COMMISSIONS, <https://www.mc.mil/ABOUTUS/LegalSystemComparison.aspx>.

<sup>88</sup> “Providing material support for terrorism” is no longer chargeable against detainees whose relevant actions took place prior to 2006, while the charge of “conspiracy” in the same circumstances is on trickier legal footing. For discussion on this, see *infra* Part IV.

<sup>89</sup> See 10 U.S.C. § 950t (2018).

<sup>90</sup> See *A History of the Detainee Population*, *supra* note 46.

<sup>91</sup> Oona Hathaway, *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT’L L. 123, 127 n.18 (2013).

have covered this topic in depth.<sup>92</sup> It is uncontroverted that military commissions, unlike trials in other federal courts, do not require a unanimous jury verdict, admit hearsay evidence much more leniently, and do not afford as much opportunity for defendants to obtain witnesses as compared to the prosecution.<sup>93</sup> Because of these differences, as well as the relative rarity of military commissions, detainees at Guantanamo Bay have far less information available to help them predict trial outcomes than do defendants in the civilian criminal justice system.

### *C. How Differences Create Increased Pressure to Plead*

Having examined some of the important distinctions between the civilian system of justice and the military commissions system at Guantanamo, we can now readily see how these differences create a pressure to plead that is far greater in the military commissions system. Put simply, the uniqueness of the system at Guantanamo decreases the odds that a detainee will be able to escape detention by going to trial. This works in several ways due to the interrelationship of the unique factors at Guantanamo.

The uncertainty of release upon acquittal at trial reduces the desirability of going to trial to a point unimaginable in a civilian context.<sup>94</sup> Whether or not the United States government would ever actually choose to continue detaining a person acquitted by military commission is certainly a matter worthy of debate. For a detainee, however, simply understanding that the government *could* legally keep him in detention after an acquittal at trial would make any agreement that secures release look quite attractive.

Detainees also have good reasons to assume that their likelihood of acquittal at trial is lower than it would be in the civilian system due to the procedural differences that tip the scales in favor of the government.

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<sup>92</sup> See, e.g., David Glazier, *Destined for an Epic Fail*, 75 OHIO ST. L.J. 903 (2014); Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551 (2013).

<sup>93</sup> See David J. R. Frakt, *Applying International Fair Trial Standards to the Military Commissions of Guantanamo*, 37 S. ILL. U. L. J. 551 (2013).

<sup>94</sup> Just like the prohibition on credit for time served, the possibility of continued detention also legally applies to defendants who enter guilty pleas. See Offer for Pretrial Agreement, United States v. Darbi (Dec. 20, 2013) [hereinafter Darbi Offer for Pretrial Agreement], [https://www.mc.mil/Portals/0/pdfs/alDarbi2/AI%20Darbi%20II%20\(AE010\).pdf](https://www.mc.mil/Portals/0/pdfs/alDarbi2/AI%20Darbi%20II%20(AE010).pdf). However, having seen that men have in fact been transferred more or less in accordance with their plea agreements gives detainees a much better reason to believe that the government would not intentionally make a plea agreement only to violate it. Additionally, such a move works against the government's interests because giving detainees a reason to distrust plea bargains would logically reduce the likelihood of convincing future detainees to agree to them.

To see how these pressures play out on an actual detainee, we can look to the case of Omar Khadr, a Canadian citizen who was detained by U.S. forces after a firefight in Afghanistan.<sup>95</sup> Khadr's case is an excellent example for our purposes because he was the type of detainee who would seem to have had good reasons to go to trial in an Article III court, and he maintained his innocence after pleading guilty and being transferred to Canada.

Omar Khadr was a Canadian citizen who was captured in Afghanistan in 2002 in the midst of hostilities when he was fifteen years old.<sup>96</sup> Khadr was badly wounded during capture, suffering a bullet in the chest and shrapnel wounds to his head and eye.<sup>97</sup> Interrogators began questioning him before his wounds had finished healing, and shortly thereafter began subjecting him to what was then called "enhanced interrogation." In his case, this included beatings, prolonged standing, and deprivation of toilet facilities, among other measures.<sup>98</sup> Through these techniques, his interrogators extracted full confessions that Khadr denied as soon as he was able to meet with representatives from the Canadian government.<sup>99</sup>

The United States charged Khadr with war crimes in 2007 after the passage of the Military Commissions Act of 2006 ("2006 MCA").<sup>100</sup> The government alleged that he had been seen throwing a grenade that killed a U.S. soldier.<sup>101</sup> The charges against him were "murder in violation of the law of war," "attempted murder in violation of law of war," "conspiracy," "providing material support for terrorism," and "spying."<sup>102</sup>

Prior to reaching his trial by military commission, facts began to emerge that called into question whether evidence against Khadr would be sufficient for a conviction. The most obvious reason for this is that due to his age, he would be considered to be a child soldier under international

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<sup>95</sup> *In re Khadr*, 823 F.3d 92, 95 (D.C. Cir. 2016).

