

Fanning the Flames of Hatred: Torture, Targeting, and Support for Terrorism[†]

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*History will not judge us kindly.*¹

I. INTRODUCTION

Following the terrorist attacks of September 11, 2001, the United States government adopted a range of measures in the “Global War on Terrorism”² designed, in large part, to thwart future terrorist attacks

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1. Joby Warrick, *CIA Tactics Endorsed in Secret Memos; Waterboarding Got White House Nod*, WASH. POST, Oct. 15, 2008, at A01, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/10/14/AR2008101403331_pf.html (quoting former U.S. Attorney General John Ashcroft during a 2004 White House briefing in which CIA interrogation methods were discussed).

2. The term “war on terrorism” appears to have been first used in print by the *New York Times* on April 2, 1881, as the title to a collection of news pieces reporting on such things as “extraordinary protective measures” then being implemented in Russia to address voting issues. In the post-9/11 world, the term “global war on terrorism” appears to have been first used by the U.S. government in December 2001 in a document produced by the Coalition Information Centers entitled, *The Global War on Terrorism: The First 100 Days*, which is available at <http://webharvest.gov/peth04/20041023112013/www.whitehouse.gov/news/releases/2001/12/100dayreport.pdf>. The phrase has been commonly used since that time to refer to a large constellation of efforts, methods, and strategies used by the United States (and some allied nations) to combat terrorism and those alleged

against the United States and capture or kill those responsible for acts that have already been committed.³ The term “Global War on Terrorism” (GWOT) has been used to refer to an extremely broad range of activities, including traditional methods of warfare, intelligence gathering, and law enforcement techniques.⁴ While many of the tactics used by the United States involve traditional governmental functions and undoubtedly lawful responses to threats of violence against our civilian population, other methods adopted are more controversial and questionable in their morality, legality, and efficacy.⁵ In particular, great debate has raged about the moral, legal, and practical consequences of indefinite detention without charge or trial and the use of torture or other “enhanced interrogation methods” against detainees.⁶

to support terrorism. In March 2009, the Obama Administration announced that it preferred not to use the term “Global War on Terrorism.” Scott Wilson and Al Kamen, ‘Global War on Terror’ Is Given New Name, WASH. POST, Mar. 25, 2009, at A04, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html>.

3. Undoubtedly, this has been the primary purpose of most anti-terror efforts. However, some methods used in the “war on terrorism” have served additional purposes. For instance, some legislative provisions championed as efforts to combat terrorism have explicitly served “other purposes.” See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, § 204, 115 Stat. 272 (2001). More recent legislation to modify provisions of FISA also served multiple purposes, including providing retroactive immunity from civil liability for telecommunication companies that may have violated FISA. See Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, § 201, 122 Stat. 2436, 2468-70 (2008). Critics of this latter piece of legislation also contend that the main purpose of this immunity provision was to ensure that violations of FISA and the Fourth Amendment to the U.S. Constitution by the Bush Administration would remain shielded from public view. See, e.g., 154 CONG. REC. S6108-09 (daily ed. June 25, 2008) (statement of Sen. Russ Feingold,) available at <http://feingold.senate.gov/statements/08/06/20080625f.htm>; 154 CONG. REC. S311, S314 (daily ed. Jan. 25, 2008) (statement of Sen. Chris Dodd), available at <http://dodd.senate.gov/index.php?q=node/4226>; and Statement of Rep. Ron Paul, available at <http://www.house.gov/paul/congreccongrec2008/cr062008h.htm>.

4. See, e.g., K. JACK RILEY ET AL., STATE AND LOCAL INTELLIGENCE IN THE WAR ON TERRORISM (2005), available at http://www.rand.org/pubs/monographs/2005/RAND_MG394.pdf; Donna Miles, *Bush Calls Iraq Central Front in Terror War, Vows Victory*, AM. FORCES PRESS SERV., Oct. 6, 2005, <http://www.defenselink.mil/news/newsarticle.aspx?id=18145>.

5. The scope of this article will not include analysis of whether methods adopted by the U.S. are unconstitutional, nor whether they violated international law. Numerous other articles and books have been written on the legality of these efforts. For some of the best discussions of legal proscriptions on the war on terrorism and of whether the U.S. has violated constitutional principles, see LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY* (2008); JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006); and PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008).

6. For a fascinating discussion of the intersection of immorality and illegality in the Bush Administration’s sanctioning of torture, see Bill Moyers’ discussion with constitutional law professor Bruce Fein in *Bill Moyers Journal*, available at <http://www.pbs.org/moyers/journal/07132007/profile.html>, and Moyers’s discussion with former Solicitor General Charles Fried, available at <http://www.pbs.org/moyers/journal/10262007/profile.html>. The Bush Administration and some defenders maintain that they have not sanctioned torture, but instead, that “enhanced interrogation methods” have been used. See, e.g., Mark Tran, *Q and A: Torture and ‘Enhanced Interrogation’*, GUARDIAN.CO.UK, Apr. 18, 2008, <http://www.guardian.co.uk/world/2008/apr/18/usa.terrorism>. For the purposes of this article, the Bush Administration’s lawyerly efforts to semantically eliminate torture are of no moment. While such distinctions may matter in other contexts, whether termed torture, inhumane treatment, abuse, or “enhanced interrogation methods,” the nomenclature matters little to those suffering such interrogations. Nor does it matter to populations who fear they are being targeted by such practices. It is the effect these methods have on the populations studied with which the authors are concerned, so the authors will use these various terms to refer to methods of

In this article, we examine some of the more controversial methods adopted by the United States and analyze their consequences. In an earlier article, we studied the methods used by the British government in Northern Ireland to combat terrorism.⁷ In *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Fighting Terrorism in Northern Ireland*, we documented the manner in which detention without trial and torture, as well as other forms of inhumane treatment, greatly increased terrorism in Northern Ireland.⁸ We also demonstrated that other anti-terror methods that protected the civil liberties of the civilian population helped reduce political violence.⁹ *Into the Fire* compared the Northern Ireland experience to the then-nascent efforts in the U.S. war on terror, noting our perception that the U.S. appeared to be in danger of repeating some of the mistakes made while fighting terrorism in Northern Ireland. We warned against the adoption of detention without charge and against abusive interrogation policies by the U.S., and predicted that such policies, if adopted, would alienate Arab and Muslim populations at home and abroad. Such alienation undermines efforts to cooperate with these important groups and leads to increased violence.¹⁰ This article builds upon our findings reported in *Into the Fire* and examines the effects of abusive and torturous interrogations and detention-without-trial policies adopted by the U.S. in the GWOT.

We are cognizant that we are writing at a time of change in the United States. A new presidential administration has begun in recent weeks, and there are early, but strong, indications that the U.S. detention and interrogation policies will change, perhaps dramatically.¹¹

interrogation that, if done to a loved one, we would consider to be an outrage against their human dignity.

7. Michael O'Connor & Celia Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657 (2003).

8. *Id.* at 1677–94.

9. *Id.* at 1699–1705.

10. *Id.* at 1734–44.

11. The steps taken by the Obama Administration, however, are far from uniform and consistent. See, e.g., Editorial, *Continuity of the Wrong Kind*, N.Y. TIMES, Feb. 11, 2009, at A30, available at <http://www.nytimes.com/2009/02/11/opinion/11wed2.html?scp=6&sq=obama%20extraordinary%20rendition&st=cse>. The new administration has not deviated from Bush Administration policies in several important respects. First, despite repeated assurances of a new openness in government, Obama Administration officials continued to assert the “state secrets privilege” in the case of *Mohamed v. Jeppesen Dataplan, Inc.*, No. 08-15693 (9th Cir. Feb. 9, 2009), oral argument available at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002777. See also John Schwartz, *Obama Backs Off a Reversal on Secrets*, N.Y. TIMES, Feb. 10, 2009, at A12, available at <http://www.nytimes.com/2009/02/10/us/10torture.html>. The “state secrets” involved in Mohamed’s case concern widely reported details of his “extraordinary rendition” to Morocco, his torture there, and subsequent transfer to Guantanamo. *Id.* While Mohamed was released from Guantanamo to Great Britain on February 23, 2009, the Obama Administration has not clearly repudiated the possibility of using extraordinary rendition as a tool to fight terrorism. See Times Topics, *Binyam Mohamed*, N.Y. TIMES, Mar. 24, 2009, http://topics.nytimes.com/top/reference/timestopics/people/m/binyam_mohamed/index.html?scp=1&sq=binyam%20mohamed%20released&st=cse; Scott Shane et al., *Obama Reverses Key Bush Security Policies*, N.Y. TIMES, Jan. 22, 2009, <http://www.nytimes.com/2009/01/23/us/politics/23obama.html?scp=9&sq=obama%20extraordinary%20rendition&st=cse>. For a discussion of “extraordinary rendition” see *infra* note 28.

President Barack Obama has issued an executive order mandating the closing of the detention facilities at Guantanamo Bay¹² and a review of the detainees' treatment to ensure that it comports with Common Article 3 of the Geneva Conventions.¹³ Additionally, President Obama has issued an executive order to ensure lawful interrogations, explicitly requiring compliance with Common Article 3, the Convention Against Torture, and the Army Field Manual.¹⁴ This order also prohibits reliance upon any interpretations of these laws promulgated by the Office of Legal Counsel (OLC) between September 11, 2001, and January 20, 2009.¹⁵ These moves have been met with some resistance by former Bush Administration officials,¹⁶ by political opponents of President Obama,¹⁷ and also by some within the ranks of military officers.¹⁸ Former Vice President Dick Cheney has publicly stated that any move away from the Bush Administration policies of detention and abusive interrogations, including torture, will leave the nation open to terrorist attacks.¹⁹ Cheney has defended Guantanamo and waterboarding, arguing that these actions were directly responsible for preventing further terrorism.²⁰ Cheney stated, "I think there's a high probability of such an attempt. Whether or not they can pull it off depends [on] whether or not we keep in place policies that have allowed us to defeat all further

12. See Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009), available at <http://edocket.access.gpo.gov/2009/pdf/E9-1893.pdf>.

13. This latter provision on humane treatment of detainees appears to extend beyond the confines of Guantanamo, applying to Guantanamo "or at a facility owned, operated, or controlled by a department or agency of the United States . . ." *Id.* § 6.

14. See Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009), available at <http://edocket.access.gpo.gov/2009/pdf/E9-1885.pdf>.

15. *Id.* § 3(c).

16. John Yoo, a former Office of Legal Counsel (OLC) lawyer who attempted to redefine torture out of existence for President Bush, has publicly chided President Obama for not seeing the value of torturing people suspected of possessing knowledge of terrorist activities. "On the advice of his intelligence advisers, the president could have authorized coercive interrogation methods like those used by Israel and Great Britain in their antiterrorism campaigns. []He could even authorize waterboarding, which he did three times in the years after 9/11." John Yoo, *Obama Made a Rash Decision on Gitmo: The President Will Soon Realize that Governing Involves Hard Choices* WALL ST. J., Jan. 29, 2009, <http://online.wsj.com/article/SB123318955345726797.html>. The arrogance of Yoo, who supposes to understand the burdens of governance more than the President of the United States, is only exceeded by his folly. He argues for the use of "coercive interrogation methods like those used by Israel and Great Britain" without any apparent understanding of how counterproductive those methods proved to be. Yoo would compound this error by advising the president that "he could even authorize waterboarding," which is torture and a war crime. Yoo and others in the OLC who gave similar advice to former President Bush are reportedly being investigated by the Office of Professional Responsibility to determine whether their profoundly bad lawyering amounted to ethical violations. See, e.g., Durbin, Whitehouse Seek Status of Report on Torture Authorizations at the Department of Justice, Feb. 16, 2009, <http://durbin.senate.gov/showRelease.cfm?releaseId=308363>.

