GUANTANAMO BAY – WHY WOULD THE UNITED STATES EVER ACTUALLY PROSECUTE?

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I. INTRODUCTION

Among the many glaring issues plaguing the Guantanamo Bay Detention Camp ("Guantanamo Bay" or "Guantanamo"), one that has long gone unaddressed is the circumstance surrounding the United States government's and its respective agencies' choice not to prosecute many of its detainees.[1] Since its opening in January of 2002, 779 men have passed through the walls of Guantanamo Bay.[2] Currently, there are forty-one detainees remaining.[3] Many of the remaining detainees have yet to be formally charged, and a significant number of them have admitted to crimes under infliction of extreme torture and through the use of highly controversial interrogation methods.[4]

In determining the legal scope of the operations at Guantanamo Bay, the D.C. Circuit Panel made three determinations: "despite the total authority of the United States over Guantanamo, for constitutional purposes it remained foreign territory,[5] that aliens without property or physical presence in the United States have no constitutional rights whatever,[6] and that, accordingly, the detainees deserved no access to

1 Note that throughout this article, the terms "detainees," "prisoners of war" and "inmates" will appear to describe the individuals incarcerated at the Guantanamo Bay Detention Camp. While these terms do not necessarily have identical definitions, for the purpose of this article, they will be used interchangeably.

2 AMER. CIV. LIB. UNION, GUANTANAMO BY THE NUMBERS (last updated January, 2017) https://www.aclu.org/infographic/guantanamo-numbers.

3 Ryan Browne, *Obama's Last Transfer of Gitmo Detainees, Trump Inherits 41*, CNN.COM (Jan. 16, 2017, 9:22pm), http://www.cnn.com/2017/01/19/politics/obama-final-guantanamo-bay-transfer/.

4 *See* VERBATIM TRANSCRIPT OF COMBATANT STATUS REVIEW TRIBUNAL HEARING FOR PRISONERS 10011-10024 (Declassified on March 10, 2007). [hereinafter TRANSCRIPT].

5 *Al Odah v. United States*, 321 F.3d 1134, 1142-44 (D.C. Cir. 2003), cert. granted, 124 S. Ct. 534 (2003) (No. 03-343).

6 *Id*. at 1141.

habeas corpus.7"[8] The result of the Al Odah decision gives rise to the many loopholes inherent in the operation of Guantanamo Bay that ultimately turn the detention camp into what is widely regarded as a "legal black hole."[9] While the greater purpose of the camp is to protect American citizens, there surely must be some way to do so without eviscerating the morality upon which the United States stands.

This Note will not harbor on the issues brought forth above and as to how Guantanamo Bay became what it is today; rather, it will investigate the legality of the detention of inmates at Guantanamo Bay, specifically as it relates to the scope of authority and the "reaches" in terms of evidence. Moreover, once detained, there are laws, both domestic and international, that establish and outline the treatment of detainees.[10] Furthermore, this Note will include an analysis of the various interrogation techniques utilized at Guantanamo, and whether they are lawful.[11] Additionally, and most in-depth, it will investigate the legal loophole ("the Act loophole[12]") that seemingly authorizes the indefinite detention of inmates at Guantanamo Bay; that inmates may ostensibly continue to remain detained at the facility without ever being formally charged–or even given *habeas corpus* rights. Once charges have been brought and a sentence entered, must detainees be awarded credit for time already served in detention?

Given the Act loophole, the question arises whether the U.S. government is ever constitutionally mandated to formally charge or release a detainee from Guantanamo Bay. If not, why would the United States ever prosecute a detainee? If so, when must the government do so, and when does sentencing time begin to run? Finally, is there, perhaps, a third option that authorizes the government to relocate detainees–specifically, the individuals who remain questionably detained–to covert CIA sites around the world?

II. BACKGROUND

In accordance with the National Defense Authorization Act for Fiscal Year 2012 ("NDAA"),[13] the United States is authorized to detain

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7 *Id*. ("We cannot see why, or how, the writ may be available to aliens abroad when basic constitutional protections are not.").

8 GERALD L. NEUMAN, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1.

9 *Id*.

10 *See* NDAA, *infra* note 13; *See also* AUMF, *infra* note 14; *See generally* USCS Geneva III.

11 *See* SSCI, *infra* note 106.

12 *See generally* NDAA, *infra* note 13; *See also* AUMF, *infra* note 14; *See also* USCS Geneva III.

13 National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 [hereinafter NDAA].

"under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force ("AUMF")."[14] While the NDAA is clear in its applicability only with regard to the AUMF, it is hardly a stretch to imagine this authority being abusively extended. Specifically, the AUMF was enacted a mere seven days after the terror attacks of September 11, 2001;[15] accordingly, the timing is likely not a coincidence, and that it was ratified, or at the very least expedited, in reaction to those attacks.[16] Therefore, it is very plausible that Congress envisioned a situation in which an individual would be detained indefinitely pending determination as to his/her knowledge of any past or future attacks on American citizens on United States soil. In fact, the court in *Hamdi v. Rumsfeld* validated and clarified this sentiment:

> Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. (citation omitted) 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.***[17]

However, the NDAA undoubtedly broadened the scope of the AUMF authorization to take necessary action by removing whatever was left of the ceiling regarding length of prisoner detention both prior to and after filing charges.[18] Specifically, detainees often wait years

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14 *Id*. at §1021(c)(1) *pursuant to* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 [hereinafter AUMF].

15 *See id*.

16 *Id*. at §2 ("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.")

17 Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) [emphasis added].

18 *See* NDAA, *supra* note 13.

before charges are even brought; furthermore, such that they are eventually–which is not, by any stretch, a guarantee–charged, detainees are rarely afforded the opportunity to appear before the military commission until yet another number of years has passed.[19] Moreover, even when an acquittal is warranted, release of the acquitted prisoner is far from certain.[20] Additionally, there is much controversy surrounding the imprisonment conditions of these prisoners of war; specifically the interrogation techniques used by the officials at Guantanamo Bay, as well as other off-site locations utilized by the government.

In terms of the chain of command, and under whose purview Guantanamo operates, it really is a function of all three branches of the United States government. The Executive has control over the Department of Defense, the military and the CIA, who ultimately run the camp,[21] while it is up to Congress to control the transfer and release of the detainees held there.[22] Finally, as evidenced by the Supreme Court's rulings on various Guantanamo Bay decisions, it maintains judicial authority over any issues arising at the camp.[23] For these reasons, among others to be addressed in this Note, the use of the facility, the military tribunals and the protections afforded the prisoners–or lack thereof–are highly complex in nature.

III. IS GUANTANAMO BAY A "COMPETENT TRIBUNAL" IN THE EYES OF THE REST OF THE WORLD?

Black's Law Dictionary defines "competent jurisdiction" as "[a] court's power to decide a case or issue a decree [the constitutional grant of federal question jurisdiction]."[24] More broadly, it is further defined as "[a] geographic area within which political or judicial authority may be

19 *See, e.g.*, United States v. Hamdan, 2011 U.S. CMCR LEXIS 1 (CMCR 2011) at 19-20. (Hamdan received confinement credit of sixty-one months, seven days for time served prior to trial.).

20 *See* Seelye, *infra* note 80.

21 Jackie Northam, Q&A About Guantanamo Bay and the Detainees, NPR.ORG (June 23, 2005, 12:00am), http://www.npr.org/templates/story/story.php?storyId=4715916.; See generally Julian Preston, Judge Orders U.S. to Supply Prisoner Names, N.Y TIMES (Jan. 24, 2006), http://www.nytimes.com/2006/01/24/politics/judge-orders-us-to-supply-prisoner-names.html. (Cited to simply show the control held by the Department of Defense.).

22 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, 257 ("[Congress] have prevented the President from following another important Bush administration policy, namely the transfer or release of innocent and low-risk detainees.").

23 *See, e.g.*, Boumediene v. Bush, 553 U.S. 723 (U.S. 2008); *see also* Hamdan v. Rumsfeld, 464 F. Supp. 2d 9 (D.D.C. 2006); *see also* Rasul v. Bush, 542 U.S. 466 (U.S. 2004); *see also* Hamdi v. Rumsfeld, 378 F.3d 426 (4th Cir. 2004).

