

TERRORIZING JUSTICE: AN ARGUMENT THAT PLEA BARGAINS STRUCK UNDER THE THREAT OF “ENEMY COMBATANT” DETENTION VIOLATE THE RIGHT TO DUE PROCESS

Abstract: As part of the War on Terror, the President has detained certain individuals as “enemy combatants”—a form of military detention that is preventive, non-criminal, and of indefinite duration. Some terrorism defendants appear to have pled guilty to criminal charges in order to avoid being detained as enemy combatants. This Note argues that plea bargains induced by threats of enemy combatant detention do not arise from the normal give-and-take of plea bargaining, create serious public policy concerns, and serve no societal interests that could not be served equally well by other means. It therefore concludes that the courts should hold such plea bargains per se unenforceable under the Due Process Clause of the Fifth Amendment.

INTRODUCTION

He took a cigarette out of the case and forced it into Rubashov's mouth without letting go his coat button. 'You're behaving like an infant. Like a romantic infant,' he added. 'Now we are going to concoct a nice little confession and that will be all for today.'

... 'It is not in my interest to lay you open to mental shocks. All that only drives you further into your moral exaltation. I need you sober and logical. My only interest is that you should calmly think your case to a conclusion. For, when you have thought the whole thing to a conclusion—then, and only then, will you capitulate.'

—Arthur Koestler¹

In Arthur Koestler's Cold War-era novel *Darkness at Noon*, set during the Soviet show trials of the 1930s, the interrogator poses a choice to the protagonist Rubashov: either insist on his innocence and be summarily sentenced to death in a secret administrative trial, or con-

¹ ARTHUR KOESTLER, *DARKNESS AT NOON* 104, 156 (Daphne Hardy trans., Folio Soc'y 1980) (1940).

fess at a public trial and gain the interrogator's assistance in reducing his sentence.²

Since the Al Qaeda terrorist attacks of September 11, 2001, U.S. President George W. Bush has claimed the authority to designate individuals as "enemy combatants" and detain them under military authority indefinitely, without charges and without a criminal trial.³ Enemy combatant detention is a form of preventive military detention that carries minimal due process guarantees (for example, the government need not accuse the detainee of any particular wrongful acts, and the detainee bears the burden of *disproving* the government's factual allegations in any challenge to the detention).⁴ It also involves confinement in unusually restrictive conditions for an uncertain, potentially lifelong, duration.⁵ Many commentators have argued

² *Id.* at 106.

³ Brief for the Respondents at 25–27, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03–6696); see Brief for the Petitioners at 38, *Rumsfeld v. Padilla (Padilla I)*, 542 U.S. 426 (2004) (No. 03–1027). No all-encompassing definition for the term "enemy combatant" exists because the government has provided only specific examples of people who could be designated enemy combatants, without providing any examples of people who could not be designated enemy combatants. See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005). In *Hamdi v. Rumsfeld*, the Supreme Court established that the term encompasses any person, whether a U.S. citizen or a foreign national, who engages in foreign armed conflict against the United States or directly assists enemy forces engaging in such hostilities. See 542 U.S. at 516–17; see also *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 475. The government also asserts that the term may encompass some individuals who have neither committed any belligerent act against U.S. forces nor directly assisted such acts, such as a little old lady who writes checks to what she believes is a charity but is actually an Al Qaeda front, an English teacher who provides language instruction to the son of an Al Qaeda member, and a journalist who refuses to disclose the location of Osama bin Laden. *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 475. In addition, the government asserts that the locus of capture is irrelevant; a person may be designated an enemy combatant regardless of whether that person is on U.S. soil or abroad. See Brief for the Petitioners, *supra*, at 30; see also *Padilla v. Hanft (Padilla II)*, 423 F.3d 386, 392 (4th Cir. 2005), *cert. denied*, No. 05-533, 2006 WL 845383 (U.S. Apr. 3, 2006). The Supreme Court has twice declined to rule on the question of whether a U.S. citizen captured in the United States may be designated an enemy combatant, and has not yet been confronted with a case in which a foreign national captured in the United States may be designated an enemy combatant. See *Padilla v. Hanft (Padilla V)*, No. 05-533, 2006 WL 845383, at *2 (U.S. Apr. 3, 2006) (denying certiorari); *Padilla I*, 542 U.S. at 430 (reversing the court on jurisdictional grounds); see also *Al-Marri v. Hanft*, 378 F. Supp. 2d 673 (D.S.C. 2005) (holding as proper the detention as an enemy combatant of a foreign national captured in the United States).

⁴ See *Hamdi*, 542 U.S. at 533–34, 538 (describing the limited due process guarantees for enemy combatants).

⁵ See *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 465 (noting that because the government has conceded that the War on Terror could last for several generations, enemy combatant detention may well amount to a life sentence); DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 41

that this asserted power to designate individuals as enemy combatants violates the individuals' due process rights, undermines fundamental principles of democratic governance, and borrows from the worst traditions of wartime repression in America and abroad.⁶ Justice Stevens opined, in dissent to one pro-government enemy combatant decision, that this kind of executive branch detention is "the hallmark of the Star Chamber."⁷ Nevertheless, few scholarly articles have addressed the harms caused by allowing the military, preventive-detention imperatives of enemy combatant detention to contaminate the criminal justice system.⁸

(2003) (asserting that society will almost certainly cure both cancer and the common cold before it can stop terrorism).

⁶ See, e.g., COLE, *supra* note 5, at 39–46; Erwin Chemerinsky, *Detainees*, 68 ALB. L. REV. 1119, 1122–26 (2005); Jesselyn A. Radack, *You Say Defendant, I Say Combatant: Opportunistic Treatment of Terrorism Suspects Held in the United States and the Need for Due Process*, 29 N.Y.U. REV. L. & SOC. CHANGE 525, 533–36 (2005).

⁷ *Padilla I*, 542 U.S. at 465 (Stevens, J., dissenting) (rejecting the Court's holding that the enemy combatant's challenge to his detention should be dismissed on jurisdictional grounds). The Court of Star Chamber was a special court convened by the King of England that was known for its secrecy and disregard for individual rights, and its name is often invoked as a symbol of abuse of power. See, e.g., *Faretta v. California*, 422 U.S. 806, 821 (1975) (describing the Star Chamber as a centuries-old symbol of disregard for basic rights); *Green v. United States*, 356 U.S. 165, 202–03 (1958) (Black, J., dissenting) (describing the Star Chamber as an "odious instrument of tyranny" whose arbitrary procedures and gross excesses inspired many of the safeguards included in the U.S. Constitution); *Ullmann v. United States*, 350 U.S. 422, 428 (1956) (describing the Fifth Amendment privilege against self-incrimination as being aimed at preventing a recurrence of the abuses of the Spanish Inquisition and the Star Chamber); *In re Oliver*, 333 U.S. 257, 268–70 (1948) (describing the Star Chamber as a symbol of menace to liberty that is in part responsible for the Anglo-American distrust for secret trials).

⁸ See Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 94–111 (2005) (arguing that in times of war, including the War on Terror, wartime conditions affect the Supreme Court's disposition of ordinary civil rights and civil liberties cases more than they affect the disposition of cases directly related to war); Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383, 431–36 (2004) (criticizing the compromise that the district court struck in *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D. Va. 2003) between the defendant's interest in gaining access to an Al Qaeda witness in U.S. custody, and the national security interest in denying such access); Radack, *supra* note 6, at 541–42 (arguing that the "revolving door" between military detention and civilian prosecutions undermines the legitimacy of both systems); Andrew T. Jackola, Comment, *A Second Bite at the Apple. How the Government's Use of the Doctrine of Enemy Combatants in the Case of Zacarias Moussaoui Threatens to Upset the Future of the Criminal Justice System*, 27 HAMLINE L. REV. 101, 125–31 (2004) (arguing that the possibility that a terrorism defendant could be tried for the same offense by both the criminal justice system and a military tribunal implicates double jeopardy concerns).

Although some scholars have mentioned the potential influence of enemy combatant threats on plea bargaining, they have not analyzed it in great detail. See Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving*

When a prosecutor uses the threat of enemy combatant detention as leverage in a criminal case, the threat creates extraordinary pressure to plead guilty, not unlike the pressure on Rubashov to capitulate.⁹ A pair of terrorism prosecutions illustrates how this pressure operates.¹⁰ In March 2003, the Federal Bureau of Investigation (the

Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?, 38 U.C. DAVIS L. REV. 609, 683 (2005) (noting that in some cases, the government appeared to be using the threat of enemy combatant detention to obtain guilty pleas); Margulies, *supra*, at 424 (noting that threats of enemy combatant detention may have an *in terrorem* effect on defendants considering whether or not to plead guilty); Radack, *supra* note 6, at 541 (noting the possibility that the government uses the threat of enemy combatant detention to coerce terrorism defendants into pleading guilty); Kent Roach & Gary Trotter, *Miscarriages of Justice in the War Against Terror*, 109 PENN ST. L. REV. 967, 997 (2005) (noting that threats of enemy combatant detention or deportation may unduly influence criminal defendants' decisions to plead guilty).

A handful of writings targeted at lay audiences have gone into greater detail than scholarly publications. See Harvey A. Silverglate & Carl Takei, *Crossing the Threshold: While We're All Fretting over the Patriot Act, John Ashcroft's Justice Department Is After Much Bigger Game*, THE BOSTON PHOENIX, Mar. 5, 2004, at 18, available at <http://www.bostonphoenix.com/threshold/03650087.asp> (arguing that the threat of enemy combatant detention during plea bargaining turns guilty pleas into a Soviet-style masquerade); KAREN J. GREENBERG, CTR. ON LAW & SEC., N.Y. UNIV. SCH. OF LAW, *THE COURTS AND THE WAR ON TERROR* 1-2 (2005), <http://www.law.nyu.edu/centers/lawsecurity/publications/documents/TerroristTrialReportCardinsert.pdf> (arguing that threats of enemy combatant detention during plea bargaining are a form of extralegal coercion).

⁹ See KOESTLER, *supra* note 1, at 106; see also Roach & Trotter, *supra* note 8, at 997 (noting in passing the pressure to plead guilty presented by the threat of enemy combatant detention).

¹⁰ See *infra* notes 11-19 and accompanying text. As used in this Note, the terms "terrorism defendant" and "terrorism prosecution" mean, respectively, any criminal defendant who is the subject of what the Justice Department describes as a "terrorism investigation" and any prosecution arising from such an investigation. See Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges, Statistics Often Count Lesser Crimes*, WASH. POST, June 12, 2005, at A1. The terms are overinclusive in that they include many cases in which the Justice Department eventually concluded that the defendant had no actual ties to terrorism or charged the defendant with minor crimes that appear unrelated to terrorism, such as credit card fraud, the making of false statements to federal officials, immigration violations, and even the defrauding of the federal food stamp program. See *id.* (concluding that of the Justice Department's 361 terrorism investigations, only 142 involved public allegations of ties to Al Qaeda or other terrorist groups, and only 39 terrorism defendants were convicted of crimes directly related to terrorism or national security); see also Jerry Markon, *The Terrorism Case That Wasn't—and Still Is*, WASH. POST, June 12, 2005, at A19; Jerry Markon, *Post-9/11 Probe Revived Stolen Cereal Incident*, WASH. POST, June 12, 2005, at A19; Mary Beth Sheridan, *Immigration Law as Anti-Terrorism Tool*, WASH. POST, June 13, 2005, at A1. Nevertheless, the Justice Department's designations remain useful for the purposes of this Note because the designations include all criminal investigations where the Department suspected—at least initially—that the defendant had ties to terrorist organizations or terrorist acts. See Eggen & Tate, *supra*, at A1. In other words, the Justice Department's terrorism investigations encompass the entire universe of cases in which prosecutors could plausibly threaten the defendant with enemy combatant detention. See *id.*

"FBI") approached Iyman Faris, a naturalized U.S. citizen from Kashmir, to investigate his possible links to terrorist organizations.¹¹ After Faris agreed to cooperate, the agents took him to Quantico, Virginia, where, according to the attorney representing Faris on appeal, the FBI kept Faris under guard and subjected him to almost daily interrogations.¹² After more than two weeks, Faris met for the first time with his court-appointed defense counsel.¹³ According to press accounts and Faris's attorney, the FBI put intense pressure on Faris to plead guilty to providing material support to terrorism; within four days of being appointed, Faris's attorney advised him that if he did not plead guilty, the Defense Department would designate him an enemy combatant and ship him to Guantanamo Bay.¹⁴ Faris chose to accept the plea bargain and was sentenced to twenty years in prison.¹⁵

During the same year, Qatari citizen Ali Saleh Kahlah al-Marri was under indictment for terrorism-related financial fraud and lying to the FBI about his phone calls to the Middle East.¹⁶ Al-Marri intended to proceed to trial, but one month before the scheduled trial date, President Bush declared him an enemy combatant.¹⁷ The gov-

¹¹ Brief of Appellant at 4, *United States v. Faris*, 388 F.3d 452 (4th Cir. 2004) (No. 03-4865) [hereinafter *Faris Withdrawal of Guilty Plea Appellate Brief*]; see *Faris*, 388 F.3d at 454 (denying Faris's motion to withdraw his guilty plea), *vacated and remanded on other grounds*, 125 S. Ct. 1637 (mem.), *aff'd on remand*, 162 F. App'x 199 (4th Cir. 2005) (unpublished) (per curiam); see also Eric Lichtblau, *U.S. Cites Al Qaeda in Plot to Destroy Brooklyn Bridge*, N.Y. TIMES, June 20, 2003, at A1.

¹² Transcript of Motions and Sentencing Hearing at 18, 42, *Faris*, No. 03-189-A (E.D. Va. Oct. 28, 2003) [hereinafter *Faris Oct. 28, 2003 Hearing Transcript*]; *Faris Withdrawal of Guilty Plea Appellate Brief*, *supra* note 11, at 4-5. According to prosecutors, Faris was eager to provide assistance, telling FBI agents that he wanted to become an "agent for the FBI" and help locate Al Qaeda members in Pakistan. *Faris Oct. 28, 2003 Hearing Transcript*, *supra*, at 18.

¹³ *Faris Withdrawal of Guilty Plea Appellate Brief*, *supra* note 11, at 5; *Faris Oct. 28, 2003 Hearing Transcript*, *supra* note 12, at 7. Faris later filed a motion to vacate his conviction, alleging that his original attorney provided ineffective assistance of counsel. Memorandum of Law in Support of Motion to Vacate Conviction Under § 2255, at 2, *Faris*, No. 03-CR-189 (E.D. Va. Feb. 3, 2006) [hereinafter *Faris 28 U.S.C. § 2255 Memorandum*].

¹⁴ *Faris Withdrawal of Guilty Plea Appellate Brief*, *supra* note 11, at 5; R. Jeffrey Smith and Amy DePaul, *Al Qaeda 'Scout' Had Low Profile: Home in Heartland Afforded Ideal Cover*, WASH. POST, June 21, 2003, at A10; see also *Faris*, 388 F.3d at 457; Lichtblau, *supra* note 11, at A12.

¹⁵ Eric Lichtblau, *Trucker Sentenced to 20 Years in Plot Against Brooklyn Bridge*, N.Y. TIMES, Oct. 29, 2003, at A23.

¹⁶ Susan Schmidt, *Qatari Man Designated an Enemy Combatant*, WASH. POST, June 24, 2003, at A1.