<sup>96</sup> Ian Austen, *Omar Khadr, Former Guantanamo Detainee, Is Released on Bail in Canada*, N.Y. TIMES (May 7, 2015), <https://www.nytimes.com/2015/05/08/world/americas/omar-khadr-canada-guantanamo-detainee-released-on-bail.html>.

<sup>97</sup> Jeff Tietz, *The Unending Torture of Omar Khadr*, ROLLING STONE (Aug. 24, 2006), <https://www.rollingstone.com/politics/politics-news/the-unending-torture-of-omar-khadr-181126>.

<sup>98</sup> *Id.*

<sup>99</sup> Affidavit of Omar Ahmed Khadr, *Khadr v. Prime Minister of Can.* (Jul. 30, 2008), [https://www.law.utoronto.ca/documents/Mackin/khadr\\_repat\\_AffidavitofOmarKhadr.PDF](https://www.law.utoronto.ca/documents/Mackin/khadr_repat_AffidavitofOmarKhadr.PDF); *Omar Khadr (Guantanamo Bay) Interrogation Tapes*, YOUTUBE (Jul. 15, 2008), [https://www.youtube.com/watch?v=yNCyrFV2G\\_0](https://www.youtube.com/watch?v=yNCyrFV2G_0).

<sup>100</sup> Referred Charges Dated 4/24/2007, *United States v. Omar Ahmed Khadr* (Apr. 24, 20017), [https://www.mc.mil/Portals/0/pdfs/Khadr/Khadr%20\(AE001\).pdf](https://www.mc.mil/Portals/0/pdfs/Khadr/Khadr%20(AE001).pdf).

<sup>101</sup> Tietz, *supra* note 97.

<sup>102</sup> *In re Khadr*, 823 F.3d 92, 95 (D.C. Cir. 2016).

treaties.<sup>103</sup> Additionally, due to the coerced nature of his confession, lawyers could have argued that it was inadmissible against him.<sup>104</sup> Even more damning for the government, however, was the release of a leaked document in 2008 that revealed that Khadr's primary accuser had not actually seen him throw the grenade that formed the foundation of the bulk of his charges, but that he had instead surmised it from context.<sup>105</sup>

Looking at Khadr's situation in light of the obvious deficiencies in the government's case, a person in an Article III court may rationally have chosen to go to trial and to attempt to clear his name, but such a move in Khadr's case would have made far less sense. Having been held at Guantanamo Bay for eight years by 2010, it would have been perfectly reasonable for Khadr to believe that his reputation was already forever ruined. At the same time, he had few reasons to believe that he could escape Guantanamo Bay by any means other than a plea agreement. By 2010 Khadr had already tried a number of procedurally based interlocutory appeals, but none of them panned out.<sup>106</sup> He was denied even the most fundamental of American judicial protections, the right to confront his accuser, when a military commission judge in 2007 determined he was too dangerous to have access to the identities of the men claiming to have witnessed the acts that gave rise to his charges.<sup>107</sup> In 2010, Khadr gave up on his case and signed a plea agreement.<sup>108</sup> He later said this was because he felt that he had been given a "hopeless choice" and that he saw no other way to avoid indefinite detention at Guantanamo.<sup>109</sup>

Khadr's plea agreement granted him favorable terms and transfer to his home country, but in no sense settled the question of his culpability.

<sup>103</sup> Madeline Torrie, *The Omar Khadr Controversy: Child Soldiers in Canadian and International Law*, CANADIAN LAWS. FOR INT'L HUM. RTS. (Dec. 15, 2017), <http://claihr.ca/2017/12/15/the-omar-khadr-controversy-child-soldiers-in-canadian-and-international-law>.

<sup>104</sup> Indeed, Khadr's counsel is now using this argument in his appeal before the Court of Military Commission Review. Brief on Behalf of Appellant, United States v. Khadr 1, 8 (USCMCR Nov. 8, 2013) (No. 13-005), <https://www.mc.mil/Portals/0/pdfs/Omar13-005/Khadr%20Brief%20on%20Behalf%20of%20Appellant.pdf>.