24 *Competent Jurisdiction*, BLACK'S LAW DICTIONARY (10th ed. 2014).

exercised."[25]

In order to delve deeper into the complexity of the controversy surrounding Guantanamo Bay, it is necessary to first understand whether or not the facility ought to be classified as a competent tribunal, and in accordance with United States law and the Geneva Conventions.[26] Understanding this designation will help determine the applicable rule of law governing the actions at the detention camp, and whether or not inmates at Guantanamo are even subject to the protections of the Conventions.

To help understand the relevance of being considered a competent jurisdiction, consider the complication that arises in the context of extradition.[27] Specifically, the United States will often surrender a given detainee to another country at that country's request, providing there is an extradition treaty with that country.[28] The rationale behind such a treaty is that the individual will face prosecution in a manner similar to the prosecution he/she would receive under United States law.[29] By way of example, Professor Mark Denbeaux[30] is currently representing a detainee from Malaysia, Mohd Farik Bin Amin, better known as "Mr. Zubair."[31] While the United States does have an extradition treaty with Malaysia, Malaysia will not necessarily recognize the military tribunal at Guantanamo Bay as a competent jurisdiction.[32] Accordingly, should the United States determine this detainee to be worthy of prosecution, there is a high likelihood that he will be extradited back to Malaysia

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25 *Id*.

26 Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, Art. 5 at ¶ 2 ("Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.").

27 *See, e.g.*, Heilbronn v. Kendall, 775 F. Supp. 1020, 1023 (W.D. Mich. 1991), citing the applicable law regarding extradition. ("The scope of *habeas* review of a magistrate's international extradition order is narrow, being limited to the following inquiry: 1. whether the magistrate had jurisdiction; 2. whether the offense charged is within the treaty; and 3. whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.").

28 18 U.S.C.S. §3181(a) ("The provisions of this chapter [18 U.S.C.S. §§3181 *et seq*.] relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.").

29 *See Heilbronn*, *supra* note 27 ("It is a fundamental requirement of international extradition that the crime for which extradition is sought be one provided for by the treaty between the requesting and the requested nation. The second determination is whether the conduct is illegal in both countries.").

30 Professor Mark Denbeaux is a professor at Seton Hall Law School. He is a practicing attorney that has represented many inmates at Guantanamo Bay, and he continues to do so. He is regarded as an expert and one of the leading sources on the legal process and issues facing inmates at Guantanamo Bay.

31 Charlie Savage, *Guantanamo Deal Could Lead to Prosecution in Indonesia Terrorist Attacks*, N.Y. TIMES (Nov. 12, 2016), https://www.nytimes.com/2016/11/13/us/politics/guantanamo-bay-malaysia.html.

32 *Id*.

where he would not, ultimately, face any legal repercussions, as the charges brought at Guantanamo would be considered non-binding.[33]

Following the above logic, classification of Guantanamo Bay as a "non-competent jurisdiction" might explain, at least in part, why the United States would choose not to prosecute the detainees at Guantanamo Bay. Namely, if the federal government cannot guarantee that other countries will recognize the military tribunal at Guantanamo Bay as a competent jurisdiction – and accordingly, the rationale for detention then in the first place is unlikely to be recognized – it is highly unlikely to agree to repatriate a prisoner, given the likelihood that the receiving country will not carry out the imposed sentence, or any sentence at all.[34] Moreover, despite Mr. Zubair, upon being extradited, may actually face unrelated domestic criminal charges in Malaysia,[35] this would afford him the rights and protections of local law.[36] The mere fact that the United States is hesitant to allow this extradition to occur – so much so that it is refusing to comply with the demand – may actually suggest that it worries the Guantanamo tribunals are not to be considered competent. Additionally, hypothetically, the U.S. government may be concerned that valid intelligence information obtained at Guantanamo could be ignored and/or discredited. For these reasons, the government would be hesitant to risk complying with Malaysia's extradition demands in the case of Mr. Zubair.[37]

A. Understanding Military Tribunals, and the Applicability of their Decisions and Fallout

Historically, military tribunals made their first appearance in the Mexican War of 1846-1848.[38] However, they were established for the purpose of prosecuting American soldiers, not soldiers or prisoners of war from the opposing side.[39]

More modern is the case of *Ex parte Quirin*.[40] Today, this case

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33 *Id*. (That said, in this specific case, it is likely that Mr. Zubair would face domestic criminal charges in Malaysia; thus ensuring his incarceration, albeit for a different reason. This does not, however, resolve the issue at hand; namely, that Malaysia does not recognize the Guantanamo military tribunal as a competent jurisdiction to find guilt and proscribe punishment.).

34 *See id*.

35 *See id*. (As aforementioned, Mr. Zubair is facing domestic charges in Malaysia for a separate incident.)

36 *See id*.

37 *See id*.

38 David Glazier, *Kangaroo Court Or Competent Tribunal?: Judging The 21st Century Military Commission*, 89 VA. L. REV. 2005, 2027, *citing* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 832-33 (2d ed. rev. 1920).

39 *Id*.

40 *Ex parte Quirin*, 317 U.S. 1 (U.S. 1942).

represents the best approach to determine the competency of military tribunals in the United States to function. This case involved the prosecution of eight individuals suspected of "preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war."[41] There, the Supreme Court found that despite the initial purpose of military tribunals–their use for court martial hearings–the President is authorized to establish military commissions for the sake of prosecuting individuals suspected of war crimes; and that authority to set up such tribunals is within the Presidential purview under the Constitution.[42]

However, Human Rights Watch ("HRW"), a non-profit organization that exposes human rights violations and seeks to bring about justice, "is convinced that the continued use of the military commissions is a grave mistake. Given their substandard procedures and tainted history, Human Rights Watch does not believe that judgments handed down by military commissions will be perceived as legitimate, either domestically or internationally."[43]

A good example of this issue arises out of the Nuremberg Trials, conducted in 1945-1946 upon twenty-two Nazis that were captured after the end of World War II ("WWII") and the Holocaust.[44] Twelve of those accused were found guilty of war crimes and sentenced to death.[45] Despite sending a message that the actions of the Nazis were horrific and inexcusable, Judge Charles Edward Wyzanski, Jr., a United States federal judge, wrote a comprehensive review of the trials, and observed the issues inherent in the outcome.[46] He stated, notably:

> At the moment, the world is most impressed by the undeniable dignity and efficiency of the proceedings and by the horrible events recited in the testimony. But, upon reflection, the informed public may be disturbed by the repudiation of widely accepted concepts of legal justice. It may see too great a resemblance between this proceeding and others which we ourselves have condemned. If in the end there is a generally accepted view that Nuremberg was an example of high politics masquerading as law, then the trial instead of promoting may retard the coming of the day of world law.[47]

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41 *Id*. at 23.

42 *Id*. at 48.

43 HUMAN RIGHTS WATCH, THE GUANTANAMO TRIALS, https://www.hrw.org/guantanamo-trials.

44 *The Nuremberg Trials*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, https://www.ushmm.org/outreach/en/article.php?ModuleId=10007722 (last visited March 5, 2017).

45 *Id*.

46 Charles E. Wyzanski, *Nuremberg: A Fair Trial? A Dangerous Precedent*, THE ATLANTIC (Apr. 1946), https://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492/.

47 *Id*.

Despite his belief that the Nazis deserved to face justice, Judge Wyzanksi's concern that the trials would be viewed by future generations as an episode of political grandstanding[48] suggest that the validity of the tribunal decisions may, perhaps, be questioned as a matter of law.

In addition to the Nuremberg Trials, the International Military Tribunal for the Far East, established on May 3, 1946, was set up to prosecute Japanese officials that committed war crimes during WWII.[49] However, this tribunal had an even greater issue. Despite the atrocities committed by Japan during the war, they did not approach the level of systematic annihilation in a manner akin to Nazi Germany.[50] Moreover, "the prosecuting powers at Tokyo violated the principle of legality by creating the new charge of crimes against peace,[51] treated the war crimes charges as almost an afterthought,[52] and breached the undertaking to give the accused a fair trial."[53]

Similar to the above tribunals, it is no stretch of the imagination to suggest that similar issues may be present with the military tribunals at Guantanamo Bay. Given the controversial nature of Guantanamo Bay, as well as the uncertainty surrounding the validity of convictions, it is not that farfetched to consider the government's potential reservations regarding prosecution of the detainees, as it risks losing them to extradition, and possibly, as outlined earlier, eventual acquittal.