¹⁷ *Id.* Because the government did not make public the specific reasons for its decision to designate al-Marri an enemy combatant, it is not entirely clear whether al-Marri's refusal to plead guilty was a factor in that decision. See *Al-Marri v. Bush*, 274 F. Supp. 2d 1003, 1009

ernment still holds al-Marri as an enemy combatant.¹⁸ The two cases, resolved within days of each other, sent a clear message to terrorism defendants: either plead guilty and accept a fixed sentence from the Justice Department, or refuse to cooperate and be thrown into the legal black hole of enemy combatant detention.¹⁹

This Note argues that in the context of the War on Terror, the threat of extrajudicial enemy combatant detention—an indefinite, preventive, and non-criminal military detention—puts unique and intolerable pressure on the plea bargaining process.²⁰ Forcing defendants to choose between enemy combatant detention and a guilty plea is far more coercive than making them choose between a trial, with its attendant risk of a conviction on more serious charges, and a guilty plea.²¹ In addition, plea bargains induced by threats of enemy combatant detention (hereinafter “enemy combatant threat bargains”) let military imperatives, rather than criminal justice imperatives, drive the plea bargaining process.²² Enforcing such bargains corrodes both the integrity of the criminal justice system and the rule of law.²³ This Note therefore concludes that the courts should hold enemy combatant threat bargains per se unenforceable under the Due Process Clause of the Fifth Amendment.²⁴

(C.D. Ill. 2003), *aff'd*, 360 F.3d 707 (7th Cir.), *cert. denied*, 543 U.S. 809 (2004). Al-Marri’s attorney believes, however, that the designation was a response to the “powerful legal challenges” that al-Marri made in his criminal case. Schmidt, *supra* note 16, at A1.

¹⁸ See *Al-Marri*, 378 F. Supp. 2d at 680–82 (denying al-Marri’s motion for summary judgment on his petition for a writ of habeas corpus).

¹⁹ See Eric Lichtblau, *Wide Impact from Enemy Combatant Detention Is Seen*, N.Y. TIMES, June 25, 2003, at A14 (reporting that “a senior F.B.I. official said today that the Marri decision held clear implications for other terrorism suspects. ‘If I were in their shoes, I’d take a message from this,’ the official said”).

²⁰ See *infra* notes 183–282 and accompanying text.

²¹ See *infra* notes 183–282 and accompanying text.

²² See *infra* notes 246–255 and accompanying text. The term “enemy combatant threat bargains” is the author’s own.

²³ See *infra* notes 246–255 and accompanying text.

²⁴ See *infra* notes 256–282 and accompanying text. Terrorism prosecutions are almost always a matter of federal criminal enforcement, and enemy combatant detention is itself an exercise of federal power. See *Hamdi*, 542 U.S. at 517–18 (describing the President’s power to detain enemy combatants as being incident to waging war); Attorney General Alberto R. Gonzalez, Remarks to Department of Justice Employees (Feb. 4, 2005), (transcript available at http://www.justice.gov/opa/pr/2005/February/05_ag_045.htm) (stating, upon his confirmation as Attorney General, that protecting the United States from terrorism is the Justice Department’s “top priority”). For that reason, this Note focuses on the Due Process Clause of the Fifth Amendment, which curtails federal power, and not on the Fourteenth Amendment, which curtails the power of the states. See U.S. CONST. amend. XIV; U.S. CONST. amend. V.

Part I of this Note introduces the role of plea bargains in the U.S. criminal justice system and examines the standards for the enforceability of plea bargains in traditional criminal justice contexts.²⁵ It also describes the related category of release-dismissal agreements, which courts have been more hesitant to enforce.²⁶ Part II describes the enemy combatant detention power and its relevance to criminal prosecutions in the War on Terror.²⁷ Part III contends that enemy combatant threat bargains do not arise from the normal give-and-take of plea bargaining, create serious public policy concerns, and serve no societal interests that could not be served equally well by other means.²⁸ It therefore concludes that the courts should hold enemy combatant threat bargains per se unenforceable under the Due Process Clause.²⁹

I. THE ENFORCEABILITY OF PLEA BARGAINS IN TRADITIONAL CRIMINAL CONTEXTS

A. *Plea Bargains Generally*

Plea bargaining is the process by which a prosecutor and a criminal defendant negotiate an agreement, where the defendant pleads guilty to a lesser offense or to a particular charge in exchange for some concession by the prosecutor, such as a more lenient sentence or a dismissal of other charges.³⁰ In 1971, in *Santobello v. New York*, the U.S. Supreme Court succinctly summarized why plea bargaining is an essential feature of the U.S. criminal justice system: it leads to prompt and largely final disposition of most criminal cases, it avoids much of the corrosive impact of a defendant's enforced idleness during pretrial confinement, it protects the public from the chance that a defendant would commit new crimes while on pretrial release, and, by

²⁵ See *infra* notes 30–86 and accompanying text.

²⁶ See *infra* notes 87–108 and accompanying text.

²⁷ See *infra* notes 109–182 and accompanying text.

²⁸ See *infra* notes 183–255 and accompanying text.

²⁹ See *infra* notes 256–282 and accompanying text.

³⁰ BLACK'S LAW DICTIONARY 1190 (8th ed. 2004). Although it now occupies a central place in the criminal justice system, plea bargaining did not become a dominant method of resolving criminal cases until the late nineteenth century, and the Supreme Court did not explicitly approve of the practice until the latter half of the twentieth century. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 921–26 (1994); George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 864–69 (2000).

shortening the time between charge and disposition, it enhances the rehabilitative prospects of guilty defendants.³¹

Without the prompt disposition of cases through plea bargaining, unresolved cases would flood the criminal justice system.³² In 2003, for example, only 4% of the 85,106 federal criminal defendants exercised their right to a trial, and guilty pleas constituted nearly 96% of the 75,805 convictions that year.³³ Yet as indispensable as plea bargaining is to the judicial system, it also carries significant potential for abuse.³⁴ By pleading guilty to a crime, the defendant relieves the prosecution of the burden of proving its case, and waives his or her privilege against self-incrimination, right to trial by jury, right to confront his or her accusers, and most evidentiary objections.³⁵ In 1968, in *Boykin v. Alabama*, the Supreme Court pointedly recognized this potential for abuse, observing that a plea bargain obtained by means of prosecutorial coercion or threats, or through the defendant's ignorance, fear, or lack of comprehension, can serve as "a perfect cover-up of unconstitutionality."³⁶ In an effort to guard against such abuses

³¹ 404 U.S. 257, 260-61 (1971) (holding that prosecutors must keep the promises they make to defendants in plea bargains).

³² *Id.* at 260 (noting that if every criminal charge resulted in a jury trial, federal and state governments would have a great need for more judges and court facilities).

³³ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, at 59, 62 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs03.pdf>.

³⁴ See John W. Keker, *The Advent of the 'Vanishing Trial': Why Trials Matter*, CHAMPION, Sept.-Oct. 2005, at 32-35 (arguing that the widespread use of plea bargains interferes with public scrutiny of the judicial system and deprives the defense bar of any way of keeping overzealous prosecutors in check).

³⁵ *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969) (reversing the conviction of a criminal defendant because the record did not clearly establish that his guilty plea was knowing and voluntary); see *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970) (holding that, where a defendant pled guilty based on counsel's incorrect conclusion that a prior coerced confession would be admissible at trial, the defendant assumed the risk that his attorney was mistaken on either the facts or the law, as long as the attorney was reasonably competent and made those mistakes in good faith).

³⁶ 395 U.S. at 243. Indeed, although the Supreme Court seldom finds unequal bargaining power in plea negotiations, many scholars and lower courts have expressed concerns about the relative bargaining power of the prosecutor and the defendant. Compare *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978) (describing the "give-and-take" of plea negotiation as a situation in which the prosecutor and the defendant possess relatively equal bargaining power) (quoting *Parker v. North Carolina*, 397 U.S. 790, 809 (1969) (Brennan, J., dissenting)), with *United States v. Mezzanatto*, 513 U.S. 196, 216 (1995) (Souter, J., dissenting) (noting that defendants are generally in no position to challenge the standard form waivers that many prosecutors require as a condition of entering into plea negotiations), *United States v. Green*, 346 F. Supp. 2d 259, 265-76 (D. Mass. 2004) (observing that various structural elements of plea bargaining, and sentencing guidelines in particular, place enormous power in the hands of federal prosecutors and give rise to a

while preserving the finality of most plea bargains, the Supreme Court requires any guilty plea to be made voluntarily and intelligently.³⁷ Yet the question remains: what kinds of coercion or unequal bargaining power can render a plea involuntary?³⁸

B. *Statutory Structures That Improperly Encourage Guilty Pleas and Their Effect on Voluntariness*

When a criminal statute mandates a lesser punishment for those who plead guilty but allows a heavier punishment for those found guilty at trial, the imposition of the heavy punishment may be unconstitutional.³⁹ In 1967, in *United States v. Jackson*, the Supreme Court held unenforceable the death penalty clause of the Federal Kidnapping Act, a criminal statute, because the statute exposed the defendant to a possible death sentence after a jury trial but only to a potential life sentence after a guilty plea.⁴⁰ After being indicted under this statute, Jackson and his co-defendants moved to dismiss the indictment, arguing that the death-by-jury, life-by-plea structure of the statute impermissibly burdened their Sixth Amendment rights to a jury trial and their Fifth Amendment due process rights.⁴¹ In response, the government asserted that because this structure served Congress's interest in avoiding the harshness of a mandatory death penalty for all capital convictions, the statute's incidental effect on the defendants' decision making was unimportant.⁴² The Supreme Court rejected the

system that is heavily rigged against the accused citizen), *rev'd sub nom.* *United States v. Yeje-Cabrera*, 430 F.3d 1 (1st Cir. 2005), Lynn Fant & Ronit Walker, *Reflections on a Hobson's Choice: Appellate Waivers and Sentencing Guidelines*, 11 FED. SENT'G REP. 60, 61 (1998) (arguing that because of both sentencing guidelines and severe mandatory minimum sentences, prosecutors have a much stronger bargaining position than defendants do during plea negotiations), and John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12-14 (1978) (arguing that modern plea bargaining coerces the accused to plead in much the same way as the medieval judiciary's use of torture coerced the accused to confess).

³⁷ See, e.g., *North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (holding that where the defendant pled guilty voluntarily and intelligently, his plea agreement was enforceable even though he steadfastly insisted that he was innocent during his plea colloquy); *Boykin*, 395 U.S. at 242 (reversing the defendant's conviction because the record did not establish that his guilty plea was both voluntary and intelligent). In federal courts, Federal Rule of Criminal Procedure 11 requires district court judges to conduct a colloquy that probes the voluntariness, intelligence, and factual basis for the defendant's plea. See FED. R. CRIM. P. 11.

³⁸ See, e.g., *Alford*, 400 U.S. at 31; *Boykin*, 395 U.S. at 242.

³⁹ See *United States v. Jackson*, 390 U.S. 570, 572 (1967).

⁴⁰ *Id.*

⁴¹ *Id.* at 571. After the district court granted the defendants' motion to dismiss the indictments, the government appealed directly to the Supreme Court. *Id.* at 571-72.

⁴² *Id.* at 582.

death or hope of leniency gripped him so tightly that, with the assistance of counsel, he did not or could not choose rationally between risking a trial or pleading guilty.⁵² The Court embraced this broad voluntariness standard because it could not distinguish Brady's predicament from that of any other defendant who feared receiving a greater penalty at trial.⁵³ And if a defendant's fear of receiving a greater penalty at trial could, without more, invalidate a guilty plea, then no plea bargain could survive attack.⁵⁴ Such a result would be against public policy, the Court reasoned, because it would eliminate the mutual benefits that plea bargaining creates for the state and the defendant: the state saves scarce judicial resources and obtains prompt punishment, and the defendant limits his exposure and avoids the burdens of a trial.⁵⁵ Thus, the Court held that Brady voluntarily entered his guilty plea.⁵⁶ Other decisions, including two decided on the same day as *Brady*, made clear that *Brady's* voluntariness standard applied to all plea bargains struck under similar death-by-jury, life-by-plea statutes.⁵⁷

⁵² *Id.* The Court in *Brady* drew a sharp distinction between defendants pleading guilty without the assistance of counsel and defendants pleading guilty while represented by counsel. See *id.* at 753–55. Pleas without counsel, however, are beyond the scope of this Note because indigent persons charged with criminal offenses have the right to an appointed attorney. See *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963) (holding that legal counsel must be made available to criminal defendants who cannot retain counsel). Although one heavily publicized terrorism defendant chose to proceed pro se and then unexpectedly chose to plead guilty, the author is not aware of any terrorism defendants who engaged in plea bargaining without the assistance of counsel. See *United States v. Moussaoui*, No. 01CR455 (E.D. Va. Apr. 25, 2005) (order denying a sealed motion by defendant Zacarias Moussaoui's court-appointed counsel to rescind Moussaoui's unrepresented guilty plea); Motion by Zacarias Moussaoui to Dismiss Court-Appointed Counsel and Proceed Pro Se, *Moussaoui*, No. 01CR455 (stating, in a motion handwritten by the defendant in his prison cell, that the defendant rejects the "imposition" of his court-appointed lawyers and wishes to proceed pro se).

⁵³ *Brady*, 397 U.S. at 751–52. In a related decision, Justice Brennan criticized the *Brady* standard as apparently requiring the defendant's mental state to border on temporary insanity to render the guilty plea involuntary. *Parker v. North Carolina*, 397 U.S. 790, 800 n.2 (1970) (Brennan, J., dissenting).

⁵⁴ *Brady*, 397 U.S. at 753.

⁵⁵ *Id.* at 752–53.

⁵⁶ *Id.* at 756–77.

⁵⁷ See *Parker*, 397 U.S. at 798; *Richardson*, 397 U.S. at 771. In *Parker v. North Carolina*, the Court refused to grant relief to a defendant who pled guilty based on a combination of incorrect legal advice and death-by-jury, life-by-plea pressures. *Parker*, 397 U.S. at 797–98. *Parker* argued that the Court should hold his plea involuntary because he was convicted under a statutory framework essentially identical to that held unconstitutional in *Jackson*. *Id.* at 794. Justice Brennan, joined by Justices Douglas and Marshall, dissented from the Court's rejection of this argument, contending that the majority's decision undermined the rationale of *Jackson* by making it essentially impossible for defendants to rescind a

In 1978, in *Corbitt v. New Jersey*, the Court limited the reach of *Jackson* in non-capital cases, refusing to extend *Jackson* principles to a statute that involved a potential life sentence rather than the death penalty and that allowed, but did not mandate, a lighter sentence for guilty pleas.⁵⁸ New Jersey prosecutors charged defendant Corbitt with first-degree murder under a New Jersey statute that imposed mandatory life imprisonment for first-degree murder jury convictions, but gave judges discretion over the penalty for those pleading *nolo contendere*.⁵⁹ Corbitt pled not guilty, the jury convicted him at trial, and he received the mandatory sentence of life imprisonment, which he subsequently challenged.⁶⁰ The Court distinguished *Jackson* because the pressures on Corbitt to forgo trial did not rise to the same magnitude as the pressures in *Jackson*.⁶¹ First, Corbitt did not face the unique severity and irrevocability of the death penalty.⁶² Second, because life imprisonment remained within the judge's sentencing discretion after accepting Corbitt's plea, pleading *nolo contendere* did not reduce Corbitt's sentencing exposure.⁶³ Unconvinced that the New Jersey statute exerted unconstitutionally powerful coercion for innocent defendants to plead *nolo contendere*, the Court affirmed Corbitt's sentence.⁶⁴ Thus, by the late 1970s, the Court had defined "voluntariness" in a way that made it very difficult for defendants to invalidate plea bargains even when *Jackson* principles applied, and it had limited *Jackson* principles to situations in which a guilty plea nec-

guilty plea based on unconstitutional coercion. *Id.* at 799-800 (Brennan, J., dissenting). Justice Brennan argued that plea bargains obtained through unconstitutional pressures give rise to a clear danger that innocent people would plead guilty, and so should be subjected to greater scrutiny than other plea bargains. *See id.* at 807-10 (Brennan, J., dissenting). Also on the same day, in *McMann v. Richardson*, the Court explicitly held that a defendant cannot overturn an otherwise valid guilty plea by proof that the plea was motivated by a prior coerced confession. 397 U.S. at 771. Justice Brennan, joined by Justices Douglas and Marshall, dissented, arguing that the majority elevated form over substance in what he characterized as a rankly unfair effort to preserve the sanctity of virtually all plea bargains. *Id.* at 786 (Brennan, J., dissenting). In 1971, in *Atkinson v. North Carolina*, the Court reaffirmed that *Jackson* was still good law—that its recent decisions had limited rather than overruled it. *Atkinson v. North Carolina*, 403 U.S. 948, 948 (1971) (mem.). Without any opinion beyond a citation to *Jackson*, the Court reversed a death sentence imposed by North Carolina's death-by-jury, life-by-plea capital statute. *Id.* at 948 (citing generally *Jackson*, 390 U.S. 570).