17. See, e.g., Carol Rosenberg, *Guantanamo Order Foresees Some Detainees Coming to U.S.*, McClatchy, Jan. 21, 2009, <http://www.mcclatchydc.com/100/story/60476.html> (describing opposition expressed by Republican House Minority Leader John Boehner).

18. See, e.g., *Military Judge Refuses to Halt Trial of USS Cole Bombing Suspect*, FOX NEWS, Jan. 29, 2009, <http://www.foxnews.com/politics/2009/01/29/military-judge-refuses-halt-trial-uss-cole-bombing-suspect/>.

19. See, e.g., John F. Harris, Mike Allen & Jim Vandehei, *Cheney Warns of New Attacks*, POLITICO, Feb. 5, 2009, <http://www.politico.com/news/stories/0209/18390.html>.

20. *Id.*

attempts, since 9/11, to launch mass-casualty attacks against the United States.”²¹ Cheney’s argument is premised in the assertion that any restoration of constitutional principles will lead to increased terrorism. Cheney’s question is apt: “If you turn ‘em loose and they go kill more Americans, who’s responsible for that?”²² The United States must accurately assess whether the policies adopted by the Bush Administration are lessening the likelihood of terrorist attacks or merely fanning the flames of hatred. It is particularly important at this time, therefore, to accurately assess the impact of U.S. detention and interrogation policies and determine whether the effects of these policies are likely to be long-lived.

This article will first identify the nature of the detention and interrogation practices that the United States has employed in the war on terror, and briefly discuss the mechanisms through which similar practices used in Northern Ireland led to alienation of the targeted community and increased levels of violence.²³ Next we will examine available data concerning opinions of the U.S. methods in the war on terror among Arab and Muslim populations in the U.S. and abroad. We will then discuss available data concerning the manner in which these attitudes affect U.S. efforts to gather intelligence and protect against terrorist attacks.

Briefly stated, our study has found that abusive interrogations and detention without charge or trial have alienated broad swaths of Arab and Muslim communities.²⁴ Attitudes among Arab and Muslim populations concerning the United States and the U.S. war on terror continue to worsen, despite a declining level of support for terrorism among these same communities in the U.S. and around the world.²⁵ Consequently, the U.S. has been unable to take advantage of the general disaffection among Muslims and Arabs with suicide bombings and other terrorist methods that target civilians to recruit speakers of Arabic, Farsi, Urdu,

21. *Id.* The basic assumption underlying Cheney’s argument is that detention without charge or process and torture produce results in the form of reliable and critical information. As has been repeatedly observed, however, “this is a hypothetical assumption that has never been backed up by reliable evidence.” DANIEL MOECKLI, HUMAN RIGHTS AND NON-DISCRIMINATION IN THE ‘WAR ON TERROR’ 11 (2008).

22. Harris, Allen & Vandehei, *supra* note 19.

23. Discussion of the Northern Ireland precedent is particularly apt, given that General Petraeus, Commander of the U.S. Central Command, with responsibility over U.S. forces from Egypt to Afghanistan, including Iraq, has suggested that the conflict in Iraq is analogous to that engaged in by the British in Northern Ireland. Karen DeYoung, *Petraeus: Iraq ‘Challenges’ to Last for Years*, WASH. POST, June 18, 2007, at A11, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/17/AR2007061700830.html>. Moreover, proponents of the Bush Administration’s detention and interrogation policies explicitly rely upon the Northern Ireland experience as an example of why we should use these methods. See discussion *supra* note 16.

24. See, e.g., THE PEW GLOBAL ATTITUDES PROJECT, THE GREAT DIVIDE: HOW WESTERNERS AND MUSLIMS VIEW EACH OTHER 1 (June 22, 2006), available at <http://pewglobal.org/reports/pdf/253.pdf>.

25. *Id.*; see also *infra* Section III.D.

and other languages as translators and intelligence operatives. American tactics in the war on terror have created more enemies among the communities in the best position to assist the U.S. in ferreting out terrorists, and have lessened the likelihood of cooperation among people with no affinity for violence. The U.S. government has disregarded the political and diplomatic efforts that are most effective at reducing violence, while pursuing methods with a proven track record for creating alienation and increasing violence. The authors conclude that the net effect of these policies has been to render Americans less safe than we would be had such practices never been implemented.

II. ADDING THE SAME FUEL TO DIFFERENT FIRES: DETENTION AND INTERROGATION IN THE U.S. AND IN IRELAND

While there are some notable differences, detention and interrogation policies used by the United States in the GWOT to combat terrorism bear marked similarities to the tactics used by the authorities combating political violence in Northern Ireland during “the Troubles.”²⁶ An examination of the policies adopted by both governments can teach much about the efficacy of those procedures.

A. *Detention in the U.S. War on Terror*

Detention practices in the United States since September 11, 2001, have taken various forms. These practices have evolved based on the location of the detention, whether within the United States, extra-territorial holdings of the United States, cooperating countries, or the theaters of battle,²⁷ Afghanistan and Iraq.²⁸ In turn, each location has

26. It must be noted that some of the methods used during interrogations, such as waterboarding, are so egregious that they are regarded as torture and war crimes. U.S. Attorney General Eric Holder recently reiterated, “Waterboarding is torture. My Justice Department will not justify it, will not rationalize it and will not condone it” Randall Mikkelsen, *U.S. Government Vows Not to Use “Waterboarding”*, REUTERS, Mar. 2, 2009, <http://www.reuters.com/article/topNews/idUSTRE5213OE20090302?feedType=RSS&feedName=topNews>. Holder’s views are not new. The U.S. has repeatedly prosecuted our enemies as war criminals when they have used waterboarding against U.S. servicemen. See, e.g., Evan Wallach, *Waterboarding Used to Be a Crime*, WASH. POST, Nov. 4, 2007, at B01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/02/AR2007110201170.html>. For a discussion of “the Troubles” see *infra* note 79.

27. See, e.g., INT’L COMM. OF THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN “HIGH VALUE” DETAINEES IN CIA CUSTODY (Feb. 2007), available at <http://www.nybooks.com/icrc-report.pdf>; see also STAFF OF S. COMM. ON ARMED SERVICES, 110TH CONG., COMMITTEE INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY (Comm. Print Nov. 20, 2008), available at http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf.

We use the term “theater(s) of battle” to distinguish it from the term “theater of war” as used in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). As the Court noted in *Youngstown*, the “theater of war” was an expanding concept, even in 1952. This concept, of course, was exponentially expanded, with equally far-reaching consequences, during the GWOT. While that expansion is relevant to aspects of the U.S. policy of detention and interrogation, it is distinguishable and, in the context used here, should be understood to include only those detention and interrogation centers used by U.S. personnel in Iraq and Afghanistan, places where the U.S. has large concentra-

its own various forms of detention, with each form raising its own unique set of questions. Common to each use of detention, however, has been the objective of using and structuring detention to facilitate interrogation.

Detention by U.S. forces has taken three primary forms in the days since 9/11: (1) detention pursuant to legal process—both criminal and immigration; (2) detention on U.S. soil of U.S. citizens and persons with lawful resident status as “enemy combatants”; and (3) detention of foreign nationals extra-territorially, including at Guantanamo Bay²⁹ and other “black sites.”³⁰

The most familiar form of detention has been in the form of criminal prosecutions under the regularly applied criminal law.³¹ In addition to those criminally prosecuted in the immediate aftermath of 9/11, thousands of immigrants to this country were detained under immigration holds without charge or trial.³² The familiar form of detention pursuant to legal process is not the focus of this article; the detention of immigrants with minimal process is more relevant for our purposes and is encompassed in the subsequent data concerning the extent to which Muslims and Arabs feel that they were unfairly targeted for detention following 9/11.

One of the most troubling innovations in detention practices is the detention on U.S. soil of alleged “enemy combatants.” This practice,

tions of active-duty battle forces.

28. In addition to the various forms of detention discussed in this article, the U.S. has also rendered an untold number of people to other countries that practice torturous interrogation methods. This practice, known as rendition or extraordinary rendition, has continued to the present. It has been reported that the Obama Administration intends to continue using rendition as an instrument to fight terrorism. See, e.g., Greg Miller, *Obama Preserves Renditions as Counter-Terrorism Tool*, L.A. TIMES, Feb. 1, 2009, available at <http://www.latimes.com/news/la-na-rendition1-2009feb01.0.7548176.full.story>.

29. One of the early legal disputes that needed to be resolved concerning the detainees held at Guantanamo was whether the military base there qualified as “U.S. territory.” While the United States Supreme Court held that federal court jurisdiction extended to habeas corpus petitions on behalf of Guantanamo detainees, the Bush Administration decided to use the base there to detain suspects in the GWOT precisely because it was extra-territorial. See *Rasul v. Bush*, 542 U.S. 466, 480-81 (2004).

30. These so-called “black sites” include some undetermined number of locations where authorities detained “high value” suspects, including Khalid Sheik Mohammed and Ramzi Binalshibh. See, e.g., Jonathan Karl, *‘High Value’ Detainees Transferred to Guantanamo*, ABC NEWS, Sept. 6, 2006, <http://abcnews.go.com/International/story?id=2400470>.

31. Between 2002 and late 2006, the federal government has initiated 579 terrorism-related prosecutions under the Justice Department Program of International Terrorism. Transactional Records Access Clearing House, Syracuse University, <http://trac.syr.edu/tracreports/terrorism/169/include/time.html> (last visited Apr. 4, 2009). Most of these prosecutions involve people the government believes are connected to terrorist activity in some way or another, though the charges filed have not always been clearly related to criminal terroristic behavior. The median sentence imposed in these cases in the two years following 9/11 was twenty-eight days. *Id.* The median sentence through May 26, 2006, was twenty days. *Id.* The government has highlighted the intelligence-gathering aspect of these prosecutions. See Dep’t of Justice, *Fact Sheet: Justice Department Counter-Terrorism Efforts Since 9/11*, Sept. 11, 2008, available at <http://www.usdoj.gov/opa/pr/2008/September/08-nsd-807.html>.

32. David Cole, *The Priority of Morality: The Emergency Constitution’s Blind Spot*, 113 YALE L.J. 1753, 1753 n.2 (2004).

exercised by the United States since September 2001, has involved only a handful of people, including two U.S. citizens. Since 9/11, the executive has held three people in this manner: Yaser Hamdi, Jose Padilla, and Ali Saleh al-Marri.³³ The U.S. government detained these men as “enemy combatants” under an expanded view of executive power. As espoused by the Bush Administration, this expanded power purportedly permits the executive branch to seize and detain incommunicado, both citizens and non-citizens alike, their entire lives.³⁴

Hamdi and Padilla were U.S. citizens at the time of their designation as enemy combatants. Sometime in 2001, Yaser Esam Hamdi was seized in Afghanistan by the Northern Alliance, and in early 2002, he was transferred to Guantanamo Bay.³⁵ When authorities learned that Hamdi was born in Louisiana, and therefore may have U.S. citizenship, he was transferred to the Norfolk Naval Station Brig.³⁶ When Hamdi’s father filed a habeas corpus petition on his behalf, the United States Court of Appeals for the Fourth Circuit ruled that his detention was legally authorized, and he had no further basis to challenge his detention.³⁷ In mid-2004, the United States Supreme Court reversed the Fourth Circuit, setting important limitations on the power of the executive.³⁸ In *Hamdi v. Rumsfeld*,³⁹ the Court held that, absent suspension, habeas corpus was available to detainees held on U.S. soil.⁴⁰ The Court also held that Hamdi was entitled to notice of the allegations supporting his classification as an enemy combatant and the opportunity to rebut these allegations.⁴¹ Finally, the Court held that Hamdi was permitted access to counsel to assist him in this endeavor.⁴² Three months after the Supreme Court decision, Hamdi was released from military detention with no further prosecution of any kind if he renounced any claim to U.S. citizenship.⁴³ He was sent to Saudi Arabia.⁴⁴

33. President Obama ordered review of al-Marri’s detention in a memorandum directed to the Attorney General, the Secretaries of Defense, State, and Homeland Security, and the Director of National Intelligence on January 22, 2009. See Memorandum from President Barack Obama to the Attorney General, the Secretary of Defense, the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence (Jan. 22, 2009), available at http://www.whitehouse.gov/the_press_office/ReviewoftheDetentionofAliSalehKahlah/.