IV. THE LEGAL BASIS FOR THE CONTINUED OPERATION OF A DETENTION FACILITY AT GUANTANAMO BAY NAVAL BASE

There is no dispute regarding the approach of the Third Geneva Convention to detention of prisoners of war or enemy combatants, and the authority of a country and military to do so.[54] Specifically, the Convention offers that an individual who is captured must be afforded the significant rights and protections detailed within the Convention, until such time as their respective status as either an enemy combatant or not has been determined by a competent tribunal.[55] This was,

48 *Id*.

49 *The Tokyo War Crimes Trials*, PBS, http://www.pbs.org/wgbh/amex/macarthur/peopleevents/pandeAMEX101.html (last visited March 5, 2017).

50 Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, EUR. J. INT. LAW (2010) 21(4): 1085, *citing* Simma*, The Impact of Nuremberg and Tokyo: Attempts at a Comparison*, A. NISUKE (ED.) JAPAN AND INTERNATIONAL LAW: PAST, PRESENT AND FUTURE (1999) at 83.

51 *Id*.

52 *Id*.

53 *Id*.

54 USCS Geneva III, generally, *supra* note 26.

55 *Id*. at art. 5; THE HERITAGE FOUNDATION, THE LEGAL BASIS OF U.S. DETENTION POLICIES,http://www.heritage.org/research/projects/enemy-detention/detention-

initially, one of the main purposes behind the opening of Guantanamo Bay; namely, to determine, through Combatant Status Review Tribunals ("CSRT") whether to detain or to release each captured prisoner.[56] More pointedly, then-Secretary of Defense Donald Rumsfeld acknowledged in a 2002 Department of Defense news briefing regarding detainees that were not released after review of their respective status, that:

> [they] have been charged with something. They have been found to be engaging in battle on behalf of the al Qaeda or the Taliban, and have been captured. And we have decided, as a country, that we prefer not to be attacked and lose thousands of lives here in the United States, and that having those people back out on the street to engage in further terrorist attacks is not our first choice. They are being detained so they don't do that. That is what they were about. That is why they were captured, and that is why they're detained.[57]

Despite Secretary Rumsfeld's reassuring remarks, there are two issues with his comments. First, he failed to describe what any of the detainees have been charged with.[58] More to the point, stating that "[t]hat is why they were captured, and that is why they're detained"[59] is a feel-good conclusary statement, but there was no substance on which American citizens can base this conclusion. In other words, Secretary Rumsfeld was vague with his description of what the detainees had done to merit being captured and subsequently incarcerated, and he further failed to provide any insight into what, if any, due process was being guaranteed.[60]

The second issue stems from the haze surrounding what actually constitutes war–that would help explain who may be considered enemy combatants–according to the AUMF and the sentencing procedures that accompany a conviction at Guantanamo Bay.[61] Furthermore, such that the United States may no longer be considered "at war," to be expounded upon below, at what point must the US take affirmative action towards each enemy combatant, and what must its actions consist of?

In order to best respond to these questions, the main issues must be

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policy#TheGenevaConventions.

56 News Transcript, Donald H. Rumsfeld, SECRETARY OF DEFENSE, SECRETARY RUMSFELD AND GEN. PACE (JAN. 22, 2002), http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=2254; GUANTANAMO DETAINEE PROCESSES (OCT. 2, 2007), HTTPS://UPLOAD.WIKIMEDIA.ORG/WIKIPEDIA/COMMONS/5/5C/GTMO_DETAINEE_PROCESSES_-_DEPARTMENT_OF_DEFENSE_FACT_SHEET_ON_THE_VARIOUS_DETAINEE_PROCESSES.PDF.

57 *Id.*

58 *See id.*

59 *Id.*

60 *See id.*

61 *See* AUMF, *supra* note 14

broken down threefold. First, what constitutes "the end of the hostilities" as set forth in the NDAA?[62] Second, once hostilities have come to an end, does there exist a point in time wherein the United States government must either formally charge or release a detainee? If there is another option, what is the extent of its utility? Finally, third, if a prisoner may seemingly be detained indefinitely through the Act loophole, why would the US ever prosecute detainees–an action that would require the government to "start the clock" and give credit to each detainee for time served?

A. What Exactly Constitutes the End of Hostilities, as Set Forth in the National Defense Authorization Act?

The HRW argues that all Afghan detainees at Guantanamo Bay–at least those with suspected ties to al Qaeda–should have been repatriated to Afghanistan following the creation of the Afghan Transitional Administration, headed by Hamid Karzai, in 2002.[63] Assuming, arguendo, that this was not in fact the end of the war in Afghanistan, in May, 2014, President Obama announced that the United States would end the war by the end of the calendar year.[64] On December 28, 2014, the North Atlantic Treaty Organization ("NATO"), along with the United States government, officially declared the end of the war and removed their respective troops from Afghanistan.[65]

Despite even its own admissions, the United States "continues to assert the authority to pick up and detain anyone anywhere in the world in accordance with the laws of war."[66] Furthermore, while the HRW accedes this point, it distinguishes the current detentions by demanding: "[h]owever, individuals apprehended in situations not amounting to armed conflict, that is, outside a traditional battlefield, ***do not fall within the realm of the laws of war***. They instead must be detained and

62 National Defense Authorization Act for the Fiscal Year 2012, Pub. L No.81-125, §1021, 125 Stat. 1298, 1308 (2011).

63 *US: Prolonged Indefinite Detention Violates International Law, Current Detention Practices at Guantanamo Unjustified and Arbitrary*, HUMAN RIGHTS WATCH, https://www.hrw.org/news/2011/01/24/us-prolonged-indefinite-detention-violates-international-law.

64 Karen DeYoung, *Obama to leave 9,800 U.S. troops in Afghanistan*, WASH. POST (May 27, 2014), https://www.washingtonpost.com/world/national-security/obama-to-leave-9800-us-troops-in-afghanistan-senior-official-says/2014/05/27/57f37e72-e5b2-11e3-a86b-362fd5443d19_story.html?utm_term=.c2166c1bd7cd.

65 *U.S. formally ends the war in Afghanistan*, CBS (Dec. 28, 2014 2:08 PM), http://www.cbsnews.com/news/america-formally-ends-the-war-in-afghanistan/; Sune Engel Rasmussen, *NATO ends combat operations in Afghanistan*, THE GUARDIAN (Dec. 28, 2014 at 12:55 PM), https://www.theguardian.com/world/2014/dec/28/nato-ends-afghanistan-combat-operations-after-13-years.

66 HUMAN RIGHTS WATCH, *supra* note 63.

prosecuted according to domestic law and international human rights law."[67]

The argument on either side is clear: the detainees and their representatives claim that the war against Al Qaeda ended in 2002,[68] while the US contends that despite the physical end of combat in Afghanistan, the "war on terror," as it is colloquially known, is ongoing, and that Al Qaeda was simply one of the terrorist organizations behind this war.[69] The government's argument, extrapolated, is that the war has not concluded, despite the dismantling of the al Qaeda organization.

According to Bruce Hoffman, a historian at Georgetown University, the war on terror is a war unlike those defined and anticipated under the various legal and political doctrines and codes; specifically, "[war] ends with the vanquishing of an opponent, with some form or [sic] armistice or truce–some kind of surrender instrument or document,"[70] but regarding the war on terror, he continues, "it's a war without boundaries. It's a war directed against multiple enemies, not just one adversary."[71] By way of example, the war on terror may be likened to President Lyndon Johnson's war on poverty or President Ronald Reagan's war on drugs, both "wars" that seemingly have no end.[72] Given this mentality, and what seems to be a never-ending fight, it suggests that the United States government may have found a loophole; namely that, so long as the war–by this definition–continues, the government may continue to detain enemy combatants at Guantanamo Bay indefinitely.

The language in the NDAA states: "[t]he disposition of a person under the law of war as described in subsection (a) may include . . . [d]etention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force."[73] Following the direction of the NDAA and turning to the AUMF, the authority to detain a prisoner of war indefinitely comes from the following verbiage:

> 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

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67 *Id*. [emphasis added].

68 *Id*.