⁵⁸ 439 U.S. 212, 217 (1978).

⁵⁹ *Id.* at 215-16.

⁶⁰ *Corbitt*, 439 U.S. at 216.

⁶¹ *Id.* at 217; *see also Jackson*, 397 U.S. at 583.

⁶² *Corbitt*, 439 U.S. at 217.

⁶³ *Id.* at 217.

⁶⁴ *Id.* at 225.

essarily prevented the court from imposing an unusually severe maximum punishment.⁶⁵

C. Proper and Improper Prosecutorial Threats in Plea Bargaining

The Court's reasoning in *Jackson* opened the door for defendants to argue that prosecutorial threats to punish defendants more harshly for exercising their right to a jury trial would, like the statutory structure at issue in *Jackson*, be constitutionally suspect because such threats exert improper pressure on the defendant to plead guilty.⁶⁶ In *Jackson*, the Court stated in dicta that if the statutory scheme had served no other purpose than to chill the assertion of constitutional rights by penalizing those who exercise them, then it would clearly violate the defendant's right to due process.⁶⁷ This raised the question of whether a *prosecutorial strategy* that chilled defendants' assertion of their right to a jury trial by penalizing those who exercised that right would be similarly unconstitutional.⁶⁸

Over the next eight years, the Supreme Court reserved that specific question but struck down efforts of judges and prosecutors to chill the right of defendants to appeal.⁶⁹ In 1969, in *North Carolina v. Pearce*, the Supreme Court held unconstitutional a trial court's punishment of defendants for appealing their original convictions by imposing heavier sentences on retrial.⁷⁰ Drawing an analogy to *Jackson*, the Court held that such vindictive resentencing is unconstitutional because it chills the exercise of a basic due process right—the right to appeal.⁷¹ In 1974, in *Blackledge v. Perry*, the Court extended *Pearce* to prosecutorial strategies that chilled the defendant's right to appeal.⁷² After the *Perry* defendant appealed a misdemeanor conviction, the prosecutor reindicted him for the same conduct, but this time

⁶⁵ See *id.* at 217; *Parker*, 397 U.S. at 795; *Richardson*, 397 U.S. at 771; *Brady*, 397 U.S. at 750.

⁶⁶ See *Jackson*, 397 U.S. at 583.

⁶⁷ *Id.* at 581.

⁶⁸ See *id.*

⁶⁹ See *Blackledge v. Perry*, 417 U.S. 21, 28–29 (1974); *Brady*, 397 U.S. at 751 n.8; *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969). In 1970, in *Brady*, the Court reserved the question, expressly stating that its holding (refusing to find coercion where the defendant pled guilty out of fear of the death penalty) did not cover situations in which the prosecutor or the judge “deliberately employ[ed] their charging and sentencing powers to induce a particular defendant to tender a plea of guilty.” 397 U.S. at 751 n.8.

⁷⁰ 395 U.S. at 723.

⁷¹ *Id.* at 724.

⁷² 417 U.S. at 25.

charged the defendant with a felony.⁷³ The defendant pled guilty to the new indictment and then filed a habeas corpus petition arguing that the felony indictment deprived him of due process of law.⁷⁴ The Court declined to enforce the guilty plea because the new indictment unconstitutionally created a fear of prosecutorial vindictiveness.⁷⁵ Significantly, the Court held that the defendant did not have to establish that the prosecutor actually had a retaliatory motive; what mattered was that the increase from a misdemeanor to a felony indictment gave rise to a fear of vindictiveness, chilling all but the hardiest of defendants from exercising their right to appeal.⁷⁶

In 1977, however, in *Bordenkircher v. Hayes*, the Court held that a prosecutor's threat during plea negotiations to indict the defendant on a more serious charge if he refused to plead guilty was a permissible bargaining tactic.⁷⁷ In *Hayes*, the prosecutor first indicted Hayes on a charge punishable by two to ten years in prison.⁷⁸ During plea negotiations, the prosecutor offered Hayes a sentence of five years if he pled guilty, but warned Hayes that if he did not plead guilty, the prosecutor would seek a superseding indictment under a different statute—one that would subject Hayes, if convicted, to mandatory life imprisonment.⁷⁹ Hayes refused the offer, and the prosecutor indicted him under the life imprisonment statute.⁸⁰ In addressing Hayes's claim of a violation of due process, the Court distinguished *Pearce* and

⁷³ *Id.* at 23. At the time, North Carolina law provided for two different tiers of trial courts, the District Court and the Superior Court. *Id.* at 22. The District Court had exclusive jurisdiction for the trial of misdemeanors, but a person convicted in the District Court decisions had the right to a trial de novo in the Superior Court. *Id.* If the defendant took such an appeal, then the prior conviction would be annulled and the prosecution would begin with a clean slate in the Superior Court. *Id.* Here, Perry was convicted of a misdemeanor in the District Court and filed a notice of appeal for trial de novo in the Superior Court. *Id.* at 23. After the notice of appeal but before the new trial, the prosecutor indicted Perry for a felony arising from the same conduct for which Perry had been tried in the District Court. *Id.*

⁷⁴ *Id.* at 21. The defendant also raised a double jeopardy claim, but the Court did not address this because his due process claim was dispositive. *Id.* at 25.

⁷⁵ *Id.* at 27-28.

⁷⁶ *Id.* at 28.

⁷⁷ 434 U.S. at 365.

⁷⁸ *Id.* at 358.

⁷⁹ *Id.* at 358-59. As Justice Powell noted in dissent, the prosecutor's offer of a five-year sentence was hardly generous for the original offense charged—uttering one forged check in the amount of \$88.30. *Id.* at 369 (Powell, J., dissenting).

⁸⁰ *Id.* at 359. Both parties stipulated that the prosecutor possessed sufficient evidence to support the superseding indictment at the time of his threat, and that the prosecutor sought the superseding indictment only because of Hayes's refusal to plead guilty to the original charge. *Id.*

Perry because those cases dealt with state retaliation against defendants who chose to appeal their convictions, rather than state pressure to plead guilty during the "normal give-and-take negotiation" of plea bargaining.⁸¹ In the give-and-take of plea bargaining, the Court held, a prosecutor's threats of new or heavier charges carry no element of improper punishment or retaliation as long as the defendant is free to accept or reject the prosecution's offer.⁸² The prosecutor has a legitimate interest at the bargaining table to persuade the defendant to waive his right to a trial and has broad discretion to decide what charges to file.⁸³ The fact that the prosecutor openly presented the defendant with a choice between forgoing trial or facing legitimate but more serious charges at trial did not violate the Due Process Clause of the Fourteenth Amendment.⁸⁴ Thus, under *Pearce* and *Perry*, a plea bargain may be unenforceable if it chills the exercise of a fundamental right, such as the right to appeal errors of fact or law.⁸⁵ But under *Hayes*, threats that form part of the normal give-and-take of plea bargaining, such as threats to file new criminal charges, are permissible—even though they tend to chill the defendant from exercising the right to a jury trial.⁸⁶

D. Judicial Hesitation to Enforce Release-Dismissal Agreements

Hayes suggests that prosecutorial threats regarding the criminal justice consequences of refusing a plea bargain are almost always a permissible part of the normal give-and-take of plea bargaining.⁸⁷ But as the example of release-dismissal agreements illustrates, threats unrelated to criminal justice objectives are not part of the normal give-and-take of plea bargaining.⁸⁸ A release-dismissal agreement is an arrangement whereby a prosecutor agrees to dismiss pending criminal

⁸¹ *Id.* at 362–63.

⁸² *Hayes*, 434 U.S. at 363.

⁸³ *Id.* at 364–65.

⁸⁴ *Id.*

⁸⁵ See *Perry*, 417 U.S. at 28–29; *Pearce*, 395 U.S. at 723.

⁸⁶ See *Hayes*, 434 U.S. at 364–65.

⁸⁷ See *id.*; *Parker*, 397 U.S. at 800 & n.2 (Brennan, J., dissenting) (describing the majority's opinion as never allowing the unconstitutional pressure identified in *Jackson* to vitiate a guilty plea except in highly unrealistic hypothetical situations, and opining that the majority apparently requires the defendant's mental state to border on temporary insanity for his or her guilty plea to be involuntary).

⁸⁸ See *Town of Newton v. Rumery*, 480 U.S. 386, 389–94 (1987) (5–4 decision) (holding that release-dismissal agreements are not automatically void as against public policy).

charges against a person, in exchange for that person agreeing not to sue public officials for alleged deprivations of constitutional rights.⁸⁹

Although release-dismissal agreements appear superficially similar to normal, purely criminal plea bargains, a different standard governs their enforceability.⁹⁰ For many years, courts viewed release-dismissal agreements with great suspicion, sometimes holding all such agreements void as against public policy.⁹¹ In 1968, for example, in *Dixon v. District of Columbia*, the U.S. Court of Appeals for the D.C. Circuit expressed concerns that release-dismissal agreements suppress legitimate complaints against police misconduct and tempt prosecutors to trump up charges; the court not only refused to enforce any release-dismissal agreements, but it also barred prosecutors from filing new charges against a defendant after he breached such an agreement.⁹² In 1970, in *MacDonald v. Musick*, the U.S. Court of Appeals for the Ninth Circuit went further, characterizing a prosecutor's decision to seek a release-dismissal agreement as a form of extortion that also violated state attorney ethics rules.⁹³

In 1987, in *Town of Newton v. Rumery*, the Supreme Court set to rest some of the ethical and enforceability questions surrounding release-dismissal agreements.⁹⁴ The Court held, by a 5-to-4 margin, both that a

⁸⁹ See *id.* at 389-94.

⁹⁰ See *id.*

⁹¹ See *Rumery v. Town of Newton*, 778 F.2d 66, 68-71 (1st Cir. 1985) (holding that an agreement to release civil rights claims against public officials in exchange for dismissal of criminal charges is per se void as against public policy), *rev'd*, 480 U.S. 386 (1987); *Boyd v. Adams*, 513 F.2d 83, 88-89 (7th Cir. 1975) (holding that release-dismissal agreements arise from inherently coercive circumstances and are invalid as against public policy in all but the rarest of circumstances); *MacDonald v. Musick*, 425 F.2d 373, 375-76 (9th Cir. 1970) (holding that a prosecutor cannot condition voluntary dismissal of a criminal charge upon a stipulation by the defendant that is designed to forestall the defendant's civil suit against the police, because such conduct is unethical and a form of extortion); *Dixon v. District of Columbia*, 394 F.2d 966, 969 (D.C. Cir. 1968) (holding that release-dismissal agreements are inherently odious and against public policy, and that courts should have no role in promoting or enforcing them). *Contra* *Bushnell v. Rosetti*, 750 F.2d 298, 301-02 (4th Cir. 1984) (holding that a release of civil rights claims in exchange for criminal sentencing considerations should be enforced if the criminal defendant made a voluntary, deliberate, and informed decision to release the civil rights claims); *Jones v. Taber*, 648 F.2d 1201, 1203-04 (9th Cir. 1981) (holding, after noting that the court could find no cases on point, that the release of a civil rights claim should be governed by a voluntariness standard borrowed from maritime law).

⁹² 394 F.2d at 969.

⁹³ 425 F.2d at 375-76 (discussing MODEL CODE OF PROF'L RESPONSIBILITY DR 7-105(A) (1980), which prohibited a lawyer from presenting, participating in presenting, or threatening to present criminal charges solely to obtain an advantage in a civil matter).

⁹⁴ See 480 U.S. at 392-94. A few jurisdictions impose more demanding ethical standards than the Model Code provisions, so one could argue that *Rumery's* ethical approval

release-dismissal agreement is enforceable if the defendant entered into it voluntarily and intelligently, and that the public interest in enforcing the agreement outweighs the public policy that would be harmed by enforcement.⁹⁵ The majority opinion explained both its rejection of a *per se* rule against enforcing release-dismissal agreements and its adoption of additional safeguards by noting that release-dismissal agreements are similar to, but distinguishable from, plea bargains.⁹⁶ Both involve a defendant's difficult but not unconstitutionally coercive choice to waive important rights in exchange for favorable criminal treatment.⁹⁷ But, the *Rumery* majority reasoned, plea bargains

of release-dismissal agreements should carry less force in those jurisdictions. See CAL. RULE OF PROF'L CONDUCT 5-100 (1992) (prohibiting a lawyer from threatening criminal, administrative, or disciplinary charges to obtain advantage in a civil suit); ME. BAR RULE 3.6(c) (2005) (prohibiting a lawyer from presenting, or threatening to present, criminal, administrative, or disciplinary charges solely to obtain an advantage in a civil matter). On the other hand, in jurisdictions that have adopted the newer Model Rules of Professional Responsibility, the ethical question is probably moot. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-363 (1992) (discussing threats of presenting criminal charges in connection with a civil matter). The Model Rules have no specific counterpart to the Model Code's DR 7-105(A). See *id.* In light of this omission, the American Bar Association's Committee on Ethics and Professional Responsibility has opined that the Model Rules give attorneys considerably greater freedom to make such threats than did the Model Code. See *id.*

⁹⁵ *Rumery*, 480 U.S. at 392-94. Although the majority agreed on the basic voluntariness standard, their fragmented opinions created some doubt about which party bears the burden of proving a release-dismissal agreement's enforceability. See *id.* at 394-97 (Powell, J., concurring) (joined by Rehnquist, C.J., White, J., & Scalia, J.) (apparently implying that the party seeking to rescind the agreement should bear the burden of proof); *id.* at 399-401 (O'Connor, J., concurring) (arguing that the party seeking to enforce the release-dismissal agreement should bear the burden of proving its enforceability); *id.* at 417-20 (Stevens, J., dissenting) (joined by Brennan, Marshall, & Blackmun, JJ.) (arguing that there should be a strong presumption against the enforceability of release-dismissal agreements). The federal circuit courts interpreting *Rumery* on this burden of proof question generally have held that the party seeking to enforce the agreement bears the burden of proving that the agreement should be enforced. See *Rodriguez v. Smithfield Packing Co.*, 338 F.3d 348, 353 (4th Cir. 2003) (noting that the vote of Justice O'Connor, who placed the burden of proof on the party seeking to enforce the agreement, was dispositive in *Rumery*); *Gonzalez v. Kokot*, 314 F.3d 311, 317 (7th Cir. 2002) (holding that the party seeking to enforce the agreement bears the burden of establishing its validity); *Hill v. Cleveland*, 12 F.3d 575, 578 (6th Cir. 1993) (same); *Vallone v. Lee*, 7 F.3d 196, 199 (11th Cir. 1993) (same); *Cain v. Darby Borough*, 7 F.3d 377, 380 (3d Cir. 1993) (same); *Coughlen v. Coots*, 5 F.3d 970, 974 (6th Cir. 1993) (same); *Lynch v. Alhambra*, 880 F.2d 1122, 1128 (9th Cir. 1989) (holding that, as to the public interest prong, the party seeking to enforce the agreement bears the burden of establishing its validity). But see *Woods v. Rhodes*, 994 F.2d 494, 499-502 (8th Cir. 1993) (failing to specify which party should bear the burden of proof).

⁹⁶ *Rumery*, 480 U.S. at 393-94.