<sup>105</sup> Michelle Shephard, *Khadr Secret Document Released by Accident*, THE STAR (Toronto) (Feb. 4, 2008), [https://www.thestar.com/news/canada/2008/02/04/khadr\\_secret\\_document\\_released\\_by\\_accident.html](https://www.thestar.com/news/canada/2008/02/04/khadr_secret_document_released_by_accident.html).

<sup>106</sup> See, e.g., *O.K. v. Bush*, 344 F. Supp. 2d 44 (D.D.C. 2004); *O.K. v. Bush*, 377 F. Supp. 2d 102 (D.D.C. 2005); *Khadr v. Bush*, 587 F. Supp. 2d 225 (D.D.C. 2008); *Khadr v. Obama*, 724 F. Supp. 2d 61 (D.D.C. 2010).

<sup>107</sup> See William Glaberson, *Witness Names to Be Withheld from Detainee*, N.Y. TIMES (Dec. 1, 2007), <https://www.nytimes.com/2007/12/01/us/nationalspecial3/01gitmo.html>.

<sup>108</sup> Austen, *supra* note 96.

<sup>109</sup> Michelle Shephard, *Omar Khadr: No Memory of Firefight in Afghanistan*, THE STAR (Toronto) (Dec. 13, 2013), [https://www.thestar.com/news/canada/2013/12/13/omar\\_khadr\\_no\\_memory\\_of\\_firefight\\_in\\_afghanistan.html](https://www.thestar.com/news/canada/2013/12/13/omar_khadr_no_memory_of_firefight_in_afghanistan.html).



Through the agreement, he exchanged his guilty plea for a promise of eight years imprisonment and a transfer to Canada after at least one year.<sup>110</sup> The United States ended up transferring him after two years, and the Canadian government released him on bail in 2015.<sup>111</sup> In his ongoing appeal to this conviction, a suit against the government of Canada, Khadr swore that he was tortured by both U.S. and Canadian forces after his capture, and that he was subjected to especially harsh treatment at Bagram Airfield in 2002, shortly after his capture and while he was still recovering from gunshot wounds.<sup>112</sup> He claimed, and Canadian interrogation transcripts confirmed, that he told Canadian forces that everything he told the Americans had been fabricated, and that he had simply been responding to torture.<sup>113</sup> The Canadian government settled the suit and apologized to Khadr,<sup>114</sup> who continues to maintain that he has no recollection of the acts he was accused of, that he confessed under duress, and that he agreed to a plea bargain only because he feared that he would be subjected to indefinite detention otherwise.<sup>115</sup>

Whether Khadr was telling the truth in his plea agreement or in the subsequent Canadian case, the world, and the families of the man he allegedly killed, will never know. For the same reason, we will also remain ignorant about whether or not the harsh interrogation methods used on him produced the truthful confession intended or a fabricated one invented for the sole purpose of avoiding additional punishment. What is certain, however, is that the family of the man who allegedly died by Khadr's hand remains disturbed and without closure. As recently as June of 2017 the slain soldier's widow, Tabitha Speer, sought Canadian enforcement of a judgment against Khadr that she had been awarded in a U.S. court in 2015.<sup>116</sup>

<sup>110</sup> Offer for Pre-trial Agreement, United States v. Khadr (Oct. 13, 2010), [https://www.mc.mil/Portals/0/pdfs/Khadr/Khadr%20\(AE341\).pdf](https://www.mc.mil/Portals/0/pdfs/Khadr/Khadr%20(AE341).pdf).

<sup>111</sup> Austen, *supra* note 96.

<sup>112</sup> Affidavit of Omar Ahmed Khadr, Khadr v. Prime Minister of Can. at 1–3 (Jul. 30, 2008), [https://www.law.utoronto.ca/documents/Mackin/khadr\\_repat\\_AffidavitofOmarKhadr.PDF](https://www.law.utoronto.ca/documents/Mackin/khadr_repat_AffidavitofOmarKhadr.PDF).

<sup>113</sup> *Id.* at 1–8; *Omar Khadr (Guantanamo Bay) Interrogation Tapes*, YOUTUBE (Jul. 15, 2008), [https://www.youtube.com/watch?v=yNCyrFV2G\\_0](https://www.youtube.com/watch?v=yNCyrFV2G_0).

<sup>114</sup> Ian Austen, *Canada Apologizes and Pays Millions to Citizen Held at Guantanamo Bay*, N.Y. TIMES (Jul. 7, 2017), <https://www.nytimes.com/2017/07/07/world/canada/omar-khadr-apology-guantanamo-bay.html>.

<sup>115</sup> See Shephard, *supra* note 109.