69 *Id*.

70 Guy Raz, *Defining the War on Terror*, NPR (Nov. 1, 2006 at 12:37 PM), http://www.npr.org/templates/story/story.php?storyId=6416780.

71 *Id*.

72 *Id*.

73 National Defense Authorization Act for Fiscal Year 2012, §1021(c)(1), Pub. L. No. 112-81, 125 Stat. 1562 (2011).

against the United States by such nations, organizations or persons.[74]

This language provides the President as close to *carte blanche* authorization to indefinitely detain anybody deemed to be a threat to the United States or any of its citizens,[75] if, in fact, the "war on terror" is an appropriate label. Moreover, it seems to suggest that the terror attacks on September 11, 2001 were but a few grievous acts that began a war in which we are still engaged.

B. Does there Exist a Point at Which the United States Government Must Either Formally Charge or Release an Enemy Combatant?

As aforementioned, under the AUMF, the federal government continues to justify its prolonged incarceration of detainees at Guantanamo Bay without formal charges by maintaining that it is still in a state of war.[76] Assume, arguendo, that the perceived loophole developed in depth above is actually limited, in that the war was specific to Al Qaeda and Afghanistan, and that it ended in 2002; assume further that Guantanamo Bay should be considered a competent jurisdiction. Accordingly, the fundamental question is reiterated: at what point in time must the government take affirmative action towards the detainees? Moreover, what exactly are the options available to the government?

The Geneva Convention provides a caveat to the general rule authorizing a government to hold prisoners of war throughout the duration of the relevant war; that as soon as a war has concluded, any prisoners of war must be released and repatriated.[77] However, the Convention was enacted on August 12, 1949, well prior to the "war on terror" that has no foreseeable end.[78] This is the crux of the issue. Under the Convention, the moment hostilities have ended, all prisoners of war must be either formally charged or released immediately.[79] However, if we are truly in a perpetual state of "war on terror"–one that will not end for the foreseeable future–the Convention may not be the appropriate legislation to consult, for the drafters may not have envisioned such a scenario at the time of drafting.

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74 AUMF at §2(a), *supra* note 14.

75 *See id*.

76 AUMF, *supra* note 14.

77 Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.").

78 *Id*.

79 *Id*.

In support of this proposition, William J. Haynes II, the Pentagon's top lawyer at the time, issued yet another shocking revelation in March, 2002; he stated then that "[i]f we had a trial right this minute, it is conceivable that somebody could be tried and acquitted of that charge but may not necessarily automatically be released."[80] This sentiment was echoed by Douglas Feith, then Undersecretary for Policy, who reasoned that as is the norm in civilian courts, a prisoner might be acquitted on one charge "but there still may be other reasons to hold the person."[81] Given the Pentagon's approach–not shying away from its martial law-esque approach to combating terror–while the happenings at Guantanamo may be draped in a veil of secrecy, its justification certainly is not.

C. Possible Solutions to Extinguishing Indefinite Detention

There may be a route to resolving this issue, but it would require, effectively, Congress relinquishing this clearly strategic advantage. Congress should consider employing its Constitutional authority,[82] and enacting a law that imposes a time limit on the length of detention for a prisoner of war. This route would serve as a systematic model that would guarantee due process to all detainees at Guantanamo Bay. For the purpose of comparison, when detaining a citizen for committing a domestic crime, that detention is authorized pursuant to the Fifth Amendment to the Constitution.[83] However, the Fifth Amendment is limited to a degree by the Sixth[84] as well as the governing state's specific law of detention.[85] Many states proscribe that an individual may not be detained by the police for longer than seventy-two hours without being formally charged, though some states restrict detention to an even shorter length of time.[86] While the Sixth Amendment and state laws do not apply directly to prisoners of war, the goals of the protections are

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80 Katharine Q. Seelye, *A NATION CHALLENGED: THE TRIALS; Pentagon Says Acquittals May Not Free Detainees*, N.Y. TIMES (March 22, 2002), http://www.nytimes.com/2002/03/22/us/a-nation-challenged-the-trials-pentagon-says-acquittals-may-not-free-detainees.html.

81 *Id*.

82 U.S. CONST. art. 1, §1.

83 U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

84 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation.").

85 *How Long May Police Hold Suspects Before Charges Must be Filed?*, FINDLAW (last visited March 5, 2017), http://criminal.findlaw.com/criminal-rights/how-long-may-police-hold-suspects-before-charges-must-be-filed.html.

86 *See id*.

"to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation, and to limit possibilities that long delay will impair the ability of an accused to defend himself."[87] Moreover, the provisions were also intended "to prevent oppression of citizens by delaying criminal prosecution for an indefinite time and to prevent delays in administration of justice by requiring the judicial tribunals to proceed with reasonable dispatch in the trial of criminal prosecutions."[88]

While the circumstances surrounding the detention of prisoners of war may be wholly different from those surrounding the detention of civilians for suspected criminal activity, the functions of the detention are, arguably, quite similar: to investigate the alleged crime(s), to interrogate the suspect and to ensure the presence of the accused for the ensuing judicial process.[89] Comparing the two systems, it is not farfetched that Congress look to the mechanisms of the civil system and enact a mandatory time-centered deadline for the prosecution or release of each prisoner of war at Guantanamo Bay.

The central issue with taking this route, however, is that President Bush's administration established a category of individuals at Guantanamo Bay known as "too dangerous to release but could not be tried."[90] David J.R. Frakt suggests in an article that Congress inherited President Bush's approach that lent itself to a need for a "Guantanamo Bay" somewhere, whether in Cuba or elsewhere.[91] Accordingly, while Congress has the authority to enact, modify, and repeal laws, if the Bush administration–that was consistent in its release of any detainees found not to be involved with terrorist activity[92]–made a point of continuing to hold certain prisoners, simply releasing the remaining detainees with the "too dangerous" status would be a highly controversial move that it should not, for the sake of national security, be willing to do. What it may consider, however, is to change its unwritten policy of blocking executive pardons in the manner in which it did almost on principle throughout the Obama administration.[93]

Alternatively, the Executive branch may be the key to reform. The President of the United States has the authority to issue Executive

87 United States v. Ewell, 383 U.S. 116, 120 (1966) (*citing* U.S. CONST. amend. VI).

88 Shepherd v. United States, 163 F.2d 974, 976 (8th Cir. 1947) (*citing* U.S. CONST. amend. VI).

89 *See* U.S. CONST. amends. V and VI regarding criminal matters; *see* AUMF regarding the detention of prisoners of war.

90 Frakt, *supra* note 22 at 257.

91 *Id*.

92 *Id*.

93 *Id*. (citing the proposition that a majority Republican Congress made a habit of blocking President Obama's pardons.).

Pardons and releases,[94] and may choose to pardon, release and/or repatriate any or all of the detainees at Guantanamo Bay. To wit, President Obama released 196 prisoners from the detention camp since he took office in 2009.[95] This route is a case-by-case approach, and requires the Executive to review the status of each inmate at any given time.[96] It leaves an element of uncertainty on the table, as it is in the sole discretion of one individual, and not a system,[97] though it does allow the threat of terrorism to be somewhat curtailed by not entirely eviscerating the intention of the AUMF.[98]

No matter the route ultimately pursued, under the Trump administration, with a Republican Congress by his side, now would likely prove the best opportunity for the two branches to work together to solve the issues at Guantanamo Bay.

Finally, Alexander Fraser suggests another option;[99] that of separating terrorists into two categories: combatant terrorists, such as Irek Hamidullin, who was captured by American forces after spearheading a military attack in Afghanistan in November, 2009,[100] and non-combatant terrorists, like the Tsarnaev brothers, who killed innocent civilians by an act of terrorism on American soil.[101] The former should be held and tried by military tribunals, while the latter should be tried by either federal court or a criminal court in the jurisdiction in which the act occurred.[102] By dividing terrorists into these two classes, the United States would be better able to justify its continued use of military tribunals.

Realistically, however, in order to solve the problem, the government would have to want to solve the problem, something it has simply swept under the rug for the last fifteen years. In fact, if a solution

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94 U.S. CONST. art. II, §2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States . . . .").