⁹⁷ *Id.*

differ from release-dismissal agreements because a plea is conducted under judicial oversight, brings immediate and tangible benefits to the public (in particular, the rapid imposition of punishment while saving prosecutorial resources), ensures some satisfaction of the public's interest in the prosecution of crime, and indicates through the plea colloquy that the prosecutor's charges have some basis in fact.⁹⁸ Release-dismissal agreements often do not share these attributes.⁹⁹

Moreover, Justice O'Connor and the four dissenters agreed that the way in which release-dismissal agreements intermingle criminal justice and non-criminal justice considerations gives rise to serious concerns that should lead the courts to treat release-dismissal agreements differently from normal plea bargains.¹⁰⁰ According to Justice O'Connor in her concurring opinion, a release-dismissal agreement differs from a plea bargain because a release-dismissal agreement explicitly trades the public criminal justice interest in convicting law-breakers against the private financial interests of public officials in avoiding civil liability; in contrast, a prosecutor striking a valid plea bargain may consider only legitimate criminal justice concerns, such as the strength of the evidence against the defendant, the defendant's prospects for rehabilitation, and the defendant's degree of cooperation with the authorities.¹⁰¹ When, as happens in release-dismissal agreements, the outcome of a criminal proceeding turns on extraneous considerations unrelated to criminal justice objectives, the public may lose faith in both the legitimacy of the bargaining process and the fairness of those who administer the criminal process.¹⁰²

Along similar lines, Justice Stevens and the three other dissenters argued that a release-dismissal agreement differs from a plea bargain because the delicate balance of mutual advantage that results from

⁹⁸ *Id.* at 393 n.3.

⁹⁹ *Id.* On the other hand, the plurality opined, release-dismissal agreements may serve the public interest in particular cases because such agreements can prevent public officials from wasting government time defending themselves against unjustified civil rights claims. *Id.* at 395-96 (plurality opinion). While emphasizing that the party seeking enforcement should bear the burden of showing that such an interest exists, Justice O'Connor agreed that this interest exists in some cases and further noted that a prosecutor's judgment to spare the community the expense of litigation arising from minor crimes also could serve the public interest. *Id.* at 399-400 (O'Connor, J., concurring).

¹⁰⁰ *See id.* at 400-01 (O'Connor, J., concurring); *id.* at 410-13 (Stevens, J., dissenting).

¹⁰¹ *Id.* at 401 (O'Connor, J., concurring). *But see* *Gregoire v. Biddle*, 177 F.2d 579, 580-81 (2d Cir. 1949) (articulating the public interest in ensuring that lawsuits do not prevent executive officials from exercising their duties).

¹⁰² *Rumery*, 480 U.S. at 400 (O'Connor, J., concurring).

plea bargains does not exist in release-dismissal agreements.¹⁰³ In plea bargaining, the negotiation is a give-and-take over the nature of the defendant's wrongdoing; in a release-dismissal agreement, the negotiation is aimed at resolving a civil rights claim against public officials that is unrelated to the nature of the defendant's wrongdoing.¹⁰⁴ Although the outcome of a criminal proceeding may affect the value of the civil claim, the two claims being negotiated in a release-dismissal agreement are quite distinct as a matter of law.¹⁰⁵ Thus, the release-dismissal agreement exacts a price from the defendant unrelated to the character of his or her wrongdoing.¹⁰⁶ Justice Stevens also expressed concern that in negotiating the agreement, serious public policy and ethical issues arise from the prosecutor's representation of multiple and conflicting interests.¹⁰⁷ In *Rumery*, then, five justices agreed that the different public policy concerns and different balance of mutual advantage that flow from release-dismissal agreements, as compared to those of normal plea bargains, justify imposing a heavier burden on the party seeking to enforce these agreements.¹⁰⁸

II. PLEA BARGAINING IN THE ENEMY COMBATANT CONTEXT

A. *The Post-9/11 Innovation of Enemy Combatant Detention*

On September 11, 2001, the Al Qaeda terrorist organization attacked the United States by hijacking commercial airplanes and deliberately crashing them into the World Trade Center in New York City and the Pentagon in Washington, D.C.¹⁰⁹ The attacks killed almost 3000 people—the largest loss of life the United States has ever suffered on its

¹⁰³ *Id.* at 410 (Stevens, J., dissenting).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 411.

¹⁰⁷ *Rumery*, 480 U.S. at 412–13 (Stevens, J., dissenting).

¹⁰⁸ *See id.* at 400–01 (O'Connor, J., concurring); *id.* at 410–13 (Stevens, J., dissenting).

As mentioned above, the Court in *Rumery* did not clearly state which party bears the burden of proving a release-dismissal agreement's enforceability, but lower courts have generally placed the burden on the party seeking to enforce the agreement. *See supra* note 95.

¹⁰⁹ *See, e.g.*, N.R. Kleinfield, *A Creeping Horror: Buildings Burn and Fall as Onlookers Search for Elusive Safety*, N.Y. TIMES, Sept. 12, 2001, at A1; Serge Schmemmann, *President Vows to Exact Punishment for 'Evil'*, N.Y. TIMES, Sept. 12, 2001, at A1. For a description of how Al Qaeda carried out the attacks, see NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 1–14 (2004), available at <http://www.gpoaccess.gov/911/pdf/fullreport.pdf> [hereinafter 9/11 COMMISSION REPORT].

soil as a result of hostile attack.¹¹⁰ In response, Congress passed an Authorization for Use of Military Force resolution (the "AUMF"), which stated in relevant part:

[T]he 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.¹¹¹

Thus began what President George W. Bush calls the "War on Terror."¹¹²

As part of the War on Terror, the President has claimed the authority to designate individuals as enemy combatants and hold them under military authority for as long as the President deems necessary for national security.¹¹³ The power to make such designations, according to the executive branch, derives from the President's war powers as Commander in Chief.¹¹⁴ The government asserts that detaining enemy combatants serves two military objectives: preventing these individuals from rejoining enemy forces and enabling the military to gather intelligence from the detainee.¹¹⁵ Unlike prisoner-of-war detentions in traditional wars, enemy combatant detentions in the War on Terror raise troubling new questions, including how to identify the "enemy" and how to identify the end of the conflict.¹¹⁶

¹¹⁰ 9/11 COMMISSION REPORT, *supra* note 109, at 311.

¹¹¹ Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2000 & Supp. III 2003)) [hereinafter AUMF].

¹¹² President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001) (transcript available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>) ("Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."). Although Bush Administration officials briefly re-branded this campaign as the "Global Struggle Against Violent Extremism," President Bush has since reverted to the more forceful-sounding "War on Terror." Eric Schmitt & Thom Shanker, *New Name for 'War on Terror' Reflects Wider U.S. Campaign*, N.Y. TIMES, July 26, 2005, at A7; Richard W. Stevenson, *President Makes It Clear: The Phrase Is 'War on Terror'*, N.Y. TIMES, Aug. 4, 2005, at A12.

¹¹³ Brief for the Respondents, *supra* note 3, at 16.

¹¹⁴ *Id.* at 13; see also U.S. CONST. art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States.").

¹¹⁵ Brief for the Respondents, *supra* note 3, at 15; Brief for the Petitioners, *supra* note 3, at 28–29.

¹¹⁶ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 519–21 (2004) (recognizing that the unconventional nature of the War on Terror could lead to perpetual detentions of enemy com-

When faced with legal challenges to enemy combatant detentions, the government has argued that the President should have essentially unfettered authority to capture and imprison anyone indefinitely—whether citizen or non-citizen, captured on U.S. soil or abroad—at the sole discretion of the President as Commander in Chief.¹¹⁷ In 2004, the Supreme Court simultaneously issued three cases—*Rasul v. Bush*, *Hamdi v. Rumsfeld*, and *Rumsfeld v. Padilla*—that gave the Court an opportunity to define the scope of the President's authority to detain enemy combatants in the War on Terror.¹¹⁸ These three cases provide the only existing judicial guidance on the potential limits of this novel authority.¹¹⁹

In the first of the 2004 enemy combatant cases, *Rasul v. Bush*, the Supreme Court held that the federal courts have jurisdiction to hear the habeas corpus petitions of various foreign nationals captured abroad and detained at the U.S. Naval Base in Guantanamo Bay, Cuba.¹²⁰ The Court did not, however, reach the merits of the detainees' claims.¹²¹

batants, but holding that the Court did not yet face that situation in the case at bar); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 474–78 (D.D.C. 2005) (criticizing the expansive definition of “enemy combatant” adopted by the government, which permits the detention of individuals based solely on their contacts with terrorists rather than on their involvement in actual terrorist activities); COLE, *supra* note 5, at 40–41 (describing the War on Terror as being directed against a potentially infinite range of enemies and having no discernible endpoint).

¹¹⁷ See Brief for the Respondents, *supra* note 3, at 25–27; Brief for the Petitioners, *supra* note 3, at 38; see also *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 475 (noting that in response to the hypotheticals posed by the court, the government asserted that its authority to detain individuals as enemy combatants extended to a little old lady in Switzerland who writes checks to what she believes is a charity but is actually an Al Qaeda front, a person who teaches English to the son of an Al Qaeda member, and a journalist who knows the location of Al Qaeda leader Osama bin Laden but refuses to disclose it in order to protect a confidential source).

¹¹⁸ See *Hamdi*, 542 U.S. at 529–33 (2004); *Rasul v. Bush*, 542 U.S. 466, 483–84 (2004); *Rumsfeld v. Padilla* (*Padilla I*), 542 U.S. 426, 451 (2004).

¹¹⁹ See *Hamdi*, 542 U.S. at 529–33; *Rasul*, 542 U.S. at 483–84; *Padilla I*, 542 U.S. at 451. Although prior cases involving the detention and trial of “unlawful combatants”—that is, enemy agents whom the President punishes for violating the law of war—speak to the source of the President's power to detain combatants, they define the contours of the President's power only as to punitive detentions, not as to the preventive, non-punitive detentions of the War on Terror. See generally *In re Yamashita*, 327 U.S. 1 (1945) (upholding the military trial and punishment of a Japanese general for permitting his troops to commit atrocities); *Ex parte Quirin*, 317 U.S. 1 (1942) (upholding the military trial and punishment of German agents who entered the United States to commit sabotage).

¹²⁰ 542 U.S. at 483–84.

¹²¹ See *id.* at 485. Since *Rasul*, the Supreme Court has agreed to hear a challenge to the fairness of the military tribunals taking place in Guantanamo Bay. See generally *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir.), *cert. granted*, 126 S. Ct. 622 (2005). About two months after the Supreme Court granted certiorari in *Hamdan*, however, Congress passed and

In the second 2004 enemy combatant case, *Hamdi v. Rumsfeld*, the Supreme Court outlined the due process guarantees for U.S. citizens captured as enemy combatants abroad.¹²² The executive branch designated Yaser Esam Hamdi, an American citizen who resided in Afghanistan during the U.S. invasion, an enemy combatant after taking him into custody in Afghanistan.¹²³ The executive branch based this designation on two factors: Hamdi's presence in Afghanistan after the U.S. invasion and the belief that Hamdi joined or assisted forces hostile to the United States or its coalition partners in Afghanistan.¹²⁴

Without reaching the government's argument that the President can detain enemy combatants under his plenary authority as Commander in Chief, the Supreme Court held that Congress authorized Hamdi's enemy combatant detention through the AUMF.¹²⁵ Having established the President's authority to detain Hamdi, the Court then described the process owed to an enemy combatant under the Due Process Clause of the Fifth Amendment.¹²⁶ Applying the *Mathews v. Eldridge* balancing test, the Court held that a citizen-detainee seeking to challenge his or her classification as an enemy combatant must receive

President Bush signed into law the Detainee Treatment Act of 2005, which strips all U.S. courts of jurisdiction to hear the habeas petitions of aliens detained at Guantanamo Bay. See Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2740-41 (to be codified at 28 U.S.C. § 2241(e)). Soon afterward, the government moved to dismiss Hamdan's petition for certiorari, arguing that the Act's jurisdiction-stripping provisions should divest the Supreme Court of jurisdiction in Hamdan's pending case. Respondent's Motion to Dismiss for Lack of Jurisdiction, *Hamdan*, No. 05-184 (U.S. Jan. 12, 2006). The Supreme Court heard oral arguments on March 28, 2006. See generally Transcript of Oral Argument, *Hamdan*, No. 05-184 (U.S. March 28, 2006), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf. Note that *Hamdan*, a case involving foreign nationals captured by U.S. military forces abroad, is not the same case as the similarly named *Hamdi*, which involves a U.S. citizen captured by U.S. military forces abroad. See generally *Hamdi*, 542 U.S. 507; *Hamdan*, 415 F.3d 33.

¹²² 542 U.S. at 509.

¹²³ *Id.* at 510. The U.S. invaded Afghanistan under the authority of the AUMF. *Id.*; see AUMF, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2000 & Supp. III 2003)). During the U.S. invasion, Afghan military forces allied with the United States captured Hamdi, detained him, and turned him over to U.S. troops. *Hamdi*, 542 U.S. at 510. After the U.S. government gained custody of Hamdi, officials first detained and interrogated him in Afghanistan, and again in Guantanamo Bay, until they learned that Hamdi was a U.S. citizen. *Id.* At that point, the U.S. government transferred Hamdi to a naval brig in Norfolk, Virginia. *Id.* As a result of his designation as an enemy combatant, Hamdi spent several months in U.S. military custody—held incommunicado, without being charged with any crime, and without access to counsel—before his father was able to file a habeas corpus petition on his behalf. *Id.* at 510-11.

¹²⁴ *Id.* at 522 n.1, 526.

¹²⁵ *Id.* at 517; see AUMF § 2, 115 Stat. at 224.

¹²⁶ *Hamdi*, 542 U.S. at 524-25.

notice of the factual basis for that classification and a fair opportunity to rebut the government's factual assertions before a "neutral decisionmaker."¹²⁷ The Court qualified its holding, however, by providing some examples of the limited process due a citizen accused of being an enemy combatant: a special military tribunal could count as a "neutral decisionmaker," hearsay could be admissible in such a hearing, and the detainee could bear the burden of proof to rebut the government's factual assertions.¹²⁸ Significantly, these due process rights do not attach upon the President's designation of the person as an enemy combatant, nor upon that person's initial capture and detention as an enemy combatant.¹²⁹ Instead, the Court held that the process described above is triggered by the enemy combatant's challenge of his or her classification as part of a *post-deprivation* hearing reviewing whether continued detention is necessary.¹³⁰

In the third 2004 enemy combatant case, *Rumsfeld v. Padilla* (*Padilla I*), the Supreme Court had an opportunity to define the due process guarantees for U.S. citizens who are arrested and designated enemy combatants within the United States, but it declined to rule on the issue.¹³¹ Jose Padilla was a U.S. citizen whom federal authorities arrested on a material witness warrant at the Chicago O'Hare International Airport, held as a material witness in New York, and then designated an enemy combatant before he had a meaningful opportunity

¹²⁷ *Id.* at 535; see *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The *Mathews* test weighs the private interest that will be affected by the official action against the government's interest (including the nature of the interest at stake and the burdens on the government of additional process), considering both the risk of an erroneous deprivation of that interest and the likely value of additional or substitute procedural safeguards. *Mathews*, 424 U.S. at 335.

¹²⁸ *Hamdi*, 542 U.S. at 533–34, 538. By contrast, a criminal defendant—whether arrested in peace or wartime—has the right to a trial by a jury of his or her peers in which a full panoply of evidentiary protections apply, and the government must prove the defendant's guilt beyond a reasonable doubt. See U.S. CONST. amend. VI (stating that in all criminal prosecutions, the accused has the right to a speedy and public trial before an impartial jury); *In re Winship*, 397 U.S. 358, 361–64 (1970) (holding that under the Due Process Clause of the Fourteenth Amendment, no person may be convicted of a crime except by proof beyond a reasonable doubt); *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (holding that because neither wartime conditions nor the declaration of martial law entitles military tribunals to supplant entirely the criminal courts within the United States, the defendants therefore were entitled to a criminal trial in a civilian court rather than in a military tribunal).

¹²⁹ *Hamdi*, 542 U.S. at 534, 537–38.

¹³⁰ See *id.* at 534.

¹³¹ 542 U.S. at 430.

to challenge his extended detention as a material witness.¹³² The U.S. Court of Appeals for the Second Circuit held that the President had no authority to hold Padilla as an enemy combatant.¹³³ Without addressing the merits of the case, the Supreme Court reversed the Second Circuit, holding that the New York court where Padilla filed his petition lacked jurisdiction to hear his habeas corpus petition.¹³⁴

After the Supreme Court's decision, Padilla renewed his litigation, this time conforming to the Court's jurisdictional requirements.¹³⁵ In *Padilla v. Hanft* (*Padilla II*), the U.S. Court of Appeals for the Fourth Circuit relied on *Hamdi* to hold that the AUMF authorized Padilla's detention—even though he was a U.S. citizen and the government neither arrested him nor designated him an enemy combatant until after he had returned to U.S. soil.¹³⁶ The court reasoned that Padilla posed

¹³² *Id.* at 430–32. Authorities arrested Padilla when he arrived in Chicago on an international flight from Pakistan and then kept him in custody as a material witness for over a month. *Id.* at 430–31. Shortly before a scheduled hearing on Padilla's motion to vacate the material witness warrant, the President designated Padilla an enemy combatant, and Defense Department officials shipped Padilla to a naval brig in South Carolina. *Id.* at 431–32.