<sup>116</sup> Mark Gollom, *Omar Khadr Fights Attempt by Soldier's Widow to Freeze His Assets*, CBC (Jul. 12, 2017), <https://www.cbc.ca/news/politics/omar-khadr-fights-back-1.4201788>.

## IV. THE PROBLEM OF WHAT CONSTITUTES A WAR CRIME

The problem of the pressure to plead guilty is made worse by the confusion about what crimes can actually be charged by military commission. Because changes in the law have completely eliminated the lowest rung of “war crimes” as triable offenses, detainees today do not have the option to plead to the same crimes that have secured release for other men.<sup>117</sup> Without these lesser charges available, detainees are faced with very serious charges that ratchet up the stakes of either choosing to go to trial or accepting a plea. While this issue does not necessarily increase the pressure to plead guilty for a detainee in all cases, the problem contributes significantly to the inherent injustice within the military commissions system by putting detainees in a position to be held responsible for offenses they did not commit. In other cases, where a very favorable plea bargain is made available, this confusion could in theory function as an extreme form of overcharging, using charges like “murder in violation of the law of war” to threaten a detainee who may only have had a very attenuated relationship to any murder.

Addressing first the legal changes that reduced the number of chargeable war crimes, two major decisions have reshaped the landscape in this regard. Decisions in the cases of Salim Hamdan and Ali Hamza Ahmad Suliman al Bahlul on the constitutionality of certain offenses defined in the 2006 MCA have eliminated the offense called Providing Material Support for Terrorism<sup>118</sup> and called into question whether inchoate conspiracy can withstand scrutiny by the federal courts. Because these were the lowest-level war crimes codified under the Act, this development may create pressure for men who may not have enough evidence against them to be charged with any currently valid war crime to plead guilty to serious offenses such as terrorism and attacking civilians. After a short explanation of this case law, this Comment will show how this phenomenon is illustrated through the case of Ahmed al Darbi.

In a case usually referred to as *Hamdan II*, the D.C. Circuit Court considered challenges to the charges against Salim Hamdan and found that the charge of “providing material support for terrorism” was not permissible when used against a defendant like Hamdan.<sup>119</sup> Salim Hamdan is a Yemeni national who was captured in Afghanistan in 2001 and transferred to Guantanamo Bay in 2002.<sup>120</sup> Hamdan, like Omar Khadr, was charged prior to the pivotal Supreme Court decisions that defined the right

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<sup>117</sup> Hafetz, *supra* note 82, at 329.

<sup>118</sup> Hafetz, *supra* note 82, at 329.

<sup>119</sup> *Hamdan v. United States*, 696 F.3d 1238, 1241 (D.C. Cir. 2012).

<sup>120</sup> *Hamdan v. Gates*, 565 F. Supp. 2d 130, 131 (D.D.C. 2008).

to habeas review and other constitutional rights for detainees, and therefore went through a complicated procedural history<sup>121</sup> prior to facing the charges that would ultimately stick: “conspiracy” and “providing material support for terrorism,” on April 5, 2007.<sup>122</sup> Unlike most detainees whose charges are referred, Hamdan went through a full trial by military commission, which found him guilty of the charge of material support, but not of the conspiracy charge.<sup>123</sup> The judge sentenced him to sixty-six months imprisonment with credit for time served and transferred him to Yemen to serve the remaining months of his sentence.<sup>124</sup> Hamdan then appealed the charges on the ground that, although codified in the 2006 MCA with the intention of applying retroactively, the “war crime” of “providing material support to terrorism” could not be charged to an individual who committed the culpable acts prior to the enactment of the law.<sup>125</sup> After losing his appeal with the Court of Military Commission Review, Hamdan appealed to the D.C. Circuit Court of Appeals, which then reversed.<sup>126</sup> The court reasoned that while the executive branch could charge a crime that was illegal under the law of war prior to the relevant acts but only codified subsequently, it was an *ex post facto* violation to charge a crime that had only become triable by military commission after the relevant acts took place.<sup>127</sup>

Ali Hamza Ahmad Suliman al Bahlul’s case brought a similar challenge to the D.C. Circuit Court, but dealt instead with the question of “conspiracy” and did not yield such conclusive results.<sup>128</sup> Despite not creating binding legal precedent, the case is nonetheless useful in considering how the military commission’s prosecutors may view the availability of different kinds of charges. Bahlul, also Yemeni, was

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<sup>121</sup> Part of this complicated history is *Hamdan I.* *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). Four justices would have ruled in that case that “conspiracy” was not a war crime triable by military commission. Due to the lack of a majority on this issue and the subsequent codification of “conspiracy” as a war crime, the case set no precedent on the matter of “conspiracy” even though it gave the matter extensive treatment. *Id.* at 600–13. As a consequence, *Bahlul* sets the precedent on this issue.