95 *Obama slams Congress over Guantanamo, releases 4 more prisoners*, DEUTSCHE WELLE (Jan. 20, 2017), http://www.dw.com/en/obama-slams-congress-over-guantanamo-releases-4-more-prisoners/a-37203516.

96 U.S. CONST. art. II, §2, cl. 1, *supra* note 94.

97 *Id*. (It is worth noting that prior to 2009, President George W. Bush, the President under whose administration the detention camp was opened, released 532 detainees throughout his two terms in office.); *See* Lucas Tomlinson, *Lawmakers slam 'reckless' Gitmo release as Obama speeds up transfers*, FOX NEWS (Aug. 16, 2016), http://www.foxnews.com/politics/2016/08/16/lawmakers-slam-reckless-gitmo-release-as-obama-speeds-up-transfers.html.

98 *See generally* AUMF.

99 Alexander Fraser, *For The Sake Of Consistency: Distinguishing Combatant Terrorists From Non-Combatant Terrorists In Modern Warfare*, 51 U. RICH. L. REV. 593, 626.

100 *Id*. at 593.

101 *Id*. at 626; *Boston Marathon Terror Attack Fast Facts*, CNN (April 18, 2016, 7:18 AM), http://www.cnn.com/2013/06/03/us/boston-marathon-terror-attack-fast-facts/. The Tsarnaev brothers, Dzhokhar and Tamerlan, are known as the Boston Marathon bombers, who set off bombs at the marathon on April 15, 2013, killing three people and injuring at least 264 others.

102 *See* Fraser, *supra* note 99, at 626-27.

ever does surface, the government may yet retain a third option, a trump card of sorts, that would allow it to maintain control of a detainee. In this vein, is there, perhaps, such a "card" currently in use?

D. Is There, Perhaps, a Third Option Currently Being Utilized by the Government to Maintain Control of its Detainees?

Having analyzed the arguments above regarding the end of hostilities and whether and when an enemy combatant must either be charged or released and repatriated to his/her home country, another alarming issue must be considered. In what seems to be an attempt to both "break" Guantanamo detainees, as well as to avoid charging or releasing them, the government engages in a third option that is, perhaps, even more controversial than the issue of indefinite detention. That is, the CIA facilitates the transfer of prisoners from Guantanamo Bay to various secret locations, known as "Black Sites" all over the world.[103] While such sites were widely speculative for quite some time, President George W. Bush finally admitted to their existence in a 2006 speech.[104] While President Bush insisted that torture was not authorized at these Black Sites, he did maintain that their operation was vital to combat the war on terror and the collection of intelligence information.[105]

The acknowledgment of such locations by President Bush was confirmed by the Senate Select Committee on Intelligence ("Senate Report").[106] In a report that was declassified on April 3, 2014, Diane Feinstein, Chairman of the Committee released the Committee's findings and conclusions with respect to the CIA's Detention and Interrogation Program.[107] In its investigation, the Committee found that the CIA continued to operate secret detention facilities in various countries, including Thailand, Afghanistan and other European countries[108], for the purpose of housing detainees off of American soil.[109] The report states, in relevant part:

> The CIA entered into an agreement with the REDACTED in Country

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103 *See Bush admits to CIA secret prisons*, BBC (Sept 7, 2006, 11:18 PM), http://news.bbc.co.uk/2/hi/ americas/5321606.stm.

104 *Id*.

105 *Id*.

106 S. SELECT COMM. ON INTELLIGENCE CHAIRMAN DIANE FEINSTEIN FINDINGS AND CONCLUSIONS (2012). [hereinafter SSCI].

107 *Id*. at iv.

108 *FAQs: What Are Ghost Detentions and Black Sites*, CENTER FOR CONST. RIGHTS (Oct. 17, 2007), https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/faqs-what-are-ghost-detentions-and-black. [hereinafter CCR].

109 SSCI, *supra* note 106, at 97.

> REDACTED to host a CIA detention facility in REDACTED 2002. […] The Station responded with an $REDACTED million "wish list" REDACTED; […] CIA *detainees were transferred to DETENTION SITE BLACK in Country REDACTED in the fall of 2003.*[110]

This is just one example laid out in the report, along with Sites BLUE, COBALT and VIOLET.[111] Moreover, despite President Bush's guarantee to the contrary,[112] the report also details highly controversial interrogation measures and many instances of torture.[113] The reports of torture are simply confirmations of what many already suspected, based largely on the testimonies of former detainees.[114]

This begs the question as to what exactly are "Black Sites," and if they might represent yet another loophole available to the government in order to continue to detain prisoners of war indefinitely. These locations appear to be "safe havens" that allow the government, facing the possibility of releasing a detainee, to simply make the prisoner vanish to a covert location not on any map, where the use of extreme measures to obtain information from detainees is fully authorized.[115]

In the 2006 speech by President Bush wherein he acknowledged the use of Black Sites, he revealed some details of the CIA detention program.[116] Specifically, President Bush suggested that the sites were used to house "high-value detainees," some of whom were later transferred to Guantanamo Bay.[117] Moreover, while he stated that the facilities were since emptied of prisoners, he further suggested that the sites would remain open for potential future use.[118] In 2007, "future use" was confirmed when the President announced the transfer (from a CIA site) of yet another prisoner to Guantanamo Bay.[119] Perhaps most concerning was the President's promise that once transferred to Pentagon custody at Guantanamo Bay, the prisoners would receive the protections afforded under the Geneva Conventions.[120] This disclosure

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110 *Id*. [emphasis added].

111 SSCI, *supra* note 106.

112 Rupert Cornwell, *Investigation: The CIA's Secret Prisons*, THE INDEPENDENT (Sept. 9, 2006), http://www.independent.co.uk/news/world/americas/investigation-the-cias-secret-prisons-415337.html ("However Mr. Bush insisted anew that the US did not engage in torture.").

113 *Id*.

114 *See* TRANSCRIPT, *supra* note 4.

115 *See generally id*.

116 *See* CCR, *supra* note 108.

117 *Id*.

118 *Id*.

119 *Id*.

120 Ed Henry and Ted Barrett, *Bush: CIA kept terror suspects in secret prisons*, CNN (Sept. 6, 2006, 2:22 PM), https://web.archive.org/web/20060906193917/http://www.cnn.com/2006/POLITICS/09/06/bush.speech/index.html.

perhaps indirectly intimates that those prisoners did not receive such protection while in CIA custody, prior to being transferred.

By way of example, the CIA captured Abu Zubaydah, the man believed to be the third highest-ranking member of al Qaeda.[121] Prior to his capture, the CIA determined that it could not allow him to be held by US military forces, for that would force them to provide him the protections afforded under the Geneva Conventions.[122] Ultimately, the CIA opted to send him to a Black Site (later found out to be located in Thailand) in order to ensure the secrecy of his detention, before he was eventually transferred to Guantanamo Bay in 2003.[123] However, pending the outcome of the *Rasul v. Bush*,[124] which was to decide, amongst other things, whether or not Guantanamo detainees had the right to counsel, the CIA sent Zubaydah, and others, back to a Black Site, before he was eventually returned to Guantanamo.[125]

Returning to the question posed above, as to whether there exists a point at which the United States government must take affirmative action regarding the detainees at Guantanamo Bay, might there be a third option in addition to formal charges or release of these prisoners? The existence of the CIA's Black Sites would suggest the answer to be in the affirmative. Specifically, if these sites continue to be used clandestinely prior to transfer to Guantanamo Bay, as well as in order to allow the CIA to prevent access to rights under the Geneva Conventions (as was seen with the handling of Abu Zubaydah), why would the United States government not continue to use these sites such that an inmate is facing the possibility of release? This is a shocking revelation, for, as this practice seems to suggest, the government has found a loophole to make prisoners vanish, so as to avoid providing them their due process rights.

V. ARE GUANTANAMO BAY DETAINEES TRULY BEING AFFORDED ANY RIGHTS TO WHICH THEY ARE ENTITLED WHILE DETAINED AT GUANTANAMO BAY?

Referring back to the matter of detention at Guantanamo Bay; assuming, arguendo, that the detention of individuals with suspected

121 Crofton Black and Sam Raphael, *Revealed: The Boom And Bust Of The CIA'S Secret Torture Sites*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Oct. 14, 2015), https://www.thebureauinvestigates.com/2015/10/14/revealed-cia-torture-black-sites-history-boom-bust/.