¹³³ *Padilla v. Rumsfeld*, 352 F.3d 695, 724 (2d Cir. 2003) (holding that the President's powers as Commander in Chief do not include the power to detain a U.S. citizen seized within the United States as an enemy combatant and that President Bush's detention of Padilla contravened the expressed will of Congress), *rev'd*, 542 U.S. 426 (2004).

¹³⁴ *Padilla I*, 542 U.S. at 451. The majority held that because the government successfully moved Padilla from New York to South Carolina two days before his lawyer filed a habeas corpus petition on his behalf, the New York court never obtained jurisdiction over Padilla. *Id.* at 441. Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented, arguing that the Court should have heard Padilla's habeas petition on the merits both because of the case's profound and disturbing implications for liberty, and because the government made the change in jurisdiction a *fait accompli* without providing fair notice to Padilla's attorney. *See id.* at 455–65 (Stevens, J., dissenting). Justice Stevens argued that the government provided inadequate notice by vacating the material witness warrant in an *ex parte* proceeding that took place on a Sunday, immediately transferring Padilla to the military facility in South Carolina, and then failing to inform Padilla's attorney officially of her client's whereabouts until after she filed the habeas petition. *See id.*

¹³⁵ *See* Brief of Petitioner for Writ of Certiorari, *Padilla v. Hanft*, No. 05-533 (U.S. Oct. 25, 2005), available at 2005 WL 2822914 (appealing *Padilla II*); *infra* note 139 and accompanying text. As a practical matter, *Padilla I*'s restrictive jurisdictional requirements mean that U.S. citizen enemy combatants cannot file their habeas petitions in any jurisdiction other than the Fourth Circuit, because the government has chosen to hold U.S. citizen enemy combatants exclusively within that circuit's territorial jurisdiction. *See Hamdi*, 542 U.S. at 510 (describing how upon learning of Hamdi's U.S. citizenship, the government transferred Hamdi first from Guantanamo Bay to a naval brig in Norfolk, Virginia, and then to another naval brig in Charleston, South Carolina); *Padilla I*, 542 U.S. at 432 (describing how upon transferring Padilla into military custody, the government held Padilla at the Consolidated Naval Brig in Charleston, South Carolina).

¹³⁶ 423 F.3d 386, 390–91, 393 (4th Cir. 2005), *cert. denied*, No. 05-533, 2006 WL 845383 (U.S. Apr. 3, 2006); *see* AUMF, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2000 & Supp. III 2003)).

the same danger to U.S. interests in Chicago as he had while abroad, so the government had the same power to designate him an enemy combatant in either circumstance.¹³⁷ After Padilla filed a petition for certiorari appealing the Fourth Circuit's ruling, the Justice Department unsealed a criminal indictment against Padilla in the Southern District of Florida, alleging offenses that were unrelated to and less serious than the alleged acts the government had used to justify his detention as an enemy combatant.¹³⁸ Following an unusual series of procedural developments, the Supreme Court authorized his transfer into civilian custody and then, after some delay, denied certiorari.¹³⁹

¹³⁷ *Padilla II*, 423 F.3d at 393. According to the Fourth Circuit, Padilla associated with anti-U.S. forces in Afghanistan and armed himself there in much the same way that Hamdi did, rendering him a threat similar to Hamdi. *Id.* at 391–92; see *Hamdi*, 542 U.S. at 512–13. Thus, the court reasoned, Padilla qualified as an enemy combatant for the same reasons as Hamdi. *Padilla II*, 423 F.3d at 392; see *Hamdi*, 542 U.S. at 522 n.1. And because detaining Padilla prevented his return to the battlefield, the court held that the AUMF authorized Padilla's detention incident to the conduct of war, without specifically stating whether the war in question was the war in Afghanistan or the larger War on Terror. See *Padilla II*, 423 F.3d at 392; see also AUMF § 2, 115 Stat. at 224. The court characterized the *Hamdi* plurality's reasoning as rendering the locus of capture irrelevant, even though the *Hamdi* plurality had repeatedly stated that Hamdi's capture while in a foreign combat zone was a significant fact. *Padilla II*, 423 F.3d at 393–94; see *Hamdi*, 542 U.S. at 523–24. The court justified this result by characterizing the fact of foreign battlefield capture as merely being part of the context of the *Hamdi* case rather than an essential part of its reasoning. *Padilla II*, 423 F.3d at 393.

¹³⁸ Cf. Transcript of the Attorney General John Ashcroft Regarding the Transfer of Abdullah al Muhajir (Born Jose Padilla) to the Department of Defense as an Enemy Combatant (June 10, 2002), reprinted in Joint App. at 60–62, *Padilla I*, 542 U.S. 426 (2004) (No. 03-1027), available at <http://www.usdoj.gov/osg/briefs/2003/3mer/2mer/2003-1027.mer.ja.pdf> (alleging that Padilla was an Al Qaeda operative who was involved in planning a radiological “dirty bomb” attack on civilians in the U.S.). See generally Superseding Indictment, United States v. Hassoun, No. 04-60001-CR-COOKE (S.D. Fla. Nov. 17, 2005), available at <http://www.wiggin.com/db30/cgi-bin/pubs/11-17-05%20Indictment.pdf> (alleging that Padilla played a minor role in a terror support cell that sent money and recruits overseas).

¹³⁹ See *Hanft v. Padilla* (*Padilla IV*), 126 S. Ct. 978, 978 (2006) (mem.) (granting the application for transfer into civilian custody). In refusing authorization for the transfer, the Fourth Circuit—in an unusual display of pique—stated that the government's actions created the impression that they were intentionally using the indictment to moot Padilla's habeas petition and thereby evade Supreme Court review. *Padilla v. Hanft* (*Padilla III*), 432 F.3d 582, 585–86 (4th Cir. 2005), application granted by 126 S. Ct. 978 (2006). Stating that the government's actions harmed the government's credibility before the courts and created the impression that Padilla's long detention was a mistake, the court held that the rule of law would best be served by maintaining the status quo and keeping the case live for consideration by the Supreme Court. *Id.* at 587. On January 4, 2006, the Supreme Court granted authorization for Padilla's transfer and indicated that the Court would consider Padilla's petition for certiorari. *Padilla IV*, 126 S. Ct. at 978. Three months later, a divided Court denied certiorari, with Justice Kennedy issuing a concurring opinion and Justice Ginsburg issuing a dissenting opinion. See *Padilla v. Hanft* (*Padilla V*), No. 05-533, 2006 WL 845383 (U.S. Apr. 3, 2006); *id.* at *2 (Kennedy, J., concurring) (describing any

B. *Interaction of Enemy Combatant Detention with the Criminal Justice System*

As discussed above, the Supreme Court has set very few limits on the President's power to designate people as enemy combatants.¹⁴⁰ Even in cases involving U.S. citizen enemy combatants, the Court has given the President wide latitude to arrest and hold individuals under military authority, without accusing them of any particular wrongful acts, and to keep them in custody until the War on Terror ends.¹⁴¹ And in a growing number of cases, the government has arrested alleged terrorists under civilian authority and then detained them as enemy combatants, or vice versa.¹⁴²

This flow between civilian prosecution and military detention is possible because the Supreme Court has accepted the government's argument that the purpose of enemy combatant detention is to prevent fighters from taking up arms on the battlefield, not to punish them.¹⁴³ Thus, criminal prosecution and enemy combatant detention serve different objectives and are—at least in theory—unrelated to one another.¹⁴⁴ The non-punitive purpose of enemy combatant deten-

consideration of Padilla's rights as an enemy combatant as "hypothetical" and unnecessary); *id.* at *2 (Ginsburg, J., dissenting) (arguing that Padilla's case is not moot and the Court should have decided whether the President has authority to hold Padilla as an enemy combatant).

¹⁴⁰ See *Hamdi*, 542 U.S. at 533–34, 538; *Rasul*, 542 U.S. at 485; *Padilla I*, 542 U.S. at 451.

¹⁴¹ See *Hamdi*, 542 U.S. at 533–34, 538. David Cole characterizes such detentions as effectively life sentences, asserting that society will almost certainly cure both cancer and the common cold before it can stop terrorism. COLE, *supra* note 5, at 41. At least one federal judge shares Cole's concerns. See *Guantanamo Detainee Cases*, 335 F. Supp. 2d at 465 (noting that because the government has conceded that the War on Terror could last for several generations, detention as an enemy combatant may well amount to a life sentence).

¹⁴² See *infra* notes 146–179 and accompanying text.

¹⁴³ *Hamdi*, 542 U.S. at 518 (describing enemy combatant detention as a means of preventing detainees from returning to the battlefield and taking up arms, not as a form of punishment or vengeance).

¹⁴⁴ See *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997) (holding that indefinite post-sentence civil commitment of sexually dangerous predators is not punishment because its purpose is not linked to any punitive purpose of retribution or deterrence, and therefore it does not implicate the Double Jeopardy Clause's prohibition against punishing a defendant twice for the same offense) (discussing the Double Jeopardy Clause of U.S. CONST. amend. V, which reads, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb"). Yet as Justice Scalia pointed out in his dissent in *Hamdi*, the grounds for designating Hamdi and Padilla as enemy combatants overlapped significantly with the grounds for prosecuting a citizen for treason. *Hamdi*, 542 U.S. at 559–61 (Scalia, J., dissenting). Moreover, scholars have argued that, by allowing prosecutors to target allegedly dangerous individuals for their associations rather than more substantial acts, broad federal anti-terrorism laws have shifted criminal enforcement toward a more prevention-focused paradigm. See Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 47–75 (2005) (arguing that the

tion also suggests that a criminal defendant could be designated an enemy combatant before a scheduled trial, after the jury announces its verdict, or even during the trial.¹⁴⁵

The 2003 case of *Al-Marri v. Bush* provides one example of a person originally arrested by civilian law enforcement, but then designated an enemy combatant and transferred into military custody.¹⁴⁶ In December 2001, federal agents arrested Ali Saleh Kahlah al-Marri, first holding him as a material witness and then charging him with lying to the FBI and various forms of financial fraud.¹⁴⁷ About a week before his pretrial conference, and less than a month before his scheduled trial date, the Justice Department dropped the criminal charges against al-Marri, and the Defense Department designated him an enemy combatant.¹⁴⁸

material support of terrorism laws are an appropriate but imperfect means of prosecuting terrorists before evidence of a conspiracy exists); David Cole, *The New McCarthyism: Repeating History in the War on Terror*, 38 HARV. C.R.-C.L. L. REV. 1, 14–15 (2003) (criticizing the material support of terrorism laws as preventive law enforcement measures that make it too easy for the government to prosecute assertedly suspicious individuals, even when there is no evidence that the person ever participated in or planned a terrorist crime). The apparent clash between present law enforcement practices and traditional theories of retribution and deterrence, however, is beyond the scope of this Note.

¹⁴⁵ See *Hendricks*, 521 U.S. at 369 (holding that indefinite post-sentence civil commitment of sexually dangerous predators is not punishment, and therefore does not implicate the Double Jeopardy Clause's prohibition against punishing a defendant twice for the same offense); *infra* notes 146–179 and accompanying text. Before the trial of September 11 co-conspirator Zacarias Moussaoui, the White House did consider dismissing the charges against him and declaring him an enemy combatant, but officials ultimately decided to let his case remain in the criminal justice system. Philip Shenon & Eric Schmitt, *White House Weighs Letting Military Tribunal Try Moussaoui*, OFFICIALS SAY, N.Y. TIMES, Nov. 10, 2002, at 17.

¹⁴⁶ 274 F. Supp. 2d 1003, 1004 (C.D. Ill. 2003), *aff'd*, 360 F.3d 707 (7th Cir.), *cert. denied*, 543 U.S. 809 (2004); Schmidt, *supra* note 16, at A1.

¹⁴⁷ *Al-Marri*, 274 F. Supp. 2d at 1004. The apparently non-terrorism-related criminal charges against al-Marri are an example of the Justice Department's so-called "Al Capone" strategy of pretextual prosecution—charging terrorism defendants with lesser offenses to disrupt alleged but unproven terrorist plots. See, e.g., COLE, *supra* note 5, at 203–04 (arguing that pretextual law enforcement is potentially useful but needs to be subject to stringent judicial review to deter improper prosecutorial motives, such as racial or religious bias); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 618–24 (2005) (characterizing pretextual prosecutions as a necessary tool in the War on Terror even though they can carry a high societal cost).

¹⁴⁸ *Al-Marri*, 274 F. Supp. 2d at 1004. Al-Marri's attorney, Lawrence Lustberg, told reporters that the designation was an end-run around the legal system. Schmidt, *supra* note 16, at A1. As quoted by the *Washington Post*, Lustberg believed the Administration designated al-Marri an enemy combatant because al-Marri was raising "powerful legal challenges" to the government's allegations, and the government had no proof he was involved in terrorism. *Id.*

Another case, *United States v. Lindh*, began with military detention and ended with a guilty plea in a civilian court.¹⁴⁹ John Walker Lindh was a U.S. citizen—a young white man from Marin County, California—who traveled to Afghanistan in the spring of 2001.¹⁵⁰ Once there, he joined the Taliban regime then governing the country and obtained military training at a camp run by Al Qaeda leader Osama bin Laden.¹⁵¹ In November 2001, during the U.S. invasion of Afghanistan, Lindh and his fighting group surrendered to Afghan troops allied with the United States in its fight against the Taliban.¹⁵² The Central Intelligence Agency (the “CIA”) briefly held and interrogated Lindh but eventually turned him over to the Justice Department.¹⁵³ The Justice Department then charged him with a variety of criminal offenses, including providing material support to various terrorist organizations and conspiring to murder U.S. nationals.¹⁵⁴ On July 15, 2002, Lindh pled guilty to providing support to the Taliban and carrying an explosive during the commission of a felony, and the U.S. District Court for the Eastern District of Virginia sentenced him to twenty years’ imprisonment.¹⁵⁵ Interestingly, Lindh’s plea agreement included a promise by the government not to designate him an enemy combatant based on the conduct alleged in the indictment.¹⁵⁶

One need not scrutinize the terms of plea agreements, however, to see that federal prosecutors have used the revolving door between civilian and military custody to their advantage.¹⁵⁷ At least two successful terrorism prosecutions—*United States v. Faris* and the “Lackawanna

¹⁴⁹ 227 F. Supp. 2d 565, 569 (E.D. Va. 2002).

¹⁵⁰ *Id.* at 567–68.

¹⁵¹ *Id.*

¹⁵² *Id.* at 569.

¹⁵³ *Id.* Some observers have argued that the President’s choice not to designate Lindh an enemy combatant was influenced by Lindh’s race and socioeconomic class. See Miles Harvey, *The Bad Guy: Gangbanger, Fifth Columnist, Radical Muslim, Poor Fatherless Puerto Rican—Is It Mere Coincidence that in Jose Padilla the Government Has the Perfect Fall Guy?*, MOTHER JONES, Mar.–Apr. 2003, at 35 (noting that the most obvious difference between John Walker Lindh and enemy combatant Jose Padilla is that Lindh is well-connected and white, while Padilla is poor and Puerto Rican), available at http://motherjones.com/commentary/notebook/2003/03/ma_293_01.html. As Padilla’s mother put it, “That John Walker Lindh. They didn’t make him disappear, take away his rights . . . I guess maybe because his father’s a lawyer. He’s white, whatever.” Deborah Sontag, *Terror Suspect’s Path from Streets to Brig*, N.Y. TIMES, Apr. 25, 2004, § 1, at 1.

¹⁵⁴ *Lindh*, 227 F. Supp. 2d at 566 n.2.