34. *Hamdi Voices Innocence, Joy at Reunion*, CNN.COM, Oct. 14, 2004, <http://www.cnn.com/2004/WORLD/meast/10/14/hamdi/>.

35. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004).

36. *Hamdi v. Rumsfeld*, 296 F.3d 278, 280 (4th Cir. 2002), *rev’d*, 542 U.S. 507 (2004).

37. *Id.* at 283.

38. See *Hamdi*, 542 U.S. at 539.

39. 542 U.S. 507 (2004).

40. *Id.* at 525.

41. *Id.* at 533.

42. *Id.* at 539. The Court did not delve further into the issue concerning the right to counsel, as it noted that since certiorari had been granted, Hamdi had been given access to counsel. *Id.*

43. Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, http://www.nytimes.com/2004/10/12/international/middleeast/12hamdi.html?_r=1&oref=slogin.

44. See, e.g., Jerry Markon, *Hamdi Returned to Saudi Arabia*, WASH. POST, Oct. 12, 2004, at A02, available at <http://www.washingtonpost.com/wp-dyn/articles/A23958-2004Oct11.html>.

Jose Padilla was arrested after landing in Chicago, Illinois.⁴⁵ He was originally held on a material witness warrant, until the military seized him and transferred him to a military brig in South Carolina.⁴⁶ According to then-Attorney General John Ashcroft, the seizure and detention of Padilla had thwarted an ominous “dirty bomb” attack.⁴⁷ After years of detention and interrogation, his case appeared destined for review by the Supreme Court on the lawfulness of his detention.⁴⁸ However, a fair reading of the plurality opinion in the *Hamdi* case, along with Justice Scalia’s dissent in *Hamdi*, suggested that the government might not prevail on its case in *Padilla*.⁴⁹ Rather than face this upset, the federal government indicted Padilla on federal charges unrelated to the supposed “dirty bomb” attack and transferred him to Florida for criminal prosecution before an Article III court.⁵⁰

Following a similar path in this newly constructed detention maze was the third person held as an “enemy combatant.” Ali Saleh al-Marri was legally in the United States on a student visa while studying at Bradley University in Peoria, Illinois at the time he was detained.⁵¹ He was arrested at his home on a material witness warrant and later charged with various fraud-related criminal charges.⁵² In June 2003, the government declared him an enemy combatant.⁵³ The military has held him since that time.⁵⁴ The government’s stated purpose both in the initial decision to detain al-Marri and in establishing the conditions of his detention was to facilitate interrogation.⁵⁵ On February 27, 2009, the Department of Justice announced that a federal grand jury in Illinois had indicted al-Marri for providing material support to al Qaeda.⁵⁶

45. See, e.g., *Profile: Jose Padilla*, BBC NEWS, Aug. 16, 2007, <http://news.bbc.co.uk/2/hi/americas/2037444.stm>.

46. *Rumsfeld v. Padilla*, 542 U.S. 426, 430-32 (2004).

47. *U.S. Authorities Capture ‘Dirty Bomb’ Suspect*, CNN.COM, June 10, 2002, <http://archives.cnn.com/2002/US/06/10/dirty.bomb.suspect/>.

48. Padilla’s case had already gone to the Supreme Court on the question of whether his habeas petition should have been filed with the courts in South Carolina, where he was being detained by the military, rather than in New York, where he had been initially detained as a material witness. *Padilla*, 542 U.S. at 432.

49. *Hamdi v. Rumsfeld*, 542 U.S. 507, 578 n.6 (2004) (Scalia, J., dissenting) (“It is difficult to imagine situations in which security is so seriously threatened as to justify indefinite imprisonment without trial, and yet the constitutional conditions of rebellion or invasion are not met.”).

50. David Stout, *U.S. Indicts Padilla After Three Years in Pentagon Custody*, N.Y. TIMES, Nov. 22, 2005, <http://www.nytimes.com/2005/11/22/politics/22cnd-terror.html>.

51. See *Al Qaeda Suspect Declared ‘Enemy Combatant’*, CNN.COM, June 24, 2003, <http://www.cnn.com/2003/LAW/06/23/qatar.combatant/>.

52. *Id.*

53. *Id.*

54. Jerry Markon, *High Court May Consider Legality of Detention*, WASH. POST, Nov. 9, 2008, at A02, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/11/08/AR2008110802266.html?nav=rss_politics.

55. See, e.g., Press Release, Brennan Center for Justice, U.S. Government Admits It Destroyed Videotape in Enemy Combatant Case (May 2, 2008) (describing government admission of at least fifty interrogations of al-Marri and Padilla), available at http://www.brennancenter.org/content/resource/us_government_admits_it_destroyed_videotape_in_enemy_combatant_case/.

56. Dep’t of Justice, *Ali Al-Marri Indicted for Providing Material Support to Al-Qaeda*, Feb.

The third and most frequently used form of post-9/11 detention practiced by the United States is the indefinite detention of hundreds of non-citizens at Guantanamo Bay and other “black sites” around the world.⁵⁷ At Guantanamo, the U.S. has held hundreds of people captured overseas and kept them as unlawful enemy combatants, with significant variation in the number of detainees at different times. According to the Bush Administration, these unlawful enemy combatants retain virtually no protections under U.S. or international law. It has been estimated that over 700 people have been detained at Guantanamo Bay since it was opened.⁵⁸ An exact number has been difficult to establish because “our own Government refused to tell the American people an exact number.”⁵⁹ As with the detention of “enemy combatants” within the United States, interrogation is a defining feature of detention at Guantanamo.⁶⁰ As one commentator has stated, “Guantanamo was designed to be the ideal interrogation chamber.”⁶¹

In addition to Guantanamo, in the years since 2001, the United States has held an undetermined number of supposed “high value” detainees at “black sites” throughout the world in cooperating countries for the purposes of interrogation through use of extreme methods.⁶² As President Bush described it:

In some cases, we determine that individuals we have captured pose a significant threat, or may have intelligence that we and our allies need to have to prevent new attacks. Many are al Qaeda operatives or Taliban fighters trying to conceal their identities, and they withhold information that could save American lives. In these cases, it has been necessary to move these individuals to an environment where they can be held secretly [sic], questioned by experts, and—when appropriate—prosecuted for terrorist acts.⁶³

Finally, the U.S. military has practiced various degrees of detention in the theaters of battle, Afghanistan and Iraq. These theater-of-

27, 2009, available at <http://www.usdoj.gov/opa/pr/2009/February/09-ag-177.html>.

57. On November 13, 2001, President Bush issued the Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, available at <http://www.globalsecurity.org/security/library/policy/dod/011113-bush-military-order.htm>.

58. ACLU, *Guantanamo Bay: Six Years and Counting . . .*, Jan. 10, 2008, available at <http://www.aclu.org/safefree/general/33623prs20080110.html>.

59. 151 CONG. REC. S6390 (daily ed. June 13, 2005) (statement of Sen. Patrick Leahy), available at http://www.fas.org/irp/congress/2005_cr/s061305.html.

60. See, e.g., SANDS, *supra* note 5, at 20.

61. Joseph Margulies, *Making Sense of Camp Delta*, 25 WASH. U. J.L. & POL'Y 27, 31 (2007).

62. This detention and interrogation procedure appears to have been authorized under a classified September 17, 2001 Presidential Order. The existence of the Presidential Order on Detention Facilities Abroad was acknowledged in November 2006 in response to a suit filed by the American Civil Liberties Union. Letter from Dep't of Justice to ACLU (Nov. 9, 2006), available at http://www.aclu.org/images/torture/asset_upload_file825_27365.pdf; Letter from CIA to ACLU (Nov. 10, 2006), available at http://www.aclu.org/images/torture/asset_upload_file825_27365.pdf.

63. George W. Bush, President of the United States, Statement regarding Secret Detention Centers in the EU (Sept. 6, 2006), available at http://www.cfr.org/publication/15060/president_bush_statement_regarding_secret_detention_centers_in_the_eu.html; see Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A01, available at <http://www.washingtonpost.com/ac2/wp-dyn/A57363-2004Oct23?language=printer>.

operations detention practices have brought the world the now too-familiar horrors of Abu Ghraib⁶⁴ and the rarely seen ghosts of Bagram Airbase.⁶⁵ The Bagram facility may draw increasing scrutiny as the U.S. shifts focus from Iraq to Afghanistan in the GWOT. Bagram Air Base is just north of Kabul and is where the U.S. military originally detained many Guantanamo detainees. Numerous deaths of detainees have been reported at Bagram, some of which have been determined to be homicides.⁶⁶

B. Interrogation Practices in the U.S.

As mentioned above, at each level of detention, the United States, under the Bush Administration, asserted that it has been guided by its desire to obtain intelligence information from the detainees during interrogation. As with each of the forms of detention practiced, the methods of interrogation employed have varied at each level of detention. However, when examined through the lens of its policy objective of interrogation and intelligence gathering, it is possible to see the thread that connects the widespread detention of immigrants after 9/11 to interrogations occurring on the battlefield and at “black sites.” For example, Rachel Meeropol, a lawyer for the Center for Constitutional Rights,⁶⁷ in discussing a suit filed by noncitizens who were arrested and held for a month on alleged visa violations in the weeks following 9/11, stated, “The kind of torture, interrogation and arbitrary detention that we now associate with Guantanamo and secret C.I.A. facilities really started right here”⁶⁸

Commentators assert that even in the detention and interrogation of immigrants rounded up in mass sweeps in the immediate aftermath of 9/11, interrogation and intelligence gathering was a primary objective.⁶⁹

64. “The nightmarish images [that came out of Abu Ghraib] showed American soldiers . . . forcing Iraqis to masturbate. American soldiers sexually assaulting Iraqis with chemical light sticks. American soldiers laughing over dead Iraqis whose bodies had been abused and mutilated.” John Barry, Michael Hirsh & Michael Isikoff, *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 28; see also Seymour Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 43.

65. For a compelling examination of the evidence of torture at Bagram Air Base, see TAXI TO THE DARKSIDE (Jigsaw Productions 2007), a documentary film which chronicles the death of a young Afghan taxi driver named Dilawar. See also Suzanne Goldenberg, *CIA Accused of Torture at Bagram Base: Some Captives Handed to Brutal Foreign Agencies*, GUARDIAN.CO.UK, Dec. 27, 2002, <http://www.guardian.co.uk/world/2002/dec/27/usa.afghanistan>.