122 *Id*.

123 Matt Apuzzo and Adam Goldman, *AP Exclusive: CIA flight carried secret from Gitmo*, BOSTON.COM (Aug. 7, 2010), http://archive.boston.com/news/nation/washington/articles/2010/08/07/ap_exclusive_cia_flight_carried_secret_from_gitmo/?page=full.

124 Rasul v. Bush, 542 U.S. 466 (2004).

125 *Id*.

terrorist ties to Al Qaeda at Guantanamo is still justified as detention under the "war on terror," then there are rules and regulations in place governing the treatment of such prisoners.[126] There exist two main areas in which the government is not fulfilling its duties to its prisoners. These areas include the failure to give time credit to prisoners for time served,[127] and the use of torture to extract information, often leading to confessions under duress and coercion.[128] This section will explore these issues in detail.

A. After Boumediene v. Bush, How is it that Detainees are Refused Due Process?

While a number of other cases touched on the issue of providing detainees at Guantanamo Bay with due process rights,[129] the 2008 decision in *Boumediene v. Bush* highlights the issues and ultimately demands *habeas corpus* rights for Guantanamo detainees,[130] while playing within the boundaries of the Suspension Clause of the Constitution.[131] So how is it that there remain detainees at Guantanamo Bay who have been denied these rights?

According to Mary Van Houten,[132] while *Boumediene* did, undoubtedly, demand *habeas* rights be made available to detainees at Guantanamo Bay, "[a]fter *Boumediene*, the D.C. Circuit maintained that *habeas* only protected the fact, place, or duration of detention, and it expressly refused to apply due process to extraterritorial *habeas*

126 *See* USCS Geneva III, *supra* note 26.

127 *See* Savage, *supra* note 31.

128 *See generally* SSCI, *supra* note 106.

129 *See, e.g.,* Hamdan v. Rumsfeld, 464 F. Supp. 2d 9 (D.D.C. 2006); *see also* Rasul v. Bush, 542 U.S. 466 (2004); *see also* Hamdi v. Rumsfeld, 378 F.3d 426 (4th Cir. 2004).

130 Boumediene v. Bush, 553 U.S. 723, 797 (2008). ("Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for *habeas corpus* relief derives. Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.").

131 *Id.*; U.S. CONST., art. 1, cl. 2. ("The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

132 Mary Van Houten, *The Post-Boumediene Paradox: Habeas Corpus or Due Process?*, 67 STANFORD L. REV. 9 (2014).

challenges."[133] Effectively, this obliterated the intended effect of *Boumediene*, by making the very thing *Boumediene* established be unattainable by anyone in Guantanamo Bay. More recently, however, in 2014, the D.C. Circuit held in *Aamer v. Obama* that *habeas* rights can extend beyond "fact, place, or duration of detention" to conditions of confinement.[134] Accordingly, Van Houten suggests that there will be much more litigation yet to come in order to entirely understand the scope of the *Boumediene* ruling, and how *habeas* is intertwined with due process rights.[135] Until then, there remains the possibility that detainees may be refused due process rights, while the government still manages to comply with *Boumediene*.

B. Must the Federal Government Give Credit to Each Detainee for Time Served Prior to Filing Criminal Charges?

First and foremost, while prisoners may remain incarcerated for the duration of hostilities,[136] a massive caveat ensues: "[a]ny period spent by a prisoner of war in confinement awaiting trial shall be deducted from any sentence of imprisonment passed upon him and taken into account in fixing any penalty."[137] That said, on April 30, 2003, the Department of Defense ("DOD") issued an instruction directly contradictory to the Convention.[138] The DOD stated, in relevant part, that "[d]etention associated with an individual's status as an enemy combatant shall not be considered to fulfill any term of imprisonment imposed by a military commission."[139] In order to understand the full effect of this instruction, a detainee may seemingly be held indefinitely pending review, and even upon review, which may occur decades later, he/she will, if convicted, begin his/her sentence anew,[140] and, if acquitted, be held regardless pending further investigation![141]

Despite the intentions of the tribunals, this DOD authorization represents a complete disregard for the Geneva Convention,[142] and yet further evidence that the tribunals and detention of prisoners at Guantanamo Bay exceed the scope of their authority. As

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133 *Id*.
134 Aamer v. Obama, 742 F.3d at 1026, 1038 (D.C. Cir. 2014).
135 Van Houten, *supra* note 132.
136 *See* NDAA, *supra* note 13; *See also* AUMF, *supra* note 14.
137 USCS Geneva III, *supra* note 26.
138 DEPARTMENT OF DEFENSE MILITARY COMMISSION INSTRUCTION NO. 7, SENTENCING, 3(A) (2003). [hereinafter DOD Instruction].
139 *Id*.
140 *See id*.
141 *See* Seelye, *supra* note 80.
142 *See* Geneva Convention, *supra* note 26.

aforementioned, the law granting a prisoner of war detainee credit at sentencing for all time served incarcerated at a facility seems clear,[143] and therefore, this issue should be relatively indisputable. However, such is not the case. While the Court held in *United States v. Hamdan* that a detainee is entitled to credit for time served while confined at Guantanamo Bay,[144] the government nonetheless seems loathe to adhere to the ruling;[145] rather, the DOD directive to the contrary is still alive and floating around the detention center.[146] For example, Mr. Denbeaux is currently representing a detainee at Guantanamo who is being denied, among other things, credit towards any potential sentence he may receive.[147] Other such prevalent issues at Guantanamo Bay include highly controversial interrogation techniques, failure to provide *habeas corpus* rights and outright abuse.[148] Despite public knowledge of these violations, and statutory and case law blatantly overruling these practices, they continue to occur, seemingly, without repercussion.

C. The Use of Torture as an Interrogation Method or as Punishment Violates International Law, as well as Domestic Law

The issue of admission of guilt under either torturous interrogation methods or threat thereof is hugely contested and extremely controversial.[149] The Convention clearly states, in relevant part:

> [n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous

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143 *Id.*

144 *See* United States v. Hamdan, 2011 U.S. CMCR LEXIS 1 (CMCR 2011)

145 *See* Savage, *supra* note 31.

146 DOD Instruction, *supra* note 138

147 *See* Savage, *supra* note 31.

148 *Torture Techniques used in Guantanamo*, THE JUSTICE CAMPAIGN, http://thejusticecampaign.org/?page_id=273 (last visited March 5, 2017).

149 *See generally* Matt Apuzzo, Sheri Fink and James Risen, *How U.S. Torture Left a Legacy of Damaged Minds*, N.Y. TIMES (Oct. 9, 2016), https://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html. (This article discusses the lasting effects of torture.); Julian Borger, *US report on 'enhanced interrogation' concludes: torture doesn't work*, THE GUARDIAN (Dec. 9, 2014), https://www.theguardian.com/us-news/2014/dec/09/senate-committee-cia-torture-does-not-work. (This article presents evidence strongly suggesting enhanced torture does not even yield accurate results.); THE JUSTICE CAMPAIGN, *supra* note 148. (This webpage lists and describes many of the techniques utilized by the CIA while interrogating suspected terrorists.); Interview by Gwen Ifill with Bill Harlow, Former CIA Official (Dec. 10, 2014), http://www.pbs.org/newshour/bb/torture-effective-gathering-intelligence/. (When Gwen Ifill, a PBS interviewer asked about the usefulness of enhanced interrogation, Former CIA Official Bill Harlow stated: "the enhanced interrogation program that we utilized on a handful of top terrorists absolutely, beyond any doubt, produced vital intelligence that helped keep America safe.")

treatment of any kind.[150]

In order to garner a more clarified definition, the United Nations General Assembly ("UN") further defines the prohibition against torture in its Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") as follows:

> [T]he term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[151]

Despite the absolutely clear language of the Convention and the CAT, shockingly, reports have surfaced and been made available that provide (in gruesome detail) some of the heinous and "creative" measures being taken by authorities at Guantanamo Bay in order to secure information from the detainees.[152] As an example, according to the Justice Campaign, an Australian organization that has sought to protect the rights of Australians being detained at Guantanamo Bay, the methods of torture used include sleep deprivation, physical assault, forced medication and even sexual assault, among other things.[153] Moreover, according to the CIA's Detention and Interrogation Program, which was declassified by the Senate in December 2014,[154] the physical, emotional and psychological torture authorized for use upon detainees in interrogatory efforts to obtain information from suspected terrorists is seemingly so intense that it may lead anybody to say almost anything.[155] In other words, by the CIA's own admission, it has engaged in the very definition of torture in an effort to extract information from detainees.[156]

To bring some perspective to this problem, Christopher Hitchens, an author well known for highlighting controversial political issues, sought to experience the well-known technique of waterboarding. Within seconds in a simulated environment, Hitchens was willing to say

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150 USCS Geneva III, *supra* note 26 at art. 17.