¹⁵⁵ *Id.* at 566, 572.

¹⁵⁶ See Plea Agreement ¶ 21, *Lindh*, 227 F. Supp. 2d 565 (No. 02-37A), available at <http://files.findlaw.com/news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf>.

¹⁵⁷ See *infra* notes 159–179 and accompanying text.

Six" case—appear to have involved direct threats to detain the defendant as an enemy combatant.¹⁵⁸ In the *Faris* case, the FBI sought for questioning Iyman Faris, a thirty-four-year-old truck driver and U.S. citizen who had immigrated to Columbus, Ohio from Kashmir.¹⁵⁹ After he agreed to cooperate on March 20, 2003, the agents interrogated Faris in a hotel room in Ohio for several days.¹⁶⁰ With Faris's consent, the FBI then transported him to Quantico, Virginia.¹⁶¹ According to Faris, the FBI subjected him to daily interrogations from 9 a.m. to 5 p.m. with a break for lunch, posted guards outside his living quarters, and permitted him to take only a one-hour escorted walk outside each night.¹⁶²

Although Faris alleges that he repeatedly requested an attorney, the FBI continued interrogating him without counsel until early April 2003, when he refused to answer any questions without a lawyer present.¹⁶³ On April 6, FBI agents allowed Faris to meet with his newly appointed attorney for the first time.¹⁶⁴ On April 16, Faris's attorney told him that if he did not accept the prosecutor's plea offer, the FBI might send Faris to Guantanamo Bay.¹⁶⁵ On April 17, according to Faris, an FBI agent visited him in his room and told Faris, outside the presence of his counsel, that his time to accept the plea offer was ending and that unless Faris pled guilty he might be sent to Guantanamo Bay.¹⁶⁶ The same day, according to Faris, Faris's attorney telephoned

¹⁵⁸ See *infra* notes 159–179 and accompanying text.

¹⁵⁹ Faris Oct. 28, 2003 Hearing Transcript, *supra* note 12, at 17–18; see United States v. Faris, 388 F.3d 452, 454 (4th Cir. 2004) (denying Faris's motion to withdraw his guilty plea), *vacated and remanded on other grounds*, 544 U.S. 916 (2005) (mem.), *aff'd on remand*, 162 F. App'x 199 (4th Cir. 2005) (unpublished) (per curiam); see also Lichtblau, *supra* note 11, at A1.

¹⁶⁰ Faris Oct. 28, 2003 Hearing Transcript, *supra* note 12, at 18.

¹⁶¹ *Id.* at 18–19.

¹⁶² Declaration of Iyman Faris in Support of Motion to Vacate Conviction Under 28 U.S.C. § 2255, at 3–4, *Faris*, No. 03-CR-189 (E.D. Va. Feb. 3, 2006) [hereinafter Declaration of Iyman Faris].

¹⁶³ *Id.* at 2–3, 6.

¹⁶⁴ *Id.* at 6. Faris's then-attorney indicated that the FBI agents introduced him to Faris. Faris Oct. 28, 2003 Hearing Transcript, *supra* note 12, at 8.

¹⁶⁵ Declaration of Iyman Faris, *supra* note 162, at 18. During the hearing on Faris's motion to withdraw his guilty plea, Faris's attorney said he told Faris in mid-April that if he did not accept the plea bargain, then "there's an agent, they're ready to take you back to at least Columbus tonight and then perhaps Guantanamo Bay, to be decided later." Faris Oct. 28, 2003 Hearing Transcript, *supra* note 12, at 10. During that hearing, the prosecutor denied threatening Faris with enemy combatant detention if he did not plead guilty, but did note that the possibility of sending Faris to Guantanamo Bay came up in a discussion with Faris's attorney while they were driving to Quantico together. *Id.* at 17.

¹⁶⁶ Declaration of Iyman Faris, *supra* note 162, at 18–19.

United States.¹⁷⁵ Despite the FBI's internal doubts about whether the men were truly as dangerous as some analysts believed, the Justice Department pushed hard on the case.¹⁷⁶ Then-U.S. Attorney Michael Battle told the *Washington Post* that his office never explicitly threatened to invoke enemy combatant status during plea negotiations, but that the defendants and their attorneys knew the Defense Department "had a hammer and an interest" and was standing ready to designate the defendants as enemy combatants.¹⁷⁷ Patrick J. Brown, who represented one of the six accused, told the *Post* that he and his fellow defense attorneys advised their clients to plead guilty because of worries that the government would respond to any defense victories in the criminal case by declaring the defendants enemy combatants.¹⁷⁸ All six men pled guilty to providing material support to terrorists, accepting prison terms of six-and-one-half to nine years.¹⁷⁹

One observer has argued that this revolving door between the criminal justice system and enemy combatant detention strongly suggests that the government will use the method that is most convenient to capture a person in the first place, and then will freely turn to another form of detention on an ad hoc basis, depending on what is most advantageous for the government.¹⁸⁰ If that argument is true—or even appears to be true—then someone accused of terrorism-related crimes could reasonably believe that if he fails to cooperate with the government by pleading guilty, he is likely to be designated an enemy combatant.¹⁸¹ Perhaps it should not be surprising, then,

¹⁷⁵ *Id.*

¹⁷⁶ See Matthew Purdy & Lowell Bergman, *Where the Trail Led: Between Evidence and Suspicion; Unclear Danger: Inside the Lackawanna Terror Case*, N.Y. TIMES, Oct. 12, 2003, § 1, at 1 (discussing the case in detail, including one FBI agent's assessment that he did not see the defendant he interviewed as being a potential suicide bomber, but merely "an all-American kid who loves so much what he has in America and, for some reason, somehow he got involved in this").

¹⁷⁷ Powell, *supra* note 174, at A1. Battle later became the Director of the Executive Office for U.S. Attorneys. Press Release, U.S. Dep't of Justice, Attorney General Gonzales to Appoint Michael A. Battle Director of the Executive Office for U.S. Attorneys (Apr. 15, 2004), available at http://www.usdoj.gov/opa/pr/2005/April/05_ag_197.htm.

¹⁷⁸ Powell, *supra* note 174, at A1.

¹⁷⁹ *Id.*

¹⁸⁰ See Radack, *supra* note 6, at 541. According to Jesselyn Radack, who coined the "revolving door" metaphor, moving terrorism defendants back and forth between the criminal justice system and enemy combatant detention is a particularly noxious variety of forum-shopping that makes enemy combatant detentions appear to be situational detentions of convenience rather than detentions on the merits and undermines the legitimacy of both the criminal justice system and the military system. *Id.*

¹⁸¹ See *id.*

that in the eleven terrorism prosecutions the Justice Department has cited as major successes in its annual reports between 2002 and 2004, all but two of the cases terminated with most or all of the defendants choosing to plead guilty.¹⁸²

III. ANALYSIS: ENEMY COMBATANT THREAT BARGAINS SHOULD BE PER SE UNENFORCEABLE

Is a prosecutor's threat, during plea negotiations, to detain the defendant as an enemy combatant akin to the permissible threats of imposing heavier sentences or bringing new indictments against the defendant?¹⁸³ If so, then any terrorism defendant who seeks to invalidate an enemy combatant threat bargain must show that fear of enemy combatant detention so tightly gripped the defendant that, even with the assistance of counsel, the defendant could not make a rational decision.¹⁸⁴

The threat of enemy combatant detention is, however, *sui generis*, and should not be treated like normal plea bargaining tactics for two major reasons.¹⁸⁵ First, enemy combatant threat bargains do not arise from the normal give-and-take of plea bargaining because the choice between a plea bargain and extrajudicial enemy combatant detention—with its limited due process guarantees, unusual severity, and unrelatedness to criminal justice objectives—creates extraordinary pressure to plead guilty to a degree unlike that presented by normal plea bargaining threats.¹⁸⁶ Second, enemy combatant threat bargains create serious public policy concerns and serve few societal interests because

¹⁸² See EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT, FISCAL YEAR 2004, at 19–20 (2004), available at http://www.justice.gov/usao/reading_room/reports/asr2004/asr2004.pdf; EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT, FISCAL YEAR 2003, at 20–22 (2003), available at http://www.usdoj.gov/usao/reading_room/reports/asr2003/03_STAT_Report.pdf; EXECUTIVE OFFICE FOR U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT, FISCAL YEAR 2002, at 20–23 (2002), available at http://www.usdoj.gov/usao/reading_room/reports/asr2002/02_stat_book.pdf; see also CTR. ON LAW & SEC., N.Y. UNIV. SCH. OF LAW, TERRORIST TRIALS: A REPORT CARD 8–12 (2005), <http://www.law.nyu.edu/centers/lawsecurity/publications/terroristtrialreportcard.pdf> (listing the names of defendants, types of charges, and outcomes for major terrorism cases since September 11, 2001).

¹⁸³ See *Bordenkircher v. Hayes*, 434 U.S. 357, 363–65 (1977); *Parker v. North Carolina*, 397 U.S. 790, 795 (1970); *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Brady v. United States*, 397 U.S. 742, 750 (1970).

¹⁸⁴ See *Brady*, 397 U.S. at 750.

¹⁸⁵ See *infra* notes 186–255 and accompanying text.

¹⁸⁶ See *infra* notes 189–216 and accompanying text.

they lack the mutuality of benefits that characterizes normal plea bargains, substantially increase the chance that innocent defendants will plead guilty, serve no societal interests that could not be served equally well by other means, and threaten both the integrity of the criminal justice system and the rule of law.¹⁸⁷ Thus, the most appropriate judicial response is to hold enemy combatant threat bargains per se unenforceable under the Due Process Clause of the Fifth Amendment.¹⁸⁸

A. *Enemy Combatant Threat Bargains Distinguished from the Normal Give-and-Take of Plea Bargaining*

In a normal plea bargaining situation, the prosecutor tries to convince the defendant to plead guilty by emphasizing the consequences of a guilty verdict for the crime charged or by threatening to seek a new indictment against the defendant.¹⁸⁹ In both such situations, the alternative to accepting the plea bargain is going to trial.¹⁹⁰ If the defendant is guilty, then the two choices the prosecutor offers to the defendant—the bargain or the trial—both directly serve criminal justice objectives, because both seek to punish and reform the defendant based on his or her past bad acts.¹⁹¹ This is the backdrop against which the U.S. Supreme Court decided to enforce the plea bargains in *Brady v. United States* and its progeny.¹⁹² In contrast, when a prosecutor tries to convince a defendant to plead guilty by threatening the defendant with enemy combatant status, the prosecutor is not comparing the consequences of a plea bargain to those of a criminal jury trial; rather, the

¹⁸⁷ See *infra* notes 217–255 and accompanying text.

¹⁸⁸ See *Blackledge v. Perry*, 417 U.S. 21, 27–29 (1974) (holding that a prosecutor's reindictment of a defendant on felony charges in response to the defendant's appeal of a misdemeanor conviction imposed unconstitutional pressure discouraging defendants from appealing); *United States v. Jackson*, 390 U.S. 570, 583–85 (1968) (holding a death-by-jury, life-by-plea penalty statute unconstitutional because its very structure penalized defendants for exercising their Sixth Amendment right to demand a jury trial); *infra* notes 256–282.

¹⁸⁹ See *Hayes*, 434 U.S. at 364–65; *Brady*, 397 U.S. at 750.

¹⁹⁰ See, e.g., *Hayes*, 434 U.S. at 365; *Brady*, 397 U.S. at 750.

¹⁹¹ See *Town of Newton v. Rumery*, 480 U.S. 386, 400–01 (1987) (O'Connor, J., concurring); *id.* at 410 (Stevens, J., dissenting); *Hayes*, 434 U.S. at 364–65; *Brady*, 397 U.S. at 750. If, on the other hand, the defendant is not guilty, then the trial is likely to serve the important criminal justice objective of exonerating the innocent. See *Berger v. United States*, 295 U.S. 78, 88 (1935) (describing the U.S. Attorney's obligation both to prevent the guilty from escaping and to refrain from making the innocent suffer).

¹⁹² See *Hayes*, 434 U.S. at 364–65; *Parker*, 397 U.S. at 794–97; *Richardson*, 397 U.S. at 768–70; *Brady*, 397 U.S. at 750–51.

consequences of a plea bargain are weighed against those of the extra-judicial black hole of enemy combatant detention.¹⁹³

For three reasons, the threat of enemy combatant detention creates extraordinary pressure to plead guilty that is unlike the pressures of any traditional plea bargaining tactic.¹⁹⁴ First, the process due to a defendant in enemy combatant detention is uniquely unlike that due to a defendant in a criminal trial.¹⁹⁵ Second, the consequences of being designated an enemy combatant are unusually severe.¹⁹⁶ Third, the threat of enemy combatant detention imports an extra element into plea negotiations that is unrelated to criminal justice objectives.¹⁹⁷ Consequently, the policy reasoning and basic assumptions that underlie *Bordenkircher v. Hayes*, *Brady*, and other typical plea bargaining cases should not apply to enemy combatant threat bargains.¹⁹⁸

First, the process due to a detainee in enemy combatant detention is uniquely unlike that due to a defendant in a criminal trial.¹⁹⁹ In a criminal trial, the government must prove the defendant guilty beyond a reasonable doubt.²⁰⁰ In enemy combatant detention, by contrast, the detainee becomes an enemy combatant as soon as the President designates the person as such, and the detainee bears the burden of *disproving* the government's factual allegations in any subsequent legal challenge.²⁰¹ In a criminal trial, the defendant has the right to be tried before a jury of his or her peers in a civilian court.²⁰² But in enemy combatant detention, the detainee's challenge may take place in

¹⁹³ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533–35 (2004) (describing the extremely limited process that is due to an enemy combatant).

¹⁹⁴ See *infra* notes 199–213 and accompanying text.

¹⁹⁵ See *infra* notes 199–205 and accompanying text.

¹⁹⁶ See *infra* notes 206–209 and accompanying text.

¹⁹⁷ See *infra* notes 210–213 and accompanying text.

¹⁹⁸ See *Hayes*, 434 U.S. at 364–65; *Parker*, 397 U.S. at 794–97; *Richardson*, 397 U.S. at 768–70; *Brady*, 397 U.S. at 750–51.

¹⁹⁹ See *Hamdi*, 542 U.S. at 533–35.

²⁰⁰ *In re Winship*, 397 U.S. 358, 364 (1970) (holding that under the Due Process Clause of the Fourteenth Amendment, no person may be convicted of a crime except by proof beyond a reasonable doubt).

²⁰¹ *Hamdi*, 542 U.S. at 534.

²⁰² See *Duncan v. Kahanamoku*, 327 U.S. 304, 319–24 (1946) (holding that because neither wartime conditions nor the declaration of martial law entitles military tribunals to supplant entirely the criminal courts, civilian defendants accused of crimes are entitled to a criminal trial in a civilian court rather than in a military tribunal); *Ex parte Milligan*, 71 U.S. 2, 119–24 (1866) (holding that a military commission, in a state that is not in rebellion and where the courts are open and unobstructed, has no jurisdiction to try a defendant and that the use of such a tribunal violated the defendant's Fifth and Sixth Amendment rights by denying him a jury trial in a civilian court).

a military tribunal.²⁰³ In a criminal trial, the government may not prove its case by introducing hearsay and evidence that poses too great a risk of unfair prejudice.²⁰⁴ In enemy combatant detention, however, the government may use hearsay against the detainee and generally may dispense with other evidentiary procedures that the government finds overly burdensome.²⁰⁵

In addition, the consequences of being designated an enemy combatant are unusually severe.²⁰⁶ As the result of a guilty plea or guilty verdict at trial, the criminal defendant receives a definite sentence, and the defendant's treatment is limited by the Eighth Amendment right to be free from cruel and unusual punishment.²⁰⁷ As the result of being designated an enemy combatant, the detainee faces many of the same harms as a convict (for example, imprisonment and damage to reputation), but additionally faces an indefinite period of confinement, and the Eighth Amendment prohibition against cruel and unusual punishment might not impose any limitations on the conditions of confinement.²⁰⁸ Because enemy combatant detention involves a potentially lifelong confinement of uncertain length, in unusually restrictive

²⁰³ *Hamdi*, 542 U.S. at 538.