<sup>122</sup> Charges and Specifications at \*3–4, *United States of America v. Salim Ahmed Hamdan* (Military Comm’n Apr. 5, 2007).

<sup>123</sup> *Hamdan v. United States*, 696 F.3d 1238, 1240 (D.C. Cir. 2012), *overruled by* *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014).

<sup>124</sup> *Hamdan* at 1240–41. Note that this took place prior to the 2009 amendments to the MCA that disallowed granting credit for time served.

<sup>125</sup> *Id.* at 1241.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* While this holding was explicitly overruled in *Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014), the holding in this latter case was so similar as to be indistinguishable for purposes of this Comment.

<sup>128</sup> See *Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014).

accused of making promotional videos for al-Qaeda and serving as a secretary to Osama bin Laden, and for these activities he was charged with “conspiracy” and “providing material support for terrorism.”<sup>129</sup> Bahlul declined to participate in his own trial, leading the military commission to find him guilty on both charges.<sup>130</sup> His appeal on this matter reached the D.C. Circuit Court three times.<sup>131</sup>

In the 2016 en banc case, the majority of the court agreed that the charge of “conspiracy” was constitutional for Bahlul’s case specifically, but the reasoning for the decision did not have a majority.<sup>132</sup> The four-judge plurality decided the case on the ground that Congress had the power to define inchoate conspiracy as a war crime in the 2006 MCA, while one judge did not reach the question due to the application of plain error review, and another affirmed on the ground that the specific facts of Bahlul’s case justified an understanding of the conviction as using conspiracy as a theory of vicarious liability instead of as an inchoate crime.<sup>133</sup> Three judges dissented, reasoning that Article III of the Constitution simply does not empower Congress to declare inchoate conspiracy to be a war crime triable by military commission.<sup>134</sup> Because of the lack of a majority on the question of the constitutionality of the Conspiracy, it is possible that judges Wilkins and Millett would rule that a case of true inchoate conspiracy—one in which there was no war crime completed by a coconspirator, when reviewed *de novo*—would present the issue properly and cause them to rule against the constitutionality of this “war crime.”

Because of this remaining uncertainty, and the fact that the Court of Military Commissions Review (“CMCR”) recently decided not to rehear the issue so that it could properly adjudicate the issue *de novo*,<sup>135</sup> the government may prefer to avoid resolving the issue by simply not charging inchoate conspiracy, thus disallowing plea agreements for conspiracies that didn’t take place, the lowest charge that would remain without Material Support. Irrespective of how the government chooses to move forward on inchoate conspiracy, it seems to have determined for the time being that completed conspiracy, as a standalone crime and not merely a theory of liability, is constitutionally safe enough to bet on. Shortly after the

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<sup>129</sup> *Id.* at 5–6.

<sup>130</sup> *See id.* at 7.

<sup>131</sup> *Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014); *Al Bahlul v. United States*, 792 F.3d 1 (D.C. Cir. 2015); *Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016).

<sup>132</sup> *Bahlul*, 840 F.3d at 758.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Bahlul v. United States*, 374 F. Supp 3d 1250, 1250 (USCMCR 2019).

CMCR's most recent *Bahlul* decision, prosecutors added counts of standalone conspiracy to the charge sheets of three detainees who had previously only been charged with more serious crimes.<sup>136</sup>

The significance of *Hamdan II* to the prosecutors and detainees at Guantanamo can hardly be overstated. Of the eight men convicted under the military commission system at Guantanamo, three (including Hamdan himself) have had their convictions for Material Support vacated.<sup>137</sup> One other man, who confessed to having been a driver and a cook for Osama bin Laden, was also convicted only on Material Support,<sup>138</sup> but has not had his conviction vacated.<sup>139</sup> Numerous other detainees subject to the same charges had their charges dropped and were either released or left in detention without charges.<sup>140</sup> For those at Guantanamo Bay attempting to move detainees through the system, and for many detainees themselves, the loss of triable offenses at the bottom rung of culpability and prison time is potentially devastating. One detainee, Sufiyan Barhoumi, grew so exhausted with his attempts to navigate the system after the loss of the two most commonly tried offenses that he literally invited military commissions prosecutors to charge him with anything at all, declaring that he would plead guilty to any charge and take any sentence.<sup>141</sup> His lawyers say that the prosecution declined the invitation, informing them that they would only accept a plea if Barhoumi were willing to testify against another detainee.<sup>142</sup>

Another example of this phenomenon can be found in the case of Ahmed Mohammed Ahmed Haza al-Darbi. Al-Darbi is a Saudi national who pleaded guilty to facilitating a plan that culminated in the attack of a French oil tanker called the *Limburg* several months after U.S. forces took him into custody.<sup>143</sup> The government first filed charges against al Darbi on

<sup>136</sup> Rosenberg-Pentagon Prosecutors, *supra* note 51.