151 G.A. Res. 39/46, Part 1, art. 1 (Dec. 10, 1984), http://www.un.org/documents/ga/res/39/a39r046.htm.

152 *See* TRANSCRIPT, *supra* note 114.

153 *See* THE JUSTICE CAMPAIGN, *supra* note 148.

154 *See* SSCI, *supra* note 105.

155 *Id.*; *See e.g.* Borger, *supra* note 149 for the proposition that torture and enhanced interrogation may not even lead to accurate information being parlayed.

156 *See generally* SSCI, *supra* note 106.

or do anything to make the torture stop.[157] He described the feeling as "a smothering feeling, as well as a drowning feeling".[158] He further suggested: "It would be bad enough if you did have something . . . but what if you didn't have anything? What if they'd got the wrong guy? Then you would be in danger of losing your mind very quickly."[159] Given the use of such techniques, setting aside the legal issues of taking such measures, it also puts into question the validity of any information obtained from prisoners subjected to torture.[160]

In response to the accusations that the CIA utilized methods that violate the prohibitions against torture, in the 2005 release of an internal memo, the CIA stated:

> The War Crimes Act prohibits torture in a manner virtually identical to the general federal anti-torture statute, 18 U.S.C. §§2340-2340A: "The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind."[161]

The report contains forty-four preliminary pages of legal analysis justifying the methods undertaken by the CIA at Guantanamo Bay and off-site.[162] Despite this assertion, in the same report, it described the many techniques utilized, many of which seem to directly contradict their guarantees; specifically, the methods seem to meet the standard set forth above. For example, the CIA describes the placement of a collar around the detainee's neck, to be used by the interrogators as a method of control, as well as "a handle for slamming the detainee's head against a wall."[163]

D. The Psychological Implications of Detention and

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157 Vanity Fair, *Watch Christopher Hitchens Get Waterboarded*, YOUTUBE (July 2, 2008), https://www.youtube.com/watch?v=4LPubUCJv58.

158 *Id*.

159 *Id*.

160 *See, e.g.*, Borger, *supra* note 149.

161 U.S. Department of Justice Office of Legal Counsel, Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees at 14 (July 20, 2007).

162 *Id*.

163 Joby Warrick, et al., *CIA Releases Its Instructions For Breaking a Detainee's Will*, WASH. POST (Aug. 26, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/08/25/AR2009082503277.html.

Interrogation at Guantanamo Bay

While there has been no shortage of interviews and reports conducted on the inmates detained at Guantanamo Bay, in order to capture their experiences and shed light on what truly occurs behind closed doors, perhaps one of the most enlightening accounts appeared recently in the New York Times, in an interview with Lieutenant Commander Shay Rosecrans, a Navy psychiatrist.[164] Most shocking is that Dr. Rosecrans *actually works* for the military, as opposed to the inmates who are detained by them; yet, nonetheless, her account highlights the horrific mental and psychological implications and residuary effects that remain with the prisoners, even after release.[165]

In the New York Times exposé entitled *Where Even Nightmares Are Classified: Psychiatric Care at Guantanamo*, Rosecrans talks about her experience leading a "mental health team" assigned to the detainees at Guantanamo Bay.[166] These teams were prohibited from showing anything to the prisoners that even slightly resembled personality or humanity.[167] Moreover, Dr. Rosecrans notes that due to the fact that everything at Guantanamo was classified, the mental health teams were prohibited from asking about certain experiences; namely, the inmates' interrogations at CIA Black Sites prior to their arrival at Guantanamo.[168]

Dr. Rosecrans also suggested that there can be no doubt that many of the psychological traumas inflicted upon the detainees throughout their respective detentions likely led to false admissions and the inability to conduct adequate investigations and trials.[169] For this reason, among others, the government may choose to continue detaining the inmates or, alternatively, to send them abroad to Black Sites, rather than risking acquittal or dismissal of charges in an American court.[170] Seemingly, this is an example of a Catch-22, whereby the government has created inadmissible testimony through the extreme detention and interrogation measures inflicted upon Guantanamo detainees, but now must continue to detain and interrogate them in order to obtain admissible evidence.

E. One Detainee's Experience Throughout the Legal Process

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164 Sheri Fink, *Where Even Nightmares Are Classified: Psychiatric Care at Guantanamo*, N.Y. TIMES (Nov. 12, 2016), http://www.nytimes.com/2016/11/13/world/guantanamo-bay-doctors-abuse.html?_r=0.

165 *Id*.

166 *Id*.

167 *Id*.

168 *Id*.

169 *Id*.

170 *See generally id*.

While in CIA Custody

As aforementioned, in December 2014, the Senate declassified formerly secret documents that outline, in painstaking detail, the methods used to obtain information from suspected terrorists detained by the agency.[171] Approximately two years later, in June 2016, in response to a Freedom of Information Act ("FOIA") suit brought by the American Civil Liberties Union ("ACLU"), the government subsequently disclosed verbatim transcripts from tribunal hearings in 2007.[172] In these transcripts, the prisoners detail the horrific means by which the CIA and members of the military interrogated them at secret Black Site facilities.[173]

One particular detainee, Abu Zubaydah, was detained in Black Sites and at Guantanamo Bay.[174] Zubaydah's experience represents perhaps the most well-known account of a Guantanamo Bay detainee in the history of the detention camp.[175] Until as recently as last January 2017, little was truly known about the intricacies of Zubaydah's continued "stay" at Guantanamo Bay.[176] However, the CIA recently disclosed more documentation that sheds light on what has occurred to Zubaydah while detained in federal custody.[177] In newly declassified documents, the report describes, quite graphically, many of the confrontations Zubaydah faced throughout his detention.[178] One example that stands out records the interrogators' notes: "Subject was walled with the question, 'What is it that you do not want us to know?'"[179] As aforementioned, "walling" describes the process whereby a subject is collared around the neck and the interrogators subsequently use the collar to slam the subject's head into a wall.[180] That said, Zubaydah described, in a prolific manner, just how far the

171 SSCI, *supra* note 106, at 194.

172 Charlie Savage, *Detainees Describe C.I.A. Torture in Declassified Transcripts*, N.Y. TIMES (June 15, 2016), https:// www.nytimes.com/ 2016/ 06/ 16/ world/ detainees-describe-cia-torture-in-declassified-transcripts.html, (*citing* TRANSCRIPT).

173 *Id.*

174 Apuzzo and Goldman, *supra* note 123.

175 *See generally* Thomas Burrows, *'I thought I was going to explode': Declassified CIA torture documents reveal how terror suspects were slammed into walls, held in coffin-like boxes and subjected to waterboarding*, THE DAILY MAIL (Jan. 20, 2017), http://www.dailymail.co.uk/news/article-4139676/New-CIA-torture-documents-reveal-Abu-Zubaydah-torture.html.

176 *Id.*

177 *Id.*

178 Sheri Fink, et al., *C.I.A. Torture Detailed in Newly Disclosed Documents*, N.Y. TIMES (Jan. 19, 2017), https://www.nytimes.com/2017/01/19/us/politics/cia-torture.html.

179 *Excerpts of Newly Disclosed Documents on CIA Torture* 2 (Dec. 20, 2016), https://assets.documentcloud.org/documents/3381183/Excerpts-of-Newly-Disclosed-Documents-on-CIA.pdf .

180 *See* Warrick, *supra* note 163.