²⁰⁴ See, e.g., FED. R. EVID. 403 (making evidence inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice); FED. R. EVID. 802 (making hearsay inadmissible); *Crawford v. Washington*, 541 U.S. 36, 54–68 (2004) (holding that the Confrontation Clause bars prosecutors from introducing the testimonial statements of any witness who does not appear at trial, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness).

²⁰⁵ *Hamdi*, 542 U.S. at 533–34.

²⁰⁶ See FED. R. CRIM. P. 32 (describing the sentencing procedure in federal courts).

²⁰⁷ See U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment); FED. R. CRIM. P. 32. (describing federal sentencing procedures).

²⁰⁸ See *Riggins v. Nevada*, 504 U.S. 127, 133 (1992) (reserving the issue of whether the Eighth Amendment imposes any limits on the involuntary administration of antipsychotic drugs to a pretrial prisoner, as opposed to a convicted prisoner); *Ingraham v. Wright*, 430 U.S. 651, 664–71 (1977) (declining to extend the Eighth Amendment's prohibition against cruel and unusual punishment to encompass schoolhouse discipline because the Eighth Amendment historically applied only to post-conviction punishment of criminals); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 465–66 (D.D.C. 2005) (noting that for enemy combatants, the uncertain and potentially lifelong nature of their confinement may make enemy combatant detention an even worse deprivation of liberty than being tried, convicted, and sentenced to a fixed term of imprisonment); Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 215 F. Supp. 2d 94, 105 (D.D.C. 2002) (acknowledging the government's contention that persons detained in connection with the September 11 attacks face embarrassment, humiliation, risk of retaliation, harassment, and physical harm due to having their names connected to the attacks), *aff'd in part and rev'd in part*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004).

conditions, it is more extreme than a life sentence imposed after a criminal trial and conviction.²⁰⁹

Lastly, the threat of enemy combatant detention is unrelated to criminal justice objectives.²¹⁰ In normal plea bargains, both possible outcomes—the prosecutor's offers and the threatened trial—serve an important criminal justice objective of punishing guilty defendants' past bad acts (or, in the case of innocent defendants, allowing them the opportunity to exonerate themselves).²¹¹ In contrast, the two purposes of enemy combatant detention are to facilitate interrogation and to prevent the detainee from returning to the battlefield.²¹² Enemy combatant detention is preventive, not punitive, detention, and thus it is unrelated to the criminal justice objective of punishing criminals for past acts.²¹³

As a result of these differences, introducing the threat of enemy combatant detention into plea bargaining disrupts the normal give-and-take of plea bargaining.²¹⁴ *Hayes, Brady*, and their progeny all dealt with situations in which the threats formed part of that normal give-and-take.²¹⁵ Their reasoning should not apply to the enemy combatant threat scenario because the threat of enemy combatant detention—with its limited due process guarantees, stark differences from a criminal trial, and unrelatedness to criminal justice objectives—is a world apart from the traditional threats identified in *Hayes, Brady*, and other typical plea bargaining cases.²¹⁶

B. Public Policy Concerns and the Failure to Serve Societal Interests

In general, the Supreme Court places a high value on preserving the finality of plea bargains, reasoning that refusing to enforce plea bargains arising from the threat of new indictments, inaccurate legal advice, fear of the death penalty, or coerced confessions would en-

²⁰⁹ See *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 465–66.

²¹⁰ *Hamdi*, 542 U.S. at 518.

²¹¹ See *Rumery*, 480 U.S. at 400–01 (O'Connor, J., concurring); *id.* at 410 (Stevens, J., dissenting).

²¹² Brief for the Respondents, *supra* note 3, at 15; Brief for the Petitioners, *supra* note 3, at 28–29.

²¹³ *Hamdi*, 542 U.S. at 518.

²¹⁴ See *Hayes*, 434 U.S. at 364–65; *Parker*, 397 U.S. at 794–97; *Richardson*, 397 U.S. at 768–70; *Brady*, 397 U.S. at 750–51.

²¹⁵ See *Hayes*, 434 U.S. at 364–65; *Parker*, 397 U.S. at 794–97; *Richardson*, 397 U.S. at 768–70; *Brady*, 397 U.S. at 750–51.

²¹⁶ See *Hayes*, 434 U.S. at 364–65; *Parker*, 397 U.S. at 794–97; *Richardson*, 397 U.S. at 768–70; *Brady*, 397 U.S. at 750–51.

danger the viability of all plea bargaining.²¹⁷ The mutual benefits that plea bargaining normally creates for both parties create a strong public policy reason to preserve their finality.²¹⁸ *Town of Newton v. Rumery* teaches, however, that when a particular kind of plea bargain gives rise to unusual and serious public policy concerns, such as in release-dismissal agreements, the courts may judge its enforceability by a different standard.²¹⁹ Enemy combatant threat bargains raise unusual and serious public policy concerns—indeed, concerns markedly more serious than those the Court addressed in *Rumery*.²²⁰ Thus, the severe consequences of enforcing enemy combatant threat bargains outweigh the limited extent to which they serve the general public policy reasons for preserving plea bargains.²²¹

First, enemy combatant threat bargains lack the mutuality of interests that characterizes normal plea bargains.²²² Compared with a trial, a plea bargain allows the government to save scarce judicial resources and secure a prompt punishment.²²³ The defendant, meanwhile, benefits by limiting his or her potential sentence and avoiding the burdens of a trial.²²⁴ But when a plea bargain is compared to the extrajudicial black hole of enemy combatant detention, the balance of interests is very different from both the government's perspective and the defendant's perspective.²²⁵

From the government's perspective, an enemy combatant threat bargain serves the government's interests no better than enemy combatant detention.²²⁶ Regardless of whether the defendant accepts the bargain or chooses to be detained as an enemy combatant, the gov-

²¹⁷ See *Hayes*, 434 U.S. at 364–65; *Parker*, 397 U.S. at 794–97; *Richardson*, 397 U.S. at 768–70; *Brady*, 397 U.S. at 750–51.

²¹⁸ See *Brady*, 397 U.S. at 752–53. As the result of a plea bargain, the state saves scarce judicial resources and obtains prompt punishment, and the defendant limits his exposure and avoids the burdens of a trial. *Id.* at 752.

²¹⁹ See 480 U.S. at 393–94; *id.* at 400–01 (O'Connor, J., concurring); *id.* at 408–11 (Stevens, J., dissenting).

²²⁰ See *id.* at 393–94 (majority opinion); *id.* at 400–01 (O'Connor, J., concurring); *id.* at 408–11 (Stevens, J., dissenting).

²²¹ See *Santobello v. New York*, 404 U.S. 257, 261 (1971) (describing the benefits that plea bargaining provides to society as a whole); *Brady*, 397 U.S. at 752–53 (describing the mutuality of benefits that legitimates plea bargaining).

²²² See *Brady*, 397 U.S. at 752–53.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ See *infra* notes 226–236 and accompanying text.

²²⁶ See *infra* note 227 and accompanying text.

ernment expends few judicial resources, achieves a prompt resolution, and successfully imprisons the defendant.²²⁷

From the defendant's perspective, however, introducing the threat of enemy combatant detention throws the traditional balance of interests out the window and makes pleading guilty the only rational choice.²²⁸ If the defendant rejects the plea bargain and is designated an enemy combatant, there is no burden of proof for the defendant to waive.²²⁹ There is no right against self-incrimination to waive.²³⁰ There is no jury trial to waive.²³¹ There is no right of confrontation to waive.²³² Thus, the government offers the defendant a choice only in that the defendant may choose between waiving these rights himself, or watching the government take these rights away.²³³ From the defendant's perspective, this perverts the plea negotiations into the old children's trick, "heads I win, tails you lose."²³⁴ Indeed, a

²²⁷ Compare *Hamdi*, 542 U.S. at 531–32 (describing the government interests that the Court has sought to accommodate in determining the due process standards for enemy combatant detention), with *Santobello*, 404 U.S. at 260 (describing the government interests in plea bargaining). Also, if the defendant has committed only minor crimes or no crimes at all, then the bargain may actually work against the government's interest in imposing a punishment proportional to the defendant's wrongdoing. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL: TITLE 9, CRIMINAL DIVISION § 9-27.400B (2002) (instructing federal prosecutors that plea bargaining should honestly reflect the totality and seriousness of the defendant's conduct), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrrm.htm#9-27.400; see also *Berger*, 295 U.S. at 88 (emphasizing that the U.S. Attorney's interest in a criminal prosecution is not merely to win convictions, but also to serve the broader goals of justice); MODEL PENAL CODE § 1.02(2)(c) (1962) (describing one of the goals of the Model Penal Code as seeking to avoid excessive, disproportionate, or arbitrary punishments).

²²⁸ See *infra* notes 229–236 and accompanying text.

²²⁹ See *Hamdi*, 542 U.S. at 534 (holding that when a person challenges his or her classification as an enemy combatant, the person may bear the burden of proving his or her innocence).

²³⁰ See *Chavez v. Martinez*, 538 U.S. 760, 769–70 (2003) (plurality opinion) (stating that where police shot a suspect multiple times, arrested him, and then coercively interrogated him in the ambulance and the emergency room, the state did not violate his Fifth Amendment right against self-incrimination because none of the compelled statements were used against him in any subsequent criminal proceeding). Because enemy combatant detention is not a form of punishment and does not terminate in a criminal proceeding, one could argue that *Chavez v. Martinez* would govern the applicability of the Fifth Amendment to enemy combatant detention. See *Hamdi*, 542 U.S. at 518; *Martinez*, 538 U.S. at 769–70.

²³¹ See *Hamdi*, 542 U.S. at 538 (holding that when a person challenges his or her classification as an enemy combatant, a military tribunal is a permissible venue).

²³² See *id.* at 533–34, 538 (holding that when a person challenges his or her classification as an enemy combatant, hearsay and affidavit evidence are permissible).

²³³ See *id.* at 518, 534, 538; *Martinez*, 538 U.S. at 769–70.

²³⁴ See E. COBBHAM BREWER, *DICTIONARY OF PHRASE AND FABLE* (Bartleby.com online ed., 2000) (1898), <http://www.bartleby.com/81/8064.html>.

defendant who refuses to plead guilty loses several significant rights that a convicted felon retains, such as a sentence of definite length, freedom from cruel and unusual treatment, and the right to visits from attorneys.²³⁵ This illusory choice makes the Fifth, Sixth, and Seventh Amendments mere hollow promises, and it eliminates the mutuality of interests that has traditionally legitimated plea bargaining.²³⁶

Second, applying *Brady* standards to enemy combatant threat bargains would legitimize these extraordinarily coercive circumstances and thereby substantially increase the likelihood that innocent defendants will choose to plead guilty.²³⁷ The choice between pleading guilty and being designated an enemy combatant leaves no opportunity for the defendant to force the government to make its proof; rather, the defendant merely has a choice between two kinds of detention.²³⁸ Given this choice, only the hardest (or foolhardest) of defendants would reject the plea bargain and opt to be designated an enemy combatant.²³⁹ The very structure of the arrangement is so coercive that it invites perjury in the form of false guilty pleas.²⁴⁰ In other contexts,

²³⁵ *Ingraham*, 430 U.S. at 664–71; *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 465–66 (noting that for enemy combatants, the uncertain and potentially lifelong nature of their confinement may make enemy combatant detention an even worse deprivation of liberty than being tried, convicted, and sentenced to a fixed term of imprisonment); Declaration of Vice Admiral Lowell E. Jacoby (Jan. 9, 2003), reprinted in Joint App. at 86, *Padilla I*, 542 U.S. 426 (2004) (No. 03-1027), available at <http://www.usdoj.gov/osg/briefs/2003/3mer/2mer/2003-1027.mer.ja.pdf> (arguing that any visits to Padilla by friends, family, and especially legal counsel would harm national security by interrupting the interrogation process).

²³⁶ See *Ex parte Milligan*, 71 U.S. at 123–24 (opining that allowing military justice to supplant the common law courts would make democracy a failure and put an end to liberty).

²³⁷ See *Brady*, 397 U.S. at 758 (noting that the Court might have reached a different result had the tactic in question substantially increased the likelihood that defendants would falsely plead guilty).

²³⁸ See *Hamdi*, 542 U.S. at 534 (holding that when a person challenges his or her classification as an enemy combatant, the person may bear the burden of proving his or her innocence).

²³⁹ See *Perry*, 417 U.S. at 28 (emphasizing that if the prosecutor can easily use new indictments to “up[] the ante” whenever a defendant appeals, then only the hardest of defendants will choose to exercise his or her right to appeal).

²⁴⁰ See *United States v. Waterman*, 732 F.2d 1527, 1531–33 (8th Cir. 1984) (en banc, with an equally divided court) (reversing the defendant’s conviction because a prosecution witness’s plea agreement promised the witness a favorable sentencing recommendation contingent upon the results of his testimony); *United States v. Dailey*, 589 F. Supp. 561, 564–65 (D. Mass. 1984) (holding that a plea agreement that made a witness’s sentencing recommendation contingent upon the successful prosecution violated due process), *rev’d*, 759 F.2d 192 (1st Cir. 1985) (holding that the court below misread the language of the agreement and that the agreement did not make the sentencing recommendation contingent upon the government’s successful use of the proffered testimony).

courts have refused to countenance plea agreements that invite perjury; the courts should do so in this context as well.²⁴¹

Third, enforcing enemy combatant threat bargains serves no legitimate governmental interest that could not be served equally well merely by designating those who deserve to be enemy combatants as enemy combatants in the first place.²⁴² As described above, both enemy combatant detention and plea bargains lead to limited expenditure of judicial resources, prompt resolution, and imprisonment of the defendant.²⁴³ From the government's perspective, the only benefit that a defendant's guilty plea has over enemy combatant detention is that the widespread use of enemy combatant detention would be politically untenable, whereas frequent criminal convictions of suspected terrorists are likely to be popular.²⁴⁴ Popularity, however, is not the kind of interest that a court should weigh in the government's favor.²⁴⁵

Finally, court enforcement of enemy combatant threat bargains undermines the rule of law and wrongly rewards the President for clothing military detention in civilian trappings.²⁴⁶ As the Supreme

²⁴¹ See *Waterman*, 732 F.2d at 1531-33; *Dailey*, 589 F. Supp. at 564-65. As Justice Sutherland famously stated in *Berger v. United States*, a federal prosecutor's interest in a criminal prosecution is not merely to win convictions, but to do justice. See 295 U.S. at 88. Though the prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id.*

²⁴² See *Hamdi*, 542 U.S. at 531-32 (describing the government interests that the Court has sought to accommodate in determining due process standards for enemy combatant detention); *Santobello*, 404 U.S. at 260 (describing the government interests in plea bargaining).

²⁴³ See *Hamdi*, 542 U.S. at 531-32; *Santobello*, 404 U.S. at 260.

²⁴⁴ See *COLE*, *supra* note 5, at 46 (noting that enemy combatant detention has received far more criticism than many other anti-terrorism measures that threaten civil liberties); President George W. Bush, President Discusses Patriot Act (June 9, 2005) (transcript available at <http://www.whitehouse.gov/news/releases/2005/06/20050609-2.html>) (arguing that the Justice Department has made communities safer by filing criminal charges against more than 400 terrorism suspects and convicting more than half of those charged).

²⁴⁵ See *United States v. Eichman*, 496 U.S. 310, 318 (1990) (holding that popular opposition to flag burning did not increase the government's interest in suppressing that form of speech); *Cooper v. Aaron*, 358 U.S. 1, 16 (1958) (holding that segregationists' threats of mob violence did not justify denying black schoolchildren the right to attend integrated schools); see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1942) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.").