66. See, e.g., Bagram Air Base, http://www.humanrightsfirst.org/us_law/etn/det_fac/bagram.htm (last visited Apr. 4, 2009).

67. The Center for Constitutional Rights is a human rights organization “dedicated to advancing and protecting rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights.” Center for Constitutional Rights, <http://ccrjustice.org/> (last visited Apr. 4, 2009).

68. Nina Bernstein, *Held in 9/11 Net, Muslims Return to Accuse U.S.*, N.Y. TIMES, Jan. 23, 2006, <http://www.nytimes.com/2006/01/23/nyregion/23detain.html?pagewanted=print>.

69. Author David Cole stated,

[T]ake the government’s aggressive focus on Arab and Muslim immigrants in the wake of the 9/11 attacks. By its own accounts, it locked up over 5,000 foreign nationals in preventive detention in the first 2 years after 9/11, sought out 8,000 Arab and Muslim men for FBI

It has become increasingly clear that the detentions of Padilla, Hamdi, and al-Marri were instigated and designed around the objective of interrogation.⁷⁰ For example, with respect to al-Marri, Jonathan Hafetz of the Brennan Center for Justice at New York University School of Law has stated that the “administration’s goal in declaring Mr. al-Marri an enemy combatant was unmistakable: to create a prison beyond the law in the United States, where a person could be detained without due process and interrogated under highly coercive conditions without any oversight or restrictions.”⁷¹

For those detained at “black sites,” and at Guantanamo Bay, there is little argument that interrogation with no oversight or limitation appears to be the driving force.⁷² While arguably the prison at Guantanamo Bay served such purposes as a place to hold, charge, and try those captured during the conflict in Afghanistan,⁷³ the sole purpose behind the “black sites” is to afford opportunities to engage in extreme interrogation methods away from the prying eyes of the Red Cross, lawyers, and the public.⁷⁴ The entire purpose behind keeping these sites secret was to prevent anyone from having any contact with these detainees—to increase their sense of isolation and render them truly incommunicado.⁷⁵

The interrogation methods utilized during the GWOT have varied greatly depending on the location of the interrogation and the people conducting the interrogation. At one end of the spectrum is the “voluntary,” out-of-custody questioning of American Arab and Muslim citizens.⁷⁶ At the other end of the spectrum are such torturous techniques as waterboarding used by the CIA on such people as Abu Zubaida.⁷⁷

interviews, and called in 80,000 Arab and Muslim foreign nationals for special registration, fingerprinting and photographing.

Questions and Answers for David Cole and Jules Lobel, www.thenewpress.com/resource_files/LessSafeLessFr_070816164130_6113.doc (last visited Apr. 4, 2009); see also O'Connor & Rumann, *Into the Fire*, *supra* note 7, at 1748–49.

70. See, e.g., Celia Rumann, *Tortured History: Making Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 694–95 (2004).

71. THE ENEMY COMBATANT PAPERS: AMERICAN JUSTICE, THE COURTS, AND THE WAR ON TERROR 847 (Karen J. Greenberg, Joshua L. Dratel & Jeffrey S. Grossman eds., 2008).

72. MARGULIES, *supra* note 5, at 4 (noting that “by far the most important purpose of the prison, was as an interrogation chamber”).

73. *Id.*

74. See Mark Benjamin, *The CIA’s Latest “Ghost Detainee”*, SALON, May 22, 2007, http://www.salon.com/news/feature/2007/05/22/cia_prisoner/.

75. YUVAL GINBAR, WHY NOT TORTURE TERRORISTS?: MORAL, PRACTICAL, AND LEGAL ASPECTS OF THE ‘TICKING BOMB’ JUSTIFICATION FOR TORTURE 237–39 (2008).

76. On November 9, 2001, then-Attorney General John Ashcroft directed federal law enforcement officials to interview 5,000 men between the ages of eighteen and thirty-five who had entered the United States in the preceding two years on non-immigrant visas and who came from countries the government had linked to terrorism. “The list of individuals was compiled solely on the basis of national origin, and even the Justice Department acknowledged that it had no basis for believing that any of these men had any knowledge relevant to a terrorism investigation.” ACLU, SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11, at 5 (2004), available at <http://www.aclu.org/FilesPDFs/racial%20profiling%20report.pdf>.

77. See, e.g., Leonard Doyle, *CIA Waterboarding ‘Broke Suspect After 35 Seconds’*,

Between those extremes are various methods ranging from the unquestionably permissible, standard criminal-type interrogation—accompanied by the full complement of constitutional protections including such things as advisement on *Miranda* rights—to the practices which, taken alone or in concert, violate various statutory, treaty, and constitutional obligations.⁷⁸

These practices by the U.S. government echoed those used in Northern Ireland to combat political violence. The results in Northern Ireland unfortunately predicted what the U.S. has wrought through overly-broad detentions and torturous interrogations.

C. Detention and Interrogation Practices in Northern Ireland: A Comparison with U.S. Practices

Detention during the Troubles⁷⁹ in Northern Ireland came in two primary forms: (1) “detention upon arrest, [which arose] out of the police powers to arrest; and (2) deprivation of liberty as a result of an extra-judicial process,” also known as internment.⁸⁰ Throughout its long history, internment took various formulations over the lifetime of its practice, ranging from military seizure and detention to one involving civilian procedures.⁸¹ As with the detention and interrogation powers asserted in the United States in the years since 2001, those interned in Northern Ireland often were subjected to enhanced, extreme, and torturous interrogation techniques. These techniques have subsequently been “branded as ‘torture’ and ‘inhuman and degrading treatment’ by the European Commission on Human Rights and Court respectively.”⁸²

As we documented in *Into the Fire*, the misuse of arrest, detention, and interrogation practices in Northern Ireland proved to be extremely counter-productive to the efforts to combat political violence.⁸³ In Northern Ireland, the great majority of those detained pursuant to the government’s emergency powers, which were enacted to combat politi-

INDEPENDENT, Dec. 12, 2007, <http://www.independent.co.uk/news/world/americas/cia-waterboarding-broke-suspect-after-35-seconds-764595.html>.

78. These various practices include the use of stress positions, isolation, hooding, sleep deprivation, nudity, gender coercion, use of individual phobias (such as fear of dogs) to induce stress, exposure to cold weather, and non-injurious physical contact. See SANDS, *supra* note 5, at 11; SECRET ORCON, LOG OF DETAINEE 063 (2006), available at <http://www.time.com/time/2006/log/log.pdf>; GTMO Interrogation Techniques, June 22, 2004, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02appendix.pdf>.

79. “The Troubles” is generally used to refer to the period of political violence and instability that occurred in Northern Ireland between the mid-1960s and the mid-1990s. See generally TIM PAT COOGAN, THE TROUBLES: IRELAND’S ORDEAL 1966–1996 AND THE SEARCH FOR PEACE (1996).

80. O’Connor & Rumann, *Into the Fire*, *supra* note 7, at 1668.

81. *Id.* at 1668–70; see generally GERARD HOGAN & CLIVE WALKER, POLITICAL VIOLENCE AND THE LAW IN IRELAND (1989).

82. O’Connor & Rumann, *Into the Fire*, *supra* note 7, at 1679 (citing COMMITTEE ON THE ADMINISTRATION OF JUSTICE, NO EMERGENCY, NO EMERGENCY LAW: EMERGENCY LEGISLATION RELATED TO NORTHERN IRELAND—THE CASE FOR REPEAL (1995)).

83. See *id.*

cal violence, were never charged.⁸⁴ For example, “little more than 1 percent (262 persons)” of the 22,282 persons arrested under the Prevention of Terrorism Acts were charged with offenses under those Acts.⁸⁵ The Northern Irish experience with internment was even less successful. “Owing to poor intelligence the army detained many people in 1971 who had played no part in the violence or para-military activity.”⁸⁶ “The army quite often simply picked up the wrong people, a son for a father, the wrong ‘man with a beard living at no. 47’ and so on.”⁸⁷ This was true despite the fact that for many reasons Britain had an enormously better intelligence apparatus in Northern Ireland than we will ever have in Afghanistan. Belfast is a short distance from the United Kingdom,⁸⁸ shares the same language, and the residents are of the same race. All these factors should have prevented the rounding up of innocents in their equivalent of the war on terror. Yet, it did not. “[I]nternment was resented [by the targeted community] as oppressive and discriminatory.”⁸⁹

It is not surprising, then, that the detention powers assumed by the U.S. since 9/11 have been equally resented as oppressive and discriminatory. For example, it is now obvious that many of those detained at Guantanamo prison were captured mistakenly, based solely on the number of people cleared by the U.S. military and released without charge. Indeed, some of those detained appear to have been victims of ruthless bounty seekers who collected on promises of payment by the United States for turning in Taliban members.⁹⁰ Moreover, few of those detained by the United States have been conclusively adjudicated to have been actually engaged in terrorism against the United States. Out of the over 700 people who have been detained over time at Guantanamo Bay, 245 remained there as of January 17, 2009.⁹¹ Through Combatant Status Review Tribunals, established in response to Supreme Court precedent, at least 520 of those detained at Guantanamo

84. *Id.* at 1681.

85. *Id.* These numbers only indicate those detained under the Prevention of Terrorism Acts (PTA), and do not reflect the greater number of people detained by the Military and the Royal Ulster Constabulary under the Emergency Powers Acts. Therefore, as a percentage of all persons detained, the number charged under the PTA is even smaller.

86. *Id.* at 1679 (citing COMMITTEE ON THE ADMINISTRATION OF JUSTICE, *supra* note 82).

87. COOGAN, *supra* note 79, at 126.

88. Belfast is approximately 110 miles from Glasgow, Scotland, and 129 miles from Blackpool, England. Cities Located Close to Belfast, <http://www.timeanddate.com/worldclock/distances.html?n=919> (last visited Apr. 4, 2009).

89. O'Connor & Rumann, *Into the Fire*, *supra* note 7, at 1679 (citing COMMITTEE ON THE ADMINISTRATION OF JUSTICE, *supra* note 82).

90. See MARK DENBEAUX & JOSHUA DENBEAUX, REPORT ON GUANTANAMO DETAINEES, A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA (2006), http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

91. See Global Security.org, *Guantanamo Bay Detainees*, http://www.globalsecurity.org/military/facility/guantanamo-bay_detainees.htm (last visited Apr. 4, 2009).

have been determined to be “enemy combatants”⁹² through an administrative rather than adversarial procedure.⁹³

To date, only one of these military tribunals has reached its conclusion, in the case of Salim Hamdan,⁹⁴ yet more than 500 of those detained over time have been released.⁹⁵ Of the three enemy combatants held in U.S. military brigs, one has been released without further charge, one has been convicted of regular criminal offenses that were not the purported basis for detention, and one has recently been charged with providing material support for al Qaeda.⁹⁶

It is not simply in the area of detention policies where the United States has replicated the practices of Northern Ireland with similar unsuccessful results. Mirroring the well-documented mistreatment of suspects and detainees subject to interrogation in Northern Ireland⁹⁷ is the mounting evidence of systematic mistreatment of those detained in the United States’ GWOT. Similar to U.S. attempts to recast the nature of the methods imposed during interrogation, by speaking of them as “extreme interrogation,” was the British practice of describing its interrogation methods in Northern Ireland as “interrogation in depth.”⁹⁸ These word games are as unsuccessful in the U.S. as they were in the United Kingdom. More importantly, as in Northern Ireland, the damage wrought by these policies is not limited to semantically tortured language. As we demonstrated in *Into the Fire*, the practices of extreme interrogation methods employed in Northern Ireland not only led to an increase in the ranks of terrorist organizations,⁹⁹ it damaged the image

92. “Enemy combatant” is defined for purposes of this tribunal as “an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners[,] . . . [including] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” See JENNIFER K. ELSEA, *DETAINEES AT GUANTANAMO BAY 2-3* (2005), available at <http://64.233.169.104/search?q=cache:sgHnJ4mV9MJ:www.fas.org/sgp/crs/natsec/RS22173.pdf+guantanamo+bay+detainees&hl=en&ct=clnk&cd=11&gl=us>.