<sup>137</sup> The other two men are David Hicks and Noor Uthman Mohamed. *The Guantanamo Trials*, HUM. RTS. WATCH, <https://www.hrw.org/guantanamo-trials> (last visited Nov. 3, 2019).

<sup>138</sup> This is Ibrahim Ahmed Mahmoud al-Qosi, and he was also convicted of conspiracy to provide material support for terrorism. *Ibrahim Ahmed Mahmoud al-Qosi*, HUM. RTS. WATCH (Oct. 25, 2012, 3:22 PM), <https://www.hrw.org/news/2012/10/25/ibrahim-ahmed-mahmoud-al-qosi>.

<sup>139</sup> *The Guantanamo Trials*, *supra* note 137.

<sup>140</sup> *See id.*

<sup>141</sup> Jess Bravin, *Detainee Begs to be Charged as Legal Limbo Worsens*, WALL STREET J. (Jul. 16, 2013), <https://tinyurl.com/rsyrd3j>.

<sup>142</sup> *Id.*

<sup>143</sup> Charlie Savage, *Guantanamo Detainee Pleads Guilty in 2002 Attack on Tanker Off Yemen*, N.Y. TIMES (Feb. 20, 2014), <https://www.nytimes.com/2014/02/21/us/guantanamo-detainee-ahmed-muhammed-haza-al-darbi.html>.

December 20, 2007, for “conspiracy” and “providing material support for terrorism.”<sup>144</sup> In the charge sheet, the government described overt acts such as working in an alleged al-Qaeda training camp, receiving weapons training, and purchasing a boat and other significant materials to be used in furtherance of the plot.<sup>145</sup> After almost two years of pretrial motions, the government withdrew all charges against al Darbi on November 25, 2009.<sup>146</sup> Hamdan had initiated the appeal that would lead to the *Hamdan II* case on October 15, 2009, with a brief advancing the position that Material Support for Terrorism presented an *ex post facto* issue.<sup>147</sup> While it cannot be known whether or not this was the reason for the government’s withdrawal of charges against al-Darbi, the timing suggests it could have been. Al-Darbi received a new set of charges in 2012,<sup>148</sup> and then entered into a plea agreement on December 20, 2013.<sup>149</sup> This agreement included altogether different and much more serious charges than the ones dismissed in 2009, including “terrorism” and “attacking civilians.”<sup>150</sup> Al Darbi’s pretrial agreement explicitly stated that he would not request credit for time served in detention once sentenced, and set forth the suggested sentence as thirteen to fifteen years from the date of the judge accepting the plea.<sup>151</sup> The agreement also included provisions for release after nine years, so long as al Darbi was repatriated to Saudi Arabia and served five years of his sentence there.<sup>152</sup> The plea agreement also spelled out that the sentence he would face without the agreement would be three life sentences plus twenty additional years for each specification.<sup>153</sup>

Because al Darbi faced similar circumstances to Omar Khadr, but with the addition of the unavailability of Material Support and confusion about the status of Conspiracy as a standalone offense, his situation

<sup>144</sup> Charges and Specifications at \*1, *United States of America v. Ahmed Mohammed Ahmed Haza al Darbi* (Military Comm’n, Dec. 20, 2007).

<sup>145</sup> *Id.* at \*1–3.

<sup>146</sup> Direction of the Convening Authority, *United States of America v. Ahmed Mohammed Ahmed Haza al Darbi* (Military Comm’n, Nov. 25, 2009).

<sup>147</sup> Brief for Appellant at 1, *United States v. Hamdan*, No. 09-002 (CMCR Oct. 15, 2009).

<sup>148</sup> Charges and Specifications, *United States v. Darbi* (Military Comm’n Aug. 29, 2012).

<sup>149</sup> Darbi Offer for Pretrial Agreement, *supra* note 94.

<sup>150</sup> He pleaded guilty to: Attacking Civilians (10 U.S.C. §950t(2)), Attacking Civilian Objects (10 U.S.C. §950t(3)), Hazarding a Vessel (10 U.S.C. §950t(23)), Terrorism (10 U.S.C. §950t(24)), and Attempt (10 U.S.C. §950t(28)) (both Attempt to Hazard a Vessel and Attempting Terrorism). Charges and Specifications, *United States v. Darbi* (Military Comm’n Dec. 16, 2013).