²⁴⁶ See *Korematsu v. United States*, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting) (arguing that the courts should not carry out a military expedient that has no place in law

Court recognized in *Boykin v. Alabama*, a plea bargain can become a "perfect cover-up of unconstitutionality."²⁴⁷ This is especially true when the plea bargain covers up the quiet pressure that military authority exerts on a criminal defendant.²⁴⁸ Enemy combatant detention serves very different objectives from imprisonment of criminals.²⁴⁹ The former is a preventive detention for national security purposes, and the latter punishes the defendant for his or her past violations of the law.²⁵⁰ Such military authority is dangerous enough on its own, because military detention of civilians in lieu of criminal prosecution is generally hostile to the Anglo-American legal tradition; its very flexibility invites abuse of power.²⁵¹ But these dangers multiply when courts let the wolf of wartime powers slip into the sheep's clothing of the judicial system.²⁵² As Justice Robert Jackson wisely observed in his dissent to the World War II internment case of *Korematsu v. United States*, the courts must exercise only the judicial power, applying law and abiding by the Constitution, lest they lose their identity as civil courts and become instruments of military policy.²⁵³ Whenever a court enforces an enemy combatant threat bargain, the court turns

under the Constitution); *Ex parte Milligan*, 71 U.S. at 121 (holding that a military tribunal cannot derive its authority from the judicial power).

²⁴⁷ See *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

²⁴⁸ See *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting) (arguing that when a military commander does something unconstitutional, it is an incident, but when the courts approve of it, that incident becomes constitutional doctrine).

²⁴⁹ See *Hamdi*, 542 U.S. at 518 (describing enemy combatant detention as a means of preventing detainees from returning to the battlefield and taking up arms, not a form of punishment or vengeance); Declaration of Vice Admiral Lowell E. Jacoby, *supra* note 235, reprinted in Joint App. at 86 (describing the importance for national security of detaining Padilla for interrogation purposes).

²⁵⁰ See *Hamdi*, 542 U.S. at 518.

²⁵¹ See *id.* at 559–69 (Scalia, J., dissenting) (arguing that, absent suspension of the writ of habeas corpus, the Founding Fathers never intended to grant the military the power to detain citizens without trial); *Ex parte Milligan*, 71 U.S. at 121–24 (holding that military detention can never be applied to citizens in non-rebel states where the courts are open and unobstructed, because civil liberty and this kind of martial law cannot coexist); cf. *Korematsu*, 323 U.S. at 220 (noting that in wartime circumstances of great peril, the government may take actions that are inconsistent with the United States' basic governmental institutions); *id.* at 224 (Frankfurter, J., concurring) (arguing that the government may take actions under the war power that would be condemned as lawless in other contexts).

²⁵² See *Korematsu*, 323 U.S. at 245–46 (Jackson, J., dissenting) (arguing that judicial approval of the internment of Japanese Americans struck a deeper blow to liberty than the military internment order itself, because when a judicial opinion puts the imprimatur of constitutionality on a military order, the court has validated the principle for all time, leaving it lying about "like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need").

²⁵³ *Id.* at 247.

plea bargaining—and therefore the courts themselves—into an instrument of military policy.²⁵⁴ Such intermingling of military and judicial roles threatens the integrity of the criminal justice system and poses grave threats to the rule of law.²⁵⁵

C. The Need for *Per Se* Unenforceability

Enemy combatant threat bargains do not arise from the normal give-and-take of plea bargaining, they create serious public policy concerns, and they serve few, if any, societal interests.²⁵⁶ Thus, the standards for enforcement of normal plea bargains should not apply to enemy combatant threat bargains.²⁵⁷ *Rumery's* tougher standards for enforcing release-dismissal agreements also fail to protect adequately the defendant's right to due process of law.²⁵⁸ Instead, it is most appropriate to apply the reasoning of *United States v. Jackson*, *North Carolina v. Pearce*, and *Blackledge v. Perry* to invalidate enemy combatant threat bargains.²⁵⁹

Rumery's release-dismissal standard—the defendant must have entered into the agreement voluntarily and intelligently, and the public interest in enforcing the agreement must outweigh the public policy harmed by enforcement—is not appropriate for the enemy combatant threat bargain context.²⁶⁰ The *Rumery* standard relies upon a careful, case-by-case factual inquiry into the public interest in enforcing the agreement.²⁶¹ But under *Hamdi v. Rumsfeld*, the government's conclusory affidavits attesting to the defendant's dangerousness are an adequate basis for designating the defendant an enemy combat-

²⁵⁴ See *id.*

²⁵⁵ See *Duncan*, 327 U.S. at 320–22 (describing the view of the Founding Fathers that military power must not be permitted to interfere with civilian government, and particularly the judiciary).

²⁵⁶ See *supra* notes 189–255 and accompanying text.

²⁵⁷ See *Rumery*, 480 U.S. at 400–01 (O'Connor, J., concurring); *id.* at 410–13 (Stevens, J., dissenting).

²⁵⁸ See *infra* notes 260–265 and accompanying text. See generally *Rumery*, 480 U.S. 386.

²⁵⁹ See *Perry*, 417 U.S. at 27–29 (holding that the prosecutor's reindictment of the defendant on felony charges in response to the defendant's appeal of a misdemeanor conviction imposed unconstitutional pressure discouraging the defendant from appealing); *North Carolina v. Pearce*, 395 U.S. 711, 723–24 (1969) (holding that a judge's imposition of heavier sentences upon re-trial chilled defendants' exercise of the right to appeal); *Jackson*, 390 U.S. at 583–85 (holding the death-by-jury, life-by-plea structure of the statute unconstitutional because it penalized defendants for exercising their Sixth Amendment right to demand a jury trial).

²⁶⁰ See *Rumery*, 480 U.S. at 401–02 (O'Connor, J., concurring).

²⁶¹ See *id.* at 392, 397–98 (majority opinion).

ant.²⁶² Thus, to evaluate the public interest in enforcing an enemy combatant threat bargain, the court would have to rely solely on the factual assertions in the government's conclusory affidavits, with no way of probing those assertions.²⁶³ An inquiry so starved of facts would not satisfy *Rumery's* demand for case-by-case decision making.²⁶⁴ Moreover, if history is any guide, a court's unquestioning reliance on the government's uncorroborated factual assertions would very likely lead to injustice.²⁶⁵

In addition, the government's primary interest in enforcing the plea bargain—to prevent dangerous terrorists from carrying out attacks by keeping them detained—is actually illusory.²⁶⁶ If the threat of enemy combatant designation is truly justified, then the government could just as easily remove the defendant from the streets by designating the defendant an enemy combatant in the first place.²⁶⁷ And if the

²⁶² See *Hamdi*, 542 U.S. at 538.

²⁶³ See *id.*; *Rumery*, 480 U.S. at 392, 397–98.

²⁶⁴ See *Rumery*, 480 U.S. at 397–98 (endorsing a case-by-case approach for examining the enforceability of release-dismissal agreements); *id.* at 401–02 (O'Connor, J., concurring) (describing the close examination of many factors that indicates whether or not a release-dismissal agreement should be enforced).

²⁶⁵ See, e.g., *Korematsu*, 323 U.S. at 223–24 (upholding *Korematsu's* conviction for violating the race-based wartime exclusion orders); *Hirabayashi v. United States*, 320 U.S. 81, 102 (1943) (upholding *Hirabayashi's* conviction for violating the race-based wartime curfew orders). The most infamous illustration of the perils of such reliance comes from the World War II Japanese American internment cases of *Korematsu v. United States* and *Hirabayashi v. United States*, in which the Supreme Court relied on the factual conclusions of an Army report to uphold race-based curfews and exclusion of Japanese Americans as necessary military measures. See *Korematsu*, 323 U.S. at 217–24; *Hirabayashi*, 320 U.S. at 100–05. Nearly half a century after the internment program ended, historical researchers discovered that the report was a knowing and deliberate misrepresentation; War Department officials had doctored the report in order to assist with the internment litigation and then suppressed evidence of their misrepresentation. See *Hirabayashi v. United States*, 828 F.2d 591, 593–99 (9th Cir. 1987) (evaluating *Hirabayashi's* petition for a writ of error *coram nobis* to set aside his conviction due to manifest injustice); *Korematsu v. United States*, 584 F. Supp. 1406, 1416–19 (N.D. Cal. 1984) (evaluating *Korematsu's* petition for a writ of error *coram nobis* to set aside his conviction due to manifest injustice). In the mid-1980s, lower courts acknowledged this injustice by vacating the wartime criminal convictions of two of the Japanese Americans who had violated the race-based military orders. See *Hirabayashi*, 828 F.2d at 608 (vacating *Hirabayashi's* wartime conviction); *Korematsu*, 584 F. Supp. at 1420 (vacating *Korematsu's* wartime conviction). More recent examples of such government prevarication also exist. See *United States v. Wilson*, 289 F. Supp. 2d 801, 807–17 (S.D. Tex. 2003) (vacating a former CIA official's criminal conviction for exporting explosives to Libya because the government knowingly introduced a false affidavit by the executive director of the CIA that prejudiced his defense).

²⁶⁶ See *Hamdi*, 542 U.S. at 519.

²⁶⁷ See *id.* Of course, numerous distinguished scholars and jurists have convincingly argued that threatening a U.S. citizen with enemy combatant detention is *never* justified ab-

threat of enemy combatant designation is not justified, then the government has no legitimate interest in detaining the person other than by normal criminal processes.²⁶⁸

The inability of the courts to conduct an in-depth analysis of the public interest in enforcement, as well as the very serious liberty, due process, and judicial integrity interests harmed by enforcement, counsel for a per se rule against enforcement of enemy combatant threat bargains.²⁶⁹ There is constitutional support for such a rule.²⁷⁰ Like the statutory structure in *Jackson*, the judge's resentencing in *Pearce*, and the prosecutor's reindictment in *Perry*, threats of enemy combatant detention during plea bargaining violate the Due Process Clause of the Fifth Amendment because they chill the exercise of a defendant's right to a jury trial, deterring all but the hardiest defendants from refusing the proffered plea bargain.²⁷¹ In order to prevent these due process violations from taking place, courts should refuse to enforce enemy combatant threat bargains.²⁷²

This per se rule does not interfere with the enforcement of normal plea bargains because the policy reasoning behind normal plea bargaining decisions does not apply to enemy combatant threat bargains.²⁷³ First, the policy reasoning behind normal plea bargaining decisions such as *Brady* and *Hayes* is inapplicable because enemy combatant threat bargains are so clearly distinguishable from the traditional give-and-take of plea bargaining.²⁷⁴ Threats of enemy combatant detention are more akin to the unconstitutional threats that the Court condemned in *Pearce* and *Perry*.²⁷⁵ Second, enemy combatant detention is itself unique.²⁷⁶ Enemy combatant detention—a potentially lifelong confinement of uncertain length, in unusually restrictive

sent an explicit congressional suspension of habeas corpus. See, e.g., *id.* at 554–79 (Scalia, J., dissenting); Chemerinsky, *supra* note 6, at 1125–26. But their arguments have not yet carried the day. See *Hamdi*, 542 U.S. at 516–24 (holding that the AUMF authorizes the detention of a U.S. citizen as an enemy combatant).

²⁶⁸ See *Padilla v. Hanft (Padilla III)*, 432 F.3d 582, 585–86 (4th Cir. 2005) (describing the government's apparent ulterior motives for transferring Padilla between enemy combatant detention and the criminal justice system).

²⁶⁹ See *Rumery*, 480 U.S. at 392, 397–98.

²⁷⁰ See *Perry*, 417 U.S. at 27–29; *Pearce*, 395 U.S. at 725.

²⁷¹ See *Perry*, 417 U.S. at 27–29; *Pearce*, 395 U.S. at 725; *Jackson*, 390 U.S. at 583.

²⁷² See *Perry*, 417 U.S. at 27–29; *Pearce*, 395 U.S. at 725.

²⁷³ See *Corbitt v. New Jersey*, 439 U.S. 212, 212–13 (1978); *Hayes*, 434 U.S. at 364–65; *Parker*, 397 U.S. at 794–97; *Richardson*, 397 U.S. at 768–70; *Brady*, 397 U.S. at 750–51.

²⁷⁴ See *Hayes*, 434 U.S. at 364–65; *Parker*, 397 U.S. at 794–97; *Richardson*, 397 U.S. at 768–70; *Brady*, 397 U.S. at 750–51.

²⁷⁵ See *Perry*, 417 U.S. at 27–29; *Pearce*, 395 U.S. at 723–24.

²⁷⁶ See *Guantanamo Detainee Cases*, 355 F. Supp. 2d at 465–66.

conditions—is an unusually severe form of detention, more extreme than a life sentence imposed after a trial and conviction, and it arises from a process where confinement is a much more certain outcome than that of any criminal trial.²⁷⁷

This rule of per se unenforceability should apply regardless of a prosecutor's motivation for making the detention threat.²⁷⁸ As the Court stated in *Perry*, a defendant is entitled to pursue his or her constitutional rights without fear of government retaliation, no matter what the government's motivations.²⁷⁹ This is particularly true where the rights at stake are as fundamental as those at stake here, and where the criminal justice system will be harmed rather than helped by widespread enforcement of enemy combatant threat bargains.²⁸⁰ Thus, because they arise from an environment that improperly chills the defendant's exercise of the Sixth Amendment right to a jury trial, courts should hold enemy combatant threat bargains per se unenforceable as a violation of the defendant's Fifth Amendment right to due process.²⁸¹ In time, such a ruling would have the salutary effect of constraining the influence of enemy combatant detention on the criminal justice system, both by deterring prosecutors from offering such bargains and by encouraging executive or legislative constraints on the enemy combatant detention power.²⁸²

²⁷⁷ See *id.*

²⁷⁸ See *Perry*, 417 U.S. at 27–28.

²⁷⁹ See *id.* at 28–29.

²⁸⁰ See *id.*

²⁸¹ See *id.* at 27–29; *Pearce*, 395 U.S. at 723–24; *Jackson*, 390 U.S. at 583–85.

²⁸² Cf. *Miranda v. Arizona*, 384 U.S. 436, 490 (1966) (suggesting a particular warning to safeguard defendants' rights during custodial interrogations but indicating that Congress and the states are free to develop their own safeguards so long as they are equally effective). One possible legislative solution would be for Congress to make clear that it has not authorized the enemy combatant power in any instance outside the context of battlefield captures. See *Hamdi*, 542 U.S. at 518 (holding that the AUMF authorizes the detention of Hamdi, who was captured on an Afghan battlefield, as a fundamental incident of war); *Padilla I*, 542 U.S. at 464 (Stevens, J., dissenting) (arguing that the AUMF does not authorize the long-term incommunicado detention of U.S. citizens arrested in the United States). Another, less dramatic solution would be to prohibit the Defense Department, through legislation or an inter-agency agreement, from designating a person as an enemy combatant after that person has been indicted pursuant to a federal terrorism investigation. See Radack, *supra* note 6, at 542 (criticizing the absence of such restrictions). Even if the political branches failed to take action, however, courts sitting in equity could achieve a similar result by putting the government to an election of remedies: that is, forcing the government to choose between enemy combatant detention and criminal prosecution soon after the defendant's arrest. See *United States v. Or. Lumber Co.*, 260 U.S. 290, 294–99 (1922) (describing election of remedies as an equitable doctrine barring a party, after

CONCLUSION

Plea bargaining is an important part of our judicial system. For two major reasons, however, plea bargains induced by threats of enemy combatant detention should not be governed by normal plea bargaining standards. First, enemy combatant threat bargains do not arise from the normal give-and-take of plea bargaining, because the choice between a plea bargain and extrajudicial enemy combatant detention—with its limited due process guarantees, stark differences from a criminal trial, and unrelatedness to criminal justice objectives—creates an extraordinary pressure to plead guilty unlike that of any normal plea bargaining tactic. Second, enemy combatant threat bargains create serious public policy concerns and serve few societal interests, because they lack the mutuality of benefits that characterizes normal plea bargains, substantially increase the chance that innocent defendants will plead guilty, serve no societal interests that could not be served equally well by other means, and threaten both the integrity of the criminal justice system and the rule of law. Because enemy combatant threat bargains chill defendants' exercise of their Sixth Amendment right to a jury trial and do not deserve the deference courts normally afford normal plea bargains, and because the limited factual basis required for an enemy combatant designation will starve for facts any case-by-case balancing of interests, the most appropriate judicial response is to hold enemy combatant threat bargains *per se* unenforceable under the Due Process Clause of the Fifth Amendment.

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