93. See *id.* at 2.

94. Salim Hamdan was a driver for Osama bin Laden. Josh White & William Branigan, *Hamdan to Be Sent to Yemen: Bin Laden Driver Spent Seven Years at Guantanamo*, WASH. POST, Nov. 25, 2008, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/24/AR2008112403159.html>. He received a recommended sentence of five and a half years, with credit for time served. *Id.* Hamdan served his remaining sentence in Yemen and was released in January 2009. *Yemen Releases Former bin Laden Driver from Jail*, N.Y. TIMES, Jan. 11, 2009, available at <http://www.nytimes.com/> (search for “Hamdan Released”; then follow “Yemen Releases” hyperlink).

95. See, e.g., *Pentagon: Gitmo Detainees Returning to Fight*, MSNBC.COM, Jan. 13, 2009, <http://www.msnbc.msn.com/id/28642784/>.

96. See *supra* notes 31-51.

97. See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (Ser. A), at 1 (1978), available at http://lawofwar.org/Ireland_v_United_Kingdom.htm; O’Connor & Rumann, *Into the Fire*, *supra* note 7, at 1685 (“documenting 1,118 allegations of misconduct by [Royal Ulster Constabulary] officers made by people arrested under the Acts”).

98. Tom Parker, *Is Torture Ever Justified?*, FRONTLINE, Oct. 18, 2005, <http://www.pbs.org/wgbh/pages/frontline/torture/justify/3.html>.

99. In discussing the effects of such practices in Northern Ireland, Jim McVeigh, in an interview with the authors at Long Kesh, Maze Prison in Northern Ireland in 1998, described the practices as some of “the best recruiting tools the I.R.A. ever had.” O’Connor & Rumann, *Into the Fire*, *supra* note 7, at 1662 & n.21.

and reputation of the British nation.¹⁰⁰ It appears the interrogation methods engaged in by the United States are producing similar results. Given the highly secretive nature of the interrogations, though the government has asserted that such techniques have resulted in valuable intelligence, questions have been raised about whether the government has obtained any real benefits through the interrogation methods employed by the United States since September 11, and whether any benefits that might have accrued outweigh the costs associated with them. One thing is clear—the detention and interrogation methods used by the U.S. in the GWOT have severely damaged U.S. standing among Muslim and Arab communities.

III. REACTIONS TO U.S. DETENTION AND INTERROGATION POLICIES IN ARAB AND MUSLIM COMMUNITIES

In this section, we review the data reflecting the opinions of Arabs and Muslims toward the U.S. policies in the GWOT, both within the United States and across the world. In subsections A and B, we track the initial responses to 9/11 in Arab and Muslim societies in the Middle East and the U.S., respectively. Subsection C examines how opinions change over time due to the U.S. tactics employed in the GWOT. Subsection D discusses the phenomenon of a general decline in support for terrorism, but a continuing support for groups who perpetuate violence against the United States and Israel, while subsection E shows how strongly negative attitudes have begun to migrate from opposing U.S. policy to hostility toward the American people. Finally, subsection F reports how these disturbing trends are beginning to infect American Arab and Muslim communities.

A. Arab and Muslim Opinions of 9/11 and the Initiation of the War on Terror

In the period immediately following September 11, 2001, the U.S. enjoyed widespread sympathy¹⁰¹ and support for its efforts to bring to justice those who attacked the U.S.¹⁰² This support extended even to radical Islamic scholars who have long expressed enmity for the U.S. and its policies in the Middle East.¹⁰³ For instance, Sheik Muhammad

100. Parker, *supra* note 98.

101. See, e.g., Jean-Marie Colombani, *We Are All Americans*, 48 WORLD PRESS REV. 11 (2001), available at http://www.worldpress.org/1101we_are_all_americans.htm (containing an English language translation of an article published in France's *Le Monde* newspaper on September 12, 2001); Gordon Corera, *Iran's Gulf of Misunderstanding with US*, BBC NEWS, Sept. 25, 2006, http://news.bbc.co.uk/2/hi/middle_east/5377914.stm (describing "vast crowds" turning out in the streets to support the U.S. following 9/11).

102. M.A. Muqtedar Khan, *Why Osama bin Laden Is an Enemy of Islam*, SALON, Nov. 14, 2001, http://archive.salon.com/news/feature/2001/11/14/osama_enemy/index.html.

103. See, e.g., John F. Burns, *A Nation Challenged: A Fighter's Tale; Bin Laden Stirs Struggle*

Hussein Fadlallah¹⁰⁴ was described as “relentless” in his condemnation of bin Laden and the 9/11 attacks for targeting innocent civilians in a distant land.¹⁰⁵ Fadlallah, himself accused of masterminding the attack on the U.S. Marine compound in Beirut in 1983, described the attacks as incompatible with Shariah law—not Jihad but suicides and crimes against Islam.¹⁰⁶ Author John Burns, in *A Nation Challenged: A Fighter’s Tale; Bin Laden Stirs Struggle on Meaning of Jihad*, quotes Sheik Yusuf Abdullah al-Qaradawi,¹⁰⁷ an Egyptian cleric often described as a radical Islamic scholar, as saying,

Islam, the religion of tolerance, holds the human soul in high esteem, and considers the attack on innocent human beings a grave sin . . . Even in times of war, Muslims are not allowed to kill anybody save the one who is engaged in face-to-face confrontation with them. . . . Killing hundreds of helpless civilians . . . is a heinous crime in Islam.¹⁰⁸

In the initial aftermath of the 9/11 attacks, attitudes toward al Qaeda and Osama bin Laden varied considerably among Arab and Muslim community leaders in different countries,¹⁰⁹ as well as within the populations of these various nations. Support for the terrorist strikes showed a similar variance. While Iran condemned the attacks against the United States, the Ayatollah Khamenei,¹¹⁰ the supreme religious leader of Iran, simultaneously warned the U.S. not to attack Afghani-

on Meaning of Jihad, N.Y. TIMES, Jan. 27, 2002, at A01, available at <http://www.nytimes.com/2002/01/27/world/nation-challenged-fighter-s-tale-bin-laden-stirs-struggle-meaning-jihad.html>.

104. According to the *Washington Post*, the Grand Ayatollah Muhammad Hussein Fadlallah is considered the leading Shi’ite Muslim Intellectual in Lebanon, and he is a “controversial figure known primarily for his support of the armed Shi’ite resistance movement, Hezbollah and for his uncompromising stance against the State of Israel.” Muhammed Hussein Fadlallah, http://web.archive.org/web/20080101015015/http://newsweek.washingtonpost.com/onfaith/muslims_speak_out/2007/07/sayyed_fadlallah.html (July 24, 2007).

105. See Burns, *supra* note 103.

106. *Id.* Burns noted the remarkable nature of these proclamations, given Fadlallah’s quarter-century of radical and anti-American pronouncements. *Id.*

107. Sheik Yusuf Abdullah al-Qaradawi “is alleged to be a shareholder in the al-Taqwa bank, which was named a specially designated global terrorist and had its assets frozen by the Bank of England and American financial authorities shortly after the 11 September attacks of 2001.” Jason Burke, *Cleric Held Shares in Bank ‘with Terror Links’*, GUARDIAN.CO.UK, July 11, 2004, <http://www.guardian.co.uk/uk/2004/jul/11/terrorism.religion>.

108. John F. Burns, *Bin Laden Stirs Struggles on Meaning of Jihad*, Jan. 27, 2002, http://www.sullivan-county.com/identity/bin_laden.html; see also Burns, *supra* note 103; *Al-Azhar’s Grand Imam Condemns Killing of Civilians*, ISLAMONLINE.NET, Sept. 14, 2001, <http://www.islamonline.net/English/News/2001-09/15/article2.shtml> (quoting the Grand Imam of Al-Azhar, Sheik Mohammad Sayyed Tantawi, condemning the attacks as “a grave sin” and “by no means Islamic”).

109. See *Iran Condemns Attack on US*, BBC NEWS, Sept. 17, 2001, http://news.bbc.co.uk/2/hi/middle_east/1549573.stm. The Ayatollah Ali Khamenei strongly condemned the attacks and all “[m]ass killings of human beings,” but warned the U.S. against attacking Afghanistan in response. *Id.* Early opinion poll research shows that this condemnation, while widespread, was not uniform. See ZOGBY INTERNATIONAL, IMPRESSIONS OF AMERICA 2004: HOW ARABS VIEW AMERICA 3 (2004), available at http://www.arabvoices.net/arabvoices/2004_impressions_of_america_poll.pdf.

110. “Ayatollah Ali Khamenei is Iran’s spiritual leader and highest authority. His voice overrides all others in the hierarchy. He is widely regarded as the figurehead of the country’s conservative establishment.” *Profile: Ayatollah Ali Khamenei*, BBC NEWS, June 30, 2003, http://news.bbc.co.uk/2/hi/middle_east/3018932.stm.

stan in response.¹¹¹ Even after the U.S. commenced military action against al Qaeda and the Taliban in Afghanistan, approximately one-third of the populations in Saudi Arabia (30%), Lebanon (30%), and the United Arab Emirates (37%) supported the U.S. response to terrorism.¹¹² While these numbers may seem low in absolute terms, they are comparatively high to favorability ratings among other groups, such as Palestinians, where U.S. efforts against terrorism consistently win approval ratings in the single digits.¹¹³

B. Attitudes of Arab Americans and Muslim Americans Following 9/11

It is important to note that attitudes among Arabs and Muslims abroad in no way paralleled those of Arab Americans and Muslims living in the U.S. Overwhelming majorities of the Arab-American and Muslim communities in the U.S. unequivocally condemned the attacks on the U.S. and strongly supported the Bush Administration's initial steps in the war on terror.¹¹⁴ A Zogby poll conducted by the Arab American Institute Foundation found that eighty-eight percent of Arab Americans approved of President Bush's efforts to combat terrorism in the aftermath of the September 11 attacks.¹¹⁵ Seven in ten Arab Americans also responded that they would support an "all-out war against countries which harbor or aid terrorists who have attacked the United States."¹¹⁶ This level of support remained constant across demographic groups, varying little if at all between those who are native-born and immigrants, between Christians and Muslims, or between the young and the old.¹¹⁷

Despite this overwhelming support from American Arabs and Muslims during the initial stages of the war on terror, some worrisome signs had already appeared in this first polling done one month following the 9/11 attacks. Sixty-one percent of those surveyed indicated that they were worried about whether discrimination against Arab Ameri-

111. See *Iran Condemns Attack on U.S.*, *supra* note 109.

112. IMPRESSIONS OF AMERICA 2004, *supra* note 109, at 4, tbl. 2.c.

113. See CENTER FOR STRATEGIC STUDIES, UNIVERSITY OF JORDAN, AMMAN-JORDAN, REVISITING THE ARAB STREET: RESEARCH FROM WITHIN 86 (Feb. 2005), available at <http://www.mafhoum.com/press7/revisit-1.pdf>.