<sup>151</sup> Darbi Offer for Pretrial Agreement, *supra* note 94.

<sup>152</sup> Darbi Offer for Pretrial Agreement, *supra* note 94, ¶¶ 29–30; *Id.* at Appendix A, ¶ 4.

<sup>153</sup> See Darbi Offer for Pretrial Agreement, *supra* note 94, ¶ 21.

presented additional pressures to plead to crimes far more serious than the ones he likely could have been convicted of in a normal civilian trial. A rational defendant in al Darbi's situation would have been faced with a very difficult decision upon being served with his second set of charges. A defendant in an Article III trial may have assessed his odds favorably, taking into account that the government's failure to note a link between al Darbi's actions and the *Limburg* bombing in his 2007 charges may indicate a lack of evidentiary support for the connection. Such a defendant might also expect a relatively light sentence, given that the six men who had already been tried and convicted in Yemen for even more serious overt acts in furtherance of the same attack on the *Limburg* were each sentenced to only ten years in prison.<sup>154</sup> Taking into account the fundamental right to credit for time served in pretrial detention, such a defendant in civilian court would undoubtedly note that even a sentence of double the length of that handed down in the Yemen cases would nonetheless result in fewer remaining years of incarceration than the plea offer proposed.

#### V. ADDITIONAL PROBLEMS WITH THE COMMISSIONS

Confusion about the law, though it is a persistent and often ostensibly insurmountable problem at Guantanamo Bay, is still not the most serious problem plaguing Camp Justice. That title goes to the numerous scandals and roadblocks that seem to infect every aspect of life at Guantanamo. It would be impossible to summarize them completely, but the following claims have been made credibly: defense attorneys found microphones in private rooms intended to be used by detainees and their attorneys for privileged conversations, prompting an entire defense team to quit and their supervisor to be held in contempt of court;<sup>155</sup> during a hearing, the video and audio feed that broadcast the proceedings to the public were abruptly shut off without the knowledge or consent of the judge, and it was later discovered that an intelligence agency had been watching remotely and had shut off the feed;<sup>156</sup> when defense attorneys returned to the island after several months without hearings, more than one team found that the trailers that served as their offices were infested with mold, and members of the defense teams suffered medical issues as a result;<sup>157</sup> and during pretrial

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<sup>154</sup> Ahmed Haj, *Yemen Convicts 15 on Terror Charges*, WASH. POST (Aug. 29, 2004), [http://www.washingtonpost.com/wp-dyn/articles/A42647-2004Aug28.html?nav=rss\\_world/mideast/gulf/yemen](http://www.washingtonpost.com/wp-dyn/articles/A42647-2004Aug28.html?nav=rss_world/mideast/gulf/yemen).

<sup>155</sup> John G. Baker, *Defending the Rule of Law: The Military Commissions Defense Organization*, 40 CHAMPION 18, 23 (2016).

<sup>156</sup> *Id.*

<sup>157</sup> See Carol Rosenberg, *9/11 Trial Lawyers Find Mold in Their Top-Secret Offices: Could It Snarl Gitmo Hearings?*, MCCLATCHY (Nov. 11, 2018), <https://www.mcclatchydc>.

hearings for the 9/11 case, a detainee suddenly recognized that his courtroom interpreter was his former interrogator from a CIA black site.<sup>158</sup> This is only a small sampling of the issues.

In a more complicated episode for the 9/11 litigation, a potentially serious ethical breach may have materially influenced the case when a member of the Department of Defense arranged for the firing of a major actor in the military commissions, the Convening Authority, possibly for reasons related to the judicial or quasi-judicial determinations of the Convening Authority.<sup>159</sup> Although this last point is difficult to understand, it is important because it highlights the inherent susceptibility of the commissions to major structural problems.

The Convening Authority is a figure in the military commissions that has no civilian equivalent.<sup>160</sup> This person is both a manager and a judicial decision-maker, making determinations about how to allocate funds as well as which charges to refer for prosecution.<sup>161</sup> Though this position is well-established in military justice and makes perfect sense for a court martial, the military commissions are a very different context.<sup>162</sup> In 2016, the Convening Authority, Harvey Rishikof, was fired from his position, allegedly to make the commissions “more cohesive.”<sup>163</sup> It also came to light that Rishikof had been considering plea agreements for the 9/11 case, was not referring all of the charges in another pending case, and had made a number of other judicial or quasi-judicial decisions with which his superiors in the Department of Defense disagreed.<sup>164</sup> If it were found that any members of the Department of Defense acted improperly either in firing Mr. Rishikof, or in soliciting a replacement who would be less inclined toward plea bargaining, this would constitute unlawful influence (“UI”).<sup>165</sup> UI and the appearance of UI can both serve as grounds for

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com/news/nation-world/national/national-security/guantanamo/article221501020.html.