"walling" went.[181] Through his attorney, Zubaydah described the following:

> He kept banging me against the wall. Given the intensity of the banging that was strongly hitting my head I fell down on the floor with each banging. I felt for few instants that I was unable to see anything, let alone the short chains that prevented me from standing tall. And every time I fell he would drag me with the towel which caused bleeding in my neck.[182]

So, if the CIA can obtain information from prisoners through the use of extrajudicial techniques–which is seemingly the case as it has continued to do so without being stopped–why would it trouble itself to take steps to ensure compliance with the Geneva Conventions? Moreover, if the government is able to flout certain portions of the Geneva Conventions, does that not evidently show that the Conventions altogether do not apply to Guantanamo Bay?

F. Is Torture Even Effective?

The government has admitted to subjecting detainees at CIA Black Sites to degrees of physical and psychological torture.[183] Two examples that highlight not only the horrific nature of the torture utilized by the government against enemy combatants, but as well, perhaps, that its use is irrelevant and unhelpful in extracting information, are the accounts of Khalid Sheikh Muhammad ("Muhammad"), the principal architect of the September 11 attacks,[184] and Abu Zubaydah, suspected of being heavily involved in the attacks.[185] Muhammad acknowledged in his Combatant Status Review Tribunal Hearing ("CSRT") that he gave up information the CIA wanted to hear only under duress and the use of torture during the years 2003-2006.[186] However, in Muhammad's case, he admitted in the CSRT just one year later that he was in charge of the planning and execution of 9/11, along with many other terrorist attacks.[187] Moreover, he admitted that he was not under any duress or risk of torture at the time of the CSRT, and that he was voluntarily divulging that information.[188] Accordingly, while his case provides insight into the possibility of the use of torture by the CIA in extracting

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181 *See* Fink, s*upra* note 179.

182 *Id*.

183 *See* Cornwell, *supra* note 112.

184 Thomas H. Kean and Lee H. Hamilton, *The 9/11 Commission Report*, at 145 (2004).

185 Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, Op. O.L.C. 1, https://file.wikileaks.org/file/us-olc-cia-torture-bybee-2002.pdf.

186 *See* TRANSCRIPT at 14-15.

187 *Id*.

188 *Id*. at 209.

information, what is more shocking is the fact that he admitted his involvement in the attacks while not under duress. This discovery lends credence to the truthfulness of his statements and sincerely questions the need for the use of torture, if, like Muhammad, other detainees are willing to give up information without being subjected to such extreme measures.[189]

Additionally, Zubaydah, who the United States government now contends may not have been "as involved" in the 9/11 attacks as originally thought,[190] was subjected to an extreme amount of physical and psychological torture.[191] In recently released CIA documents, Zubaydah discusses his detention in horrific detail, including the specific methods of torture used against him to extract information.[192] In Zubaydah's case, which is likely the most extreme instance of physical and psychological torture known to have occurred at the hands of the CIA, the government has been largely unable to prove many of its suspicions, which raises the question on the other end of the spectrum: Does torture necessarily effectuate the intended results?

These two examples of individuals who admitted being subjected to extreme torture by the CIA to extract information represent polar opposite results, and identify the functional problem–aside from the human rights issues–with torture. While there are undoubtedly instances in which such techniques elicit the desired information that is otherwise unobtainable, information such as that set forth above weighs heavily on the side of the balancing test favoring basic human rights over the importance of acquiring information at any cost.

VI. SHOULD COST BE A FACTOR IN THE UNITED STATES GOVERNMENT'S DECISION WHETHER AND WHEN TO PROSECUTE DETAINEES?

With respect to the cost of operation of Guantanamo Bay and secret CIA detention sites, an important factor for consideration is the cost of operation of the facilities. Is it feasible to spend hundreds of

189 *See generally* TRANSCRIPT. (More examples of the willingness of many detainees to testify openly to their respective involvements with terrorist organizations can be seen in the Transcript).

190 Respondent's Memorandum of Points & Authorities in Opposition to Petitioner's Motion for Discovery & Petitioner's Motion for Sanctions at 35, Husayn v. Gates, 588 F. Supp. 2d 7 (D.C Cir. 2008) (No. 08-cv-1360). (explaining "[t]he Government also has not contended in this proceeding that at the time of his capture, Petitioner had knowledge of any specific impending terrorist operations other than his own thwarted plans.").

191 *See* Burrows, *supra* note 175.

192 *Id*.

millions of dollars[193] to continue operations at these locations? While holding prisoners is undoubtedly costly,[194] were the government quicker to charge, prosecute and sentence (and repatriate, if applicable), the operation costs would likely be significantly lower.

Despite the significant costs, national security and antiterrorism cost a lot of money, and this is, arguably, one area of government expenditure that cannot be skimped on. However, the President has promised that he will increase traffic at Guantanamo while driving down the cost.[195] This is something that will likely become more clear in the early weeks of the President's administration.[196]

VII. MOVING FORWARD

The issues surrounding Guantanamo have persisted since the camp's opening in 2001 and each Executive administration has had its own approach to detention and the measures taken there. Recently, President Donald Trump stated throughout his presidential campaign that he intends to not only keep Guantanamo operational, but additionally, he intends on increasing the scope of interrogation techniques currently employed to include measures that were previously banned, like waterboarding.[197] In fact, President Trump even suggested that the tactics he would authorize would be "much worse," in an effort to improve intelligence collection and thwart potential terror attacks.[198]

Moreover, President Trump has suggested that he has no interest in cutting back on detention at Guantanamo Bay, something that President Obama tried hard to accomplish.[199] Despite President Obama signing an executive order on January 22, 2009 that promised to close the camp within one year,[200] he was ultimately unsuccessful in completing that task. Furthermore, despite his continued efforts to do so, claiming that the detention of inmates off of American soil does not actually equate to

193 *See Wasted Opportunities: The Cost Of Detention Operations At Guantanamo Bay*, ACLU (Feb. 2, 2017), https://www.aclu.org/infographic/wasted-opportunities-cost-detention-operations-guantanamo-bay.

194 *Id*.

195 Carol Rosenberg, *What will President Trump do with Guantanamo?*, THE MIAMI HERALD (Nov. 11, 2016), http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article114185018.html.

196 Josh Dawsey, *Trump team weighing orders on Guantanamo, cutting government*, POLITICO (Feb. 7, 2017), http://www.politico.com/story/2017/02/trump-guantanamo-government-cuts-234745.

197 *See* Fink, *supra* note 164.

198 *Id*.

199 *See* Rosenberg, *supra* note 195.

200 Kevin Liptak, *Obama still plans to shut Guantanamo. Can he?*, CNN (Nov. 19, 2015), http://www.cnn.com/2015/11/19/politics/guantanamo-bay-prison-obama/.

increased security, President Obama acknowledged that given recent terrorist attacks around the world, it is unlikely that Congress would authorize his plan to have the inmates tried in the American civil court system.[201] Both of these promises have materialized, to a degree, in that President Trump has placed the issue squarely in front of the Executive to determine the future of the detention camp.[202]

VIII. CONCLUSION

There are no perfect answers that would dictate how to manage detainees suspected of ties to terrorist organizations with respect to their detention and how to elicit information from them that would uncover details of terror attacks that have occurred, as well as details that would help prevent future attacks. However, what is evident is that the current detention system is a violation in every which way. From the human rights perspective, detainees are being afforded very few; under the rules of international laws of war, indefinite detention and torture are violations of the Geneva Conventions; under American and even military law, prisoners are being held without the protections upon which this great land was founded, including even the fundamental right to *habeas corpus*, the right to be confronted by one's accuser, to be informed of all charges against him/her and to be released without a legitimate reason for detention.

Perhaps, as suggested in this Note, Congress must crack down and develop a legitimate process to be adhered to in fighting the "war on terror". Maybe, alternatively, the Executive must dedicate more time and resources to ensuring that individuals are afforded certain rights while detained, and that those rights are never encroached. Perhaps, there is yet a better solution altogether; there must be a solution that lies somewhere in between the law and the lack thereof that is currently being employed.[203] This solution would require all three branches of government to look introspectively into the foundation upon which this country is laid, and to work together to adopt an approach unique to Guantanamo Bay to ensure that it does not sacrifice or even bend any of the tenets that hold it up as a pillar of light to the rest of the world.

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201 *Id*.

202 *See* Dawsey, *supra* note 196.

203 Jonathan Hafetz, *Detention Without End?: Reexamining the Indefinite Confinement of Terrorism Suspects Through the Lens of Criminal Sentencing*, 61 UCLA L. REV. 326, 392.