114. See JAMES J. ZOGBY, ARAB AMERICAN ATTITUDES & THE SEPTEMBER 11 ATTACKS 1 (2001), available at http://aai.3cdn.net/75eccc470d751307bc_jcm6bx13j.pdf. Dr. Zogby is the President of the Arab American Institute. *Id.*

115. See *id.* Arab Americans surveyed also overwhelmingly gave President Bush high approval ratings in general. *Id.* In the same survey, 83% of Arab Americans approved of President Bush's job performance. *Id.* Only 15% of Arab Americans disapproved of his overall job performance, a number consistent with his approval ratings among other groups of Americans at the time. *Id.*

116. *Id.* at 2. Sixty-nine percent of respondents indicated that they would support such a war. *Id.* This poll was conducted approximately four weeks after 9/11, before the invasion of Afghanistan. *Id.* at 1.

117. *Id.* at 2. There also was no difference based upon the gender of the respondent. *Id.*

cans would persist and have long-term effects on the community.¹¹⁸ Forty-five percent of respondents knew someone who had already been the target of anti-Arab discrimination, while twenty percent of respondents stated that they had personally been targeted by such discrimination following the 9/11 attacks.¹¹⁹ Compounding the potential danger from this level of discrimination, there is evidence that the majority of these discriminatory acts appear to have been targeted at the young and at Muslims.¹²⁰ Thirty-seven percent of Arab-American Muslims reported that they were targeted for discrimination based upon their ethnicity or religion.¹²¹ Forty-nine percent of Arab Americans between the ages of eighteen and twenty-nine reported that they were the target of ethnic discrimination in the month following 9/11.¹²² More than forty-five percent of all Arab-American students similarly reported such acts of discrimination in the first month following 9/11.¹²³

This volume of discriminatory acts, and the concerns they raised among Arab Americans, is an important warning sign for the U.S. Our research in Northern Ireland showed that when a community feels targeted for discrimination based upon ethnicity or faith, and are viewed as potential security threats due to their immutable characteristics, members of that community become far less likely to cooperate with law enforcement and become increasingly likely to see violence as an appropriate political expression. While the number of people who move into the latter category (viewing violence as appropriate) are very likely to remain small, it does not take many people to commit an atrocity, particularly if they live in a larger community that has become alienated from law enforcement.

C. Effects of U.S. Tactics in the GWOT on Global Arab and Muslim Opinions

The considerable variance of early post-9/11 attitudes among Arabs and Muslims living in the U.S. and other nations is quite interesting and worthy of its own study. However, the reasons underlying this initial variance are beyond the scope of this article. What is significant for

118. *Id.* This is precisely the type of worry that should be of concern to Americans generally, and U.S. policy makers in particular. It signals a growing anxiety among members of the relevant communities that they may be treated differently from their fellow Americans. The sense of separation and diminishment engendered by such anxiety greatly compounded the difficulty in combating terrorism in Northern Ireland.

119. *Id.* These numbers are particularly troubling, given the short interval of time that had elapsed since the 9/11 attacks.

120. ARAB AMERICAN INSTITUTE FOUNDATION, PROFILING AND PRIDE: ARAB AMERICAN ATTITUDES AND BEHAVIOR SINCE SEPTEMBER 11, at 1 (2002), available at http://aai.3cdn.net/d7083bd00cf4ce3240_wfm6ii8b7.pdf.

121. See ZOGBY, ARAB AMERICAN ATTITUDES & THE SEPTEMBER 11 ATTACKS, *supra* note 114, at 3.

122. *Id.*

123. *Id.*

purposes of this discussion is the consistency of certain trends among these communities, despite the varying starting points. Between 2001 and the present, there is strong evidence of a consistent trend turning against terrorism and its proponents in most Arab and Muslim communities.¹²⁴ This trend in the data might initially suggest that U.S. tactics in the GWOT have succeeded in turning attitudes against terrorism.¹²⁵ At the very least, one could present the argument that U.S. tactics have not hardened attitudes against the U.S. and have not encouraged acts of terrorism. In fact, various commentators and pollsters have made such arguments.¹²⁶ However, a more careful examination of the available data undermines that argument.

The available evidence concerning the relevant communities strongly suggests that U.S. tactics in the GWOT have impeded an otherwise strong movement of attitudes against terrorism and its proponents. While consistent trends against terrorism have developed in most of the relevant communities, these trends have not seen corresponding increases in favorable attitudes toward the U.S.¹²⁷ In fact, despite significant decreases in support for terrorism in most of the relevant communities, opinions of the U.S. and of its actions in the GWOT have also decreased markedly.¹²⁸ Moreover, support for some groups that explicitly endorse acts of terrorism against the U.S. and its allies remains high in many of these communities.¹²⁹ This evidence strongly suggests that these communities, themselves frequently subjected to acts of terrorism, have turned strongly against terrorism, as a general matter; yet, a corresponding increase in enmity toward the U.S. and its tactics in the GWOT have permitted significant support in these same communities for groups that advocate terror against the U.S.¹³⁰

The strong trend of increasing animosity toward the U.S. and its tactics in the GWOT is found in numerous surveys conducted by various reliable entities. These attitudes appear to have hardened against the United States following the opening of the Guantanamo Bay prison and the revelations of abuse and torture of Muslim prisoners.¹³¹ The photo-

124. See generally IMPRESSIONS OF AMERICA 2004, *supra* note 109.

125. This has been an explicit goal of U.S. policy in winning the "hearts and minds" of people in the relevant communities in the Middle East. See Warren P. Strobel & Jonathan S. Landay, *U.S. Winning Battles Against Terror, but May Be Losing the War*, Sept. 4, 2006, <http://www.commondreams.org/headlines06/0904-02.htm>.

126. See, e.g., Richard Thompkins, *Feature: Winning Hearts and Minds*, Dec. 22, 2008, http://www.spacewar.com/reports/Feature_Winning_hearts_and_minds_999.html.

127. See PEW GLOBAL ATTITUDES PROJECT, GLOBAL OPINION TRENDS 2002-2007: A RISING TIDE LIFTS MOOD IN DEVELOPING WORLD 46 (2007), available at <http://pewglobal.org/reports/pdf/257.pdf>.

128. See IMPRESSIONS OF AMERICA 2004, *supra* note 109, at 2.

129. See generally *id.*

130. *Id.* at 7, tbl. 3.c.

131. See *id.*; see also *infra* Section IV (discussing large numbers of fighters drawn to Iraq by publication of photographs of Abu Ghraib cruelty).

graphs of the Abu Ghraib scandal early in 2004 and the reports of U.S. military personnel desecrating the Koran were particularly damaging to U.S. standing in these communities. In 2005, reports surfaced concerning the alleged desecration of a Koran at Guantanamo Bay.¹³² “The Guantanamo-Quran report prompted demonstrations and disturbances in more than nine countries, resulting in the deaths of at least 15 people.”¹³³

In *Who Speaks for Islam: What a Billion Muslims Really Think*, John Esposito and Dalia Mogahed analyzed the findings of Gallup’s World Poll, concluding that

[i]t is precisely because the West in general, and the United States in particular, is seen as having “a fair judicial system,” as giving its “own citizens many liberties,” and portraying itself as a champion of human rights that U.S. actions toward Muslims, such as those at Guantanamo, Abu Ghraib, and other abuses are seen as so hypocritical.¹³⁴

The hardening of attitudes against the U.S. and its tactics corresponds closely with the revelations concerning mistreatment and torture of Muslim prisoners. A Zogby poll conducted in 2004 concluded, “In other words, and quite simply, what we found was that what ultimately determined how Arabs viewed America was how they saw America treating Arab people.”¹³⁵

It is important to gauge just how precipitously the views of America have dropped, and how hardened these attitudes may have become. In the *Impressions of America 2004* poll, Zogby found that the favorability rating declined among almost every group in the period between 2002 and 2004.¹³⁶ Attitudes toward the U.S. policy on terror declined sharply during that two-year period. Favorability ratings of the U.S. “policy toward terrorism” dropped in Lebanon from a high of 30% in 2002, to 10% in 2004.¹³⁷ In Saudi Arabia, approval of America’s policy toward terrorism dropped from 30% in 2002, to 2% in 2004.¹³⁸ During the same time period, attitudes in the United Arab Emirates toward the U.S. policy on terrorism dropped from 37% to 9%.¹³⁹ It is no coincidence that during this period many Muslims captured around the world were transferred to Guantanamo Bay. In addition, the fact that the U.S. was torturing people in its custody became known, and photographs of

132. Carl Conetta, *Losing Hearts and Minds: World Public Opinion and Post-9/11 US Security Policy*, Sept. 2006, <http://www.comw.org/pda/0609bm37.html>.

133. *Id.*

134. JOHN L. ESPOSITO & DALIA MOGAHED, *WHO SPEAKS FOR ISLAM: WHAT A BILLION MUSLIMS REALLY THINK* 165 (2007).

135. *IMPRESSIONS OF AMERICA 2004*, *supra* note 109, at 2.

136. *Id.* at 1.

137. *Id.* at 4, tbl 2.c.

138. *Id.*

139. *Id.* These numbers mirrored others taken at the same time. The unfavorability rating for the U.S. policy on terrorism was 82% in Morocco, 96% in Saudi Arabia, 75% in Jordan, 84% in Lebanon, and 84% in the United Arab Emirates. *Id.* at 3, tbl. 2.a.

inhumane treatment and murder at Abu Ghraib were widely disseminated. The latter of these undoubtedly influenced the even lower favorability scores concerning U.S. policy in Iraq. In Morocco, the U.S.-Iraq policy received a favorability rating of 1%; in Saudi Arabia, that number also was 1%; in Jordan, it was 2%.¹⁴⁰ The highest scores on U.S.-Iraq policy were received in Lebanon and the United Arab Emirates, where 4% of the populations viewed U.S. actions in Iraq favorably.¹⁴¹

When asked to specifically articulate why America was held in such low esteem,¹⁴² three answers vied for the top spot among respondents in each nation: (1) American foreign policy; (2) unfair Middle East policy; and (3) America murders Arabs.¹⁴³ "America murders Arabs" took the top spot among the populations of Morocco and Jordan, one of our closest allies in the region.¹⁴⁴ There was little disagreement over U.S. standing across population groups in the various countries, with Muslims and Christians giving substantially similar poll results in Lebanon.¹⁴⁵

As disheartening as the numbers were in 2004, attitudes toward the U.S. had worsened by 2005. In measuring attitudes at that time, five of the six countries reported strong majorities saying that their attitude toward the U.S. had worsened in the past year. Those five nations were Egypt, Jordan, Morocco, Saudi Arabia, and the United Arab Emirates.¹⁴⁶ It should be noted that these nations are among the United States' best allies in the region. Lebanon, the only "aberration," still had a plurality of 49% saying that attitudes toward the U.S. had worsened, with 21% reporting they had improved, and 27% saying they had remained the same.¹⁴⁷ When asked to name the most important factor in determining attitudes toward the U.S., respondents split between the "War in Iraq" and "American treatment of Arabs and Muslims."¹⁴⁸

140. *Id.* at 3, tbl. 2.a.

141. *Id.*

142. The question asked in the survey was "What is the worst thought that comes to mind when you [hear] America?" *Id.* at 7.

143. *Id.* at 7, tbl. 3.c.