<sup>158</sup> Ben Fox, *Interpreter’s Alleged Link to CIA Halts Guantanamo Case*, MIL. TIMES (Feb. 9, 2015), <https://www.militarytimes.com/2015/02/10/interpreter-s-alleged-link-to-cia-halts-guantanamo-case/>.

<sup>159</sup> Charlie Savage, *Mattis Says Guantanamo Lawyers Were Fired Over Temperament, Not Legal Work*, N.Y. TIMES (Mar. 22, 2018), <https://www.nytimes.com/2018/03/22/us/politics/guantanamo-officials-fired-mattis.html>.

<sup>160</sup> See Baker, *supra* note 155, at 24.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Savage, *supra* note 159.

<sup>164</sup> Carol Rosenberg, *Secretary of Defense Fires Guantanamo War Court Overseer*, MIAMI HERALD (Feb. 5, 2018), <https://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article198456714.html>.

<sup>165</sup> Savage, *supra* note 159.



dismissal.<sup>166</sup> Although the judge in this case recently found in favor of the prosecution on this claim, the fact that it was raised at all shows the incredible potential for conflicts of interest to influence the military commissions.

Because of changes in the law that have taken place in the last few years, prosecutors for the commissions have lost the three triable offenses that were the easiest to prove and to secure pleas to. Meanwhile, a long series of mishaps has afflicted the commissions, stalling pretrial hearings in all of the active cases.<sup>167</sup> More than seventeen years after the original crime and after seven years of pretrial hearings, the current judge in the case against the alleged 9/11 coconspirators recently set the date for trial as January 11, 2021.<sup>168</sup> The many setbacks in this case and the others point to a larger problem: the military commissions are structurally unsound.<sup>169</sup> Without an effective means of conducting trials or securing pleas, the commissions now have no purpose except to delay justice for both detainees and those who were harmed by the crimes with which the detainees are accused.

## VI. CONCLUSION

When President Obama left office with forty-one detainees still remaining in custody at Guantanamo Bay, the Periodic Review Boards were still in place. Because the PRBs are an internal executive branch creation, however, it was impossible to determine exactly why they have now suddenly seemed to stop functioning after years of working effectively to process and release detainees.<sup>170</sup> Now that President Trump seems to have immobilized the review boards that the executive branch had been using to transfer, free, or charge detainees, he has given the people of the United States the opportunity to recognize that the PRBs were essentially detainees' last hope. Now, there is practically no way out of Guantanamo at all, and absolutely no way out without pleading guilty to a serious war crime or encountering a spontaneous moment of executive mercy, a situation that will likely leave most of the forty men currently in detention

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<sup>166</sup> See Monu Bedi, *Unraveling Unlawful Command Influence*, 93 WASH. U. L. REV. 1401, 1424 (2016).

<sup>167</sup> Baker, *supra* note 155.

<sup>168</sup> Carol Rosenberg, *Trial for Men Charged with Plotting 9/11 Attacks Is Set for 2021*, N. Y. TIMES (Aug. 30, 2019), <https://www.nytimes.com/2019/08/30/us/politics/sept-11-trial-guantanamo-bay.html>.

<sup>169</sup> For a fuller analysis of this point, see David Glazier, *supra* note 92.

<sup>170</sup> See Benjamin R. Farley, *Who Broke Periodic Review at Guantanamo Bay?*, LAWFARE (Oct. 15, 2018), <https://www.lawfareblog.com/who-broke-periodic-review-guantanamo-bay>.

there to die before they could hope to escape. Such a system may promote the aims of military detention, but it cannot produce any real accountability for acts of terrorism.

Luckily, this is not a problem with a completely obscure solution. Most of the advantages of Article III courts over the military commissions have been discussed elsewhere, but have largely been forgotten by many Americans and legal scholars.<sup>171</sup> Although it may be unlikely that the Department of Justice will insist on its own that it be able to charge detainees outside of the military commissions, it is always possible for Congress to take action to close the detention center instead of allowing it to become a home for aged prisoners.

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<sup>171</sup> See Lewis A. Kaplan, *The Implications of Trying National Security Cases in Article III Courts*, 8 J. NAT'L SEC. L. & POL'Y 337 (2016).