144. *Id.*

145. *See id.* at 11, tbl. 4.c. Lebanon was the only country for which the data was separated between Christians and Muslims. *Id.* The one significant deviation among otherwise virtually uniform scores (on American policy toward Arabs, Palestinians, and Iraq) was on the favorability rating for America's policy on terrorism. Muslims gave a 6% rating and Christians gave a 17% rating. *Id.* Obviously, neither of these scores represent a truly favorable rating, but there was significantly more support among Lebanese Christians than there was among Lebanese Muslims. *Id.* This is not particularly surprising because the U.S. GWOT has routinely been described in the Middle East as a "war on Islam." *See* Interview with Ayaan Hirsi Ali by Clive Crook, Editor-in-Chief, *Atlantic Monthly* (July 6, 2007), <http://www.youtube.com/watch?v=HLmkHMBs4s4>.

146. JAMES ZOGBY, ATTITUDES OF ARABS 2005: AN IN-DEPTH LOOK AT SOCIAL AND POLITICAL CONCERNS OF ARABS 12, tbl. 9 (2005), available at http://aai.3cdn.net/6e38e45846c8ce7df5_k0m6be9di.pdf.

147. *Id.*

148. *Id.* at 12, tbl. 10.

A virtually identical poll was conducted again in 2006, and showed further significant decline in attitudes toward the U.S.¹⁴⁹ Again, respondents from the same five countries produced strong majorities stating that their attitudes toward the U.S. had worsened. A more detailed study conducted by the Center for Strategic Studies at the University of Amman found even more disturbing details in these numbers.¹⁵⁰ In a study, entitled *Revisiting the Arab Street: Research from Within*, important deviations within the population groups were noted.¹⁵¹ Socio-economic status, age, and education all contributed to a respondent's judgment of "the West" and the U.S. in particular.¹⁵²

Although the West is generally held in low regard, the U.S. fares worst among Western nations in opinion polls.¹⁵³ France tends to score higher in opinion polls than either the U.S. or the United Kingdom.¹⁵⁴ Twenty-five percent of respondents in Jordan, Lebanon, Palestine, and Egypt felt either "highly positive" or "moderately positive" toward the U.S., while 57% held such attitudes toward France.¹⁵⁵ The U.S. consistently fared the worst in the Arab world. Seventy-five percent of Syrians perceived the U.S. as "not at all positive."¹⁵⁶ Only 28% of survey respondents provided any positive statements about the U.S.¹⁵⁷

Like the Zogby studies cited in this section, *Revisiting the Arab Street* also linked negative attitudes concerning the U.S. with the belief that the U.S. fails to protect the rights of Muslims. "[L]ess than 12% across national samples largely agreed that the US treated Muslims and non-Muslims equally."¹⁵⁸ Large majorities in every country surveyed—excepting only Lebanon where opinion was evenly divided—agreed with the statement that the U.S. always violates human rights in the world.¹⁵⁹

149. ZOGBY INTERNATIONAL, FIVE NATION SURVEY OF THE MIDDLE EAST 3 (2006), available at http://aai.3cdn.net/96d8eeaec55ef4c217_m9m6b97wo.pdf.

150. See CENTER FOR STRATEGIC STUDIES, REVISITING THE ARAB STREETS, *supra* note 113, at 13. This report states,

There are critical distinctions within Arab public perceptions of the West, based largely on status, age, and education. . . . [Y]ounger respondents and those with less education are more likely to judge the West harshly. In a region with a large and growing youthful population, underdeveloped educational facilities, and poor prospects for social mobility, anti-Westernism is unlikely to wither away.

Id.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 14.

158. *Id.* at 43. The same belief was held about Western societies generally. *Id.* However, once again, the U.S. was viewed most negatively of all Western nations. *Id.*

159. *Id.* at 61, fig. V.2.

D. Declining Support for Terrorism, but Not Against the United States or Israel

A potentially hopeful sign is that there is decreasing support in Arab and Muslim societies for suicide bombings and other forms of terrorism.¹⁶⁰ There is a strong and consistent movement in Muslim communities to reject acts of terrorism. Though suicide bombings are sometimes seen as justified for use against civilians in defense of Islam, significant decreases in support for suicide bombings, by 50% or more, have been seen in Lebanon, Pakistan, Bangladesh, and Indonesia between 2002 and 2007.¹⁶¹ This would suggest that these societies are turning strongly against the use of terrorism.

However, most Arabs in the countries surveyed do not share views of terrorism that coincide with definitions prevalent in the U.S.¹⁶² “Rather, they see such violence—and the groups that perpetrate it—as legitimate if they are part of a strategy to counter the policies of what they see as threatening powers—the US and Israel.”¹⁶³ Participants in *The Great Divide* survey determined the character of the act in question by their perception of the actor’s motivation, not necessarily by the nature of the act. “Actions against Israel and the US, in particular, are frequently considered as legitimate resistance.”¹⁶⁴

Palestinians, whether living in the Occupied Territories or in Jordan, were more likely than other Arabs surveyed to find any act against Israel or the U.S. to be justifiable. In both Jordan and Palestine, small minorities of respondents labeled the 9/11 attacks as terrorist acts. Only 35% of respondents in Jordan agreed the 9/11 attacks were terrorism, and only 22% of respondents in Palestine similarly characterized that

160. THE PEW GLOBAL ATTITUDES PROJECT, *THE GREAT DIVIDE*, *supra* note 24, at 3.

The survey shows both hopeful and troubling signs with respect to Muslim support for terrorism and the viability of democracy in Muslim countries. In Jordan, Pakistan and Indonesia, there have been substantial declines in the percentages saying suicide bombings and other forms of violence against civilian targets can be justified to defend Islam against its enemies. The shift has been especially dramatic in Jordan, likely in response to the devastating terrorist attack in Amman last year; 29% of Jordanians view suicide attacks as often or sometimes justified, down from 57% in May 2005.

Id.

161. PEW GLOBAL ATTITUDES PROJECT, *GLOBAL OPINION TRENDS 2002-2007: A RISING TIDE*, *supra* note 127, at 56.

162. One such definition used by the U.S. State Department is “all premeditated, politically motivated violence perpetrated against noncombatant targets.” CENTER FOR STRATEGIC STUDIES, *REVISITING THE ARAB STREETS*, *supra* note 113, at 71.

163. *Id.*

164. *Id.* “Opinion about Hezbollah and Hamas varies among Muslim publics. Views of both groups are favorable among most predominantly Muslim countries in the Middle East and Asia. And Palestinians have strongly positive opinions of both militant groups.” PEW GLOBAL ATTITUDES PROJECT, *GLOBAL OPINION TRENDS 2002-2007: A RISING TIDE*, *supra* note 127, at 7.

attack.¹⁶⁵ These attitudes strongly coincide with attitudes about Western societies and the policies of those nations. The groups that express the greatest antipathy for the U.S. and the U.S. policies in the GWOT and the Middle East, are the most likely to find those organizations the U.S. labels as terrorist to be legitimate.¹⁶⁶ More detailed surveys conducted by the Center for Strategic Studies at the University of Amman show that most Arabs surveyed do not define terrorism to include attacks on the U.S. and Israel.¹⁶⁷

Age and education are significant factors in predicting a respondent's support for al Qaeda and its actions. This support for al Qaeda and other similar organizations is strongly tied to the antipathy these organizations express for U.S. policies. "It can thus be predicted that in the future, youth—particularly if poorly educated and unexposed to other information—may provide an important base of support for such organizations."¹⁶⁸

E. Negative Attitudes Spread from U.S. Policy to American People

Recent polls suggest a continued slide in Arab opinions concerning the U.S., and significantly, the American people as well.¹⁶⁹ "The U.S. image remains abysmal in most Muslim countries in the Middle East and Asia, and continues to decline among the publics of many of America's oldest allies. Favorable views of the U.S. are in single digits in Turkey—only 9%—and have declined to 15% in Pakistan."¹⁷⁰ In past years, while the U.S. and its policies have received strongly negative poll results, Arab and Muslim opinions of Americans have remained positive. However, the *Global Unease* poll demonstrated that views toward the American people have been changing. In twenty-three of the thirty-three countries surveyed, opinions toward the American people have declined over the past five years. "In Indonesia and Turkey, where favorable views of the U.S. have declined markedly over the past five years, opinions of Americans have fallen sharply as well. In Indonesia, positive opinions of Americans have fallen from 65% in 2002 to 42%; in Turkey, favorable opinions have declined 19 points."¹⁷¹

Arab and Muslim populations are increasingly linking U.S. policies

165. CENTER FOR STRATEGIC STUDIES, REVISITING THE ARAB STREETS, *supra* note 113, at 71. It is interesting to note that this view is at odds with the overwhelming majority of Islamic scholars and religious leaders. While Americans often equate such beliefs with radical Islamic philosophy, this belief does not seem to be tied to religious dogma, but rather, to more political ideology.

166. *Id.* at 78.

167. *Id.* at 71.

168. *Id.* at 78-79.

169. THE PEW GLOBAL ATTITUDES PROJECT, RISING ENVIRONMENTAL CONCERN IN 47-NATION SURVEY: GLOBAL UNEASE WITH MAJOR WORLD POWERS 3-4 (2007), available at <http://pewglobal.org/reports/pdf/256.pdf>.

170. *Id.* at 3.

171. *Id.* at 4.

toward Muslims in the war on terror not only to the U.S. government, but also to the American people. This link is not without merit. A CNN/Opinion Research Corporation poll, conducted June 22-24, 2007, showed Americans divided in their opinions of whether the prison at Guantanamo Bay should remain in operation, with 46% saying it should stay open, and 45% saying it should be closed and the prisoners transferred.¹⁷² Guantanamo is one issue that directly implicates the strong opinion held by many Arabs and Muslims that the U.S. does not respect the rights of Muslims. A similar issue is the fact that the U.S. has been torturing Muslim prisoners.¹⁷³ In a survey conducted by Princeton Survey Research Associates International, more than 40% of the American public said that torture is sometimes or often justified to gain information from suspected terrorists.¹⁷⁴ This figure has remained fairly constant since July 2004.¹⁷⁵

These policies and the public's tacit support for them have greatly contributed to the antipathy currently being expressed about the United States and Americans. The negative view of U.S. foreign policy and its actions in the war on terror have impaired its ability to successfully fight the war on terror. For example, a Rand report prepared for the U.S. Army shows that violence in Iraq spiked immediately following publication of the Abu Ghraib photographs.¹⁷⁶ The negative opinions toward Americans have led to a sustained level of support for al Qaeda and other violent groups who desire to harm the U.S., despite the strong trend in Arab and Muslim communities toward condemnation of violence.

The most recent studies of Arab and Muslim attitudes confirm this disturbing dichotomy of increased antipathy for terrorism generally, but continuing support for groups like al Qaeda who are openly and notoriously committed to perpetrating terrorist attacks against Americans.¹⁷⁷ While majorities in all countries studied expressed disapproval of terror-

172. See War on Terrorism, <http://www.pollingreport.com/terror.htm> (last visited Apr. 4, 2009) (compiling polls from several sources). Since this is a "hot button" issue for most predominantly Muslim countries, Americans' ambivalence on the issue is likely to provoke a strong reaction.

173. Randall Mikkelsen, *Obama Govt Vows Not to Use "Waterboarding"*, SWISSINFO.CH, Mar. 2, 2009, http://www.swissinfo.ch/eng/news/international/Obama_govtment_condemns_waterboarding_as_torture.html?siteSect=143&sid=10398035&cKey=1236010081000&ty=ti (quoting Eric Holder as saying, "Waterboarding is torture. My Justice Department will not justify it, will not rationalize it and will not condone it . . .").

174. See War on Terrorism, *supra* note 172.

175. War on Terrorism (p. 2), <http://www.pollingreport.com/terror2.htm> (last visited Apr. 4, 2009) (showing that 35% of all U.S. adults believe torture to get information from a suspected terrorist is "sometimes justified" and an additional 5% believe the use of such torture "depends").

176. BNSAHEL ET AL., AFTER SADDAM: PREWAR PLANNING AND THE OCCUPATION OF IRAQ 131 & n.53 (2008); see also Coalition Provisional Authority and the Iraq Center for Research and Strategic Studies, Public Opinion in Iraq: First Poll Following Abu Ghraib Revelations: Baghdad, Basrah, Mosul, Hillah, Diwaniyah, Baqubah, May 14-23, 2004, www.globalpolicy.org/security/issues/iraq/poll/2004/06iiacs.pdf.

177. See *Public Opinion in the Islamic World on Terrorism, Al Qaeda and U.S. Policies*, Feb. 25, 2009, available at http://www.worldpublicopinion.org/pipa/pdf/feb09/STARTII_Feb09_rpt.pdf.

ist attacks on Americans, majorities in Egypt, Morocco, Pakistan, Jordan, and the Palestinian Territories feel either “very positive,” “somewhat positive,” or “mixed” about Osama bin Laden.¹⁷⁸ When asked how they felt about “groups in the Muslim world that attack Americans,” opinion in every nation surveyed¹⁷⁹ on that question was evenly divided, with no country having a majority express disapproval of groups attacking the U.S.¹⁸⁰ This apparent dissonance between views on terrorism, generally, and terrorism used against the United States, specifically, correlates strongly with a dissonance that respondents in this survey see in the United States. Strong majorities in almost every nation surveyed agreed with the following statement: “[T]he U.S. tries to promote international laws for other countries, but is hypocritical because it often does not follow these rules itself.”¹⁸¹ Given the antipathy toward the U.S. and Americans and the continuing level of support for groups bent on killing Americans, it is essential that the U.S. be able to marshal strong support from American Muslims and Arabs.

F. Shifting Attitudes of Arab Americans and Muslim Americans

Although U.S. policies in the GWOT have had a negative impact upon the United States’ ability to effectively work with Arab and Muslim communities abroad to stop terrorism, it is important that the U.S. does not alienate Arab Americans and Muslim Americans. Members of these communities are essential to U.S. efforts to combat terrorism by radical Islamic groups. It is from the ranks of Arab Americans that the U.S. must hope to obtain needed intelligence assistance in the form of translation, infiltration, and other human intelligence. If U.S. tactics in the GWOT have alienated Muslim and Arab Americans, the U.S. may have undermined its own security as much as Northern Ireland did its own by targeting the Catholic community in the final thirty years of the last century. Unfortunately, there is increasing evidence that U.S. policies in the GWOT have begun to sow distrust in those important American communities, further eroding our ability to combat terrorism.

In stark contrast to the initial polls taken one month after 9/11, a Zogby poll seven months later indicated that in 2002 one-third of all Muslim Americans viewed the war on terror as a “war on Islam.”¹⁸² This was a dramatic departure from attitudes expressed in October

178. See *Public Opinion in the Islamic World—Questionnaire*, Feb. 25, 2009, at 12, available at http://www.worldpublicopinion.org/pipa/pdf/feb09/STARTII_Feb09_quaire.pdf.

179. Egypt, Indonesia, Morocco, and Pakistan were the only nations for which there were responses reported to that question. *Id.* at 17.

180. *Id.*

181. *Id.* at 20. Only Nigeria had less than a majority agree with this statement, but still had a plurality of 48%. *Id.*

182. HAMILTON COLLEGE AND ZOGBY INTERNATIONAL, MUSLIM AMERICA POLL 5 (2002); see Conetta, *supra* note 132.

2001, when 88% of the Arab Americans surveyed approved of President Bush's efforts in the war on terror.¹⁸³ By July 2002, 78% of Arab Americans expressed the view that the government had increased profiling of Arab Americans.¹⁸⁴

When asked in May 2002, 54% of Arab Americans said they were reassured by President Bush's conduct toward Arab Americans, while 35% said they were not reassured.¹⁸⁵ That figure represents a steep drop from the October 2001 poll when fully 90% of Arab Americans expressed reassurance due to the President's comments and actions toward their community.¹⁸⁶ Young Arab Americans are more likely to find the President's actions toward their community to be wanting; in fact, 45% of those aged eighteen to thirty-four held this opinion, and 58% of young Muslims also found the President's actions lacking.¹⁸⁷

Forty percent of Arab Americans know someone who has suffered discrimination since 9/11.¹⁸⁸ The young, if Muslim and/or foreign-born, are more likely to have personally experienced discrimination since 9/11.¹⁸⁹ Forty-six percent of Arab-American Muslims say they have personally experienced discrimination since 9/11.¹⁹⁰ Corresponding numbers for Arab-American Protestants at 14% and Catholics at 10% were much lower.¹⁹¹

"The 2002 respondents who are very or somewhat worried about the long-term effects include four in five Muslims and a 73% average of 18- to 49-year-olds and Arab Americans not born in the United States."¹⁹² The alienation of young Arab Americans and Muslim Americans is potentially very dangerous. It was disaffected young Muslims who attacked the London subway system on July 11, 2005. However, the danger from alienating the young and Muslim Americans stems as much from what the U.S. would lose due to their positive cooperation as from their potential for violence. For far too long, the U.S. has suffered intelligence failures in the Middle East due to a lack of

183. See ZOGBY, ARAB AMERICAN ATTITUDES & THE SEPTEMBER 11 ATTACKS, *supra* note 114, at 1.

184. AMERICAN INSTITUTE FOUNDATION, PROFILING AND PRIDE, *supra* note 120, at 2. "Two-thirds or more in almost every sub-group in 2002 feel there has been more profiling of Arab Americans since September 11. Among the most likely to agree are nine in ten 18- to 29-year-olds, and more than eight in ten U.S.-born respondents." *Id.* at 4.

185. *Id.* at 2.

186. *Id.* at 5.

187. *Id.* "[T]he numbers indicate that Arab Americans would like to see a return to what was perceived last October as positive leadership from the administration toward the Arab American community, and that Arab Americans have concerns with the Bush Administration's foreign and domestic policies." *Id.* at 8.

188. *Id.* at 3.

189. *Id.*

190. *Id.*

191. *Id.* However, "the number of those who believe Arab Americans have been victims of ethnic profiling rose by 9%. A majority of those surveyed remain concerned about the long-term effects of discrimination." *Id.* at 8.

192. *Id.* at 4-5.

skilled linguists and other inabilities to obtain human intelligence from the Arab- and Muslim-American communities.

IV. PROBLEMS RELATED TO U.S. POLICIES

There are three dangerous consequences that are almost certain to flow from the policies that the U.S. has pursued in the GWOT since 9/11. The first is that the U.S. has done little to help, and has most likely exacerbated its difficulties in obtaining human intelligence from Arab or Muslim sources useful in combating acts of terror, by alienating the communities who would necessarily provide the human intelligence that the U.S. needs. The second negative consequence is that the U.S. has likely swelled the ranks of those who desire to harm the U.S. and its citizens. Finally, and closely related to the second negative consequence, the U.S. has almost certainly increased levels of terrorism in the world due to its conduct in the GWOT.

The United States has suffered from a lack of adequate human intelligence resources in the Middle East for decades. Repeatedly, the U.S. has been “caught off guard” by events in the Middle East. When the Shah of Iran was overthrown and the Ayatollah Khomeini came to power, American intelligence agencies confessed that they had been relying upon the Shah’s own assessments of conditions in Iran and had no adequate intelligence sources independent from the Shah’s forces.¹⁹³

Similar problems are reported with every major event from the Middle East that has surprised the U.S. When Saddam Hussein invaded Kuwait, the U.S. government professed ignorance of his intentions.¹⁹⁴ When the U.S. was attacked on 9/11, “chatter” that could have warned of the imminent attack remained untranslated.¹⁹⁵ The Select Committee on Intelligence reported that translation problems may have played a role in failing to discern the forged nature of documents that purported to show Iraq was seeking uranium from Niger.¹⁹⁶ Problems related to poor translations also contributed to the inability to accurately assess

193. See Robert Jervis, *The Failure to See that the Shah Might Fall: The Jervis Post-Mortem for the CIA in Retrospect*, Speech at the 2006 Annual Meeting of the American Political Science Association 16 (August 30-September 6, 2006) (transcript available at <http://www.international.ucla.edu/cms/files/jervis.pdf>).

194. See, e.g., Michael Wines, *The Iraqi Invasion; U.S. Says Bush Was Surprised by the Iraqi Strike*, N.Y. TIMES, Aug. 5, 1990, available at <http://query.nytimes.com/gst/fullpage.html?res=9C0CE6D8173EF936A3575BC0A966958260>.

195. See 9/11 COMMISSION, 9/11 COMMISSION REPORT 77 (2004). This failure was due to a lack of “sufficient translators proficient in Arabic and other key languages, resulting in a significant backlog of untranslated intercepts.” *Id.*

196. “On February 7, 2003, the State Department’s Office of Language Services, Translating Division, completed the translation of the Iraq-Niger uranium documents. The State Department passed the translated documents to the CIA. Some signs that the documents were forgeries were not conveyed in the translation process.” S. SELECT COMM. ON INTELLIGENCE, REPORT OF THE SELECT COMMITTEE ON INTELLIGENCE ON THE U.S. INTELLIGENCE COMMUNITY’S PREWAR INTELLIGENCE ASSESSMENTS ON IRAQ, TOGETHER WITH ADDITIONAL VIEWS, S. REP. 108-301, at 68 (2004), available at <http://intelligence.senate.gov/108301.pdf>.

Saddam Hussein's communications with the Iraqi Atomic Energy Commission.¹⁹⁷ A Central Intelligence Agency analyst has also stated that translation problems hampered the ability to assess the reliability of "Curveball."¹⁹⁸

Of course, U.S. intelligence failures prior to the Iraq War are well known.¹⁹⁹ However, these problems were exacerbated at every turn by the United States' treatment of Muslims in detention. The attitudes expressed in the many surveys cited in this article indicate a growing alienation between Arabs and Muslims on one hand, and the U.S. government on the other, caused by the belief that the U.S. was acting unfairly toward other Arabs and Muslims. This alienation necessarily decreases the willingness of people from the affected groups to cooperate in what is viewed as an unfair and biased "war" effort. This is precisely what happened in Northern Ireland, and the evidence strongly supports a similar alienation occurring due to U.S. policies in the GWOT. FBI Assistant Deputy Director Pasquale J. D'Amuro has stated unequivocally that abusive and torturous interrogation policies prevented the FBI from developing necessary "sources" of human intelligence.²⁰⁰ This is perhaps the most important negative ramification of U.S. policies in the GWOT, in that we have been prevented from working with precisely those people who are best positioned to assist in identifying and capturing the terrorists who seek to attack our nation. We have succeeded in alienating the people most likely to provide the kind of human intelligence that could prevent catastrophic attacks against the United States.

United States tactics of torture and targeting have also spurred recruitment by al Qaeda and increased violence against U.S. personnel and allies. It is widely accepted that the failure to treat Sunni and Shi'a Muslims equally in Iraq following the U.S. invasion contributed mightily to the violent insurgency that followed Saddam's overthrow. One Rand Corporation study described the failures of the Office of Reconstruction

197. The Select Committee on Intelligence reported numerous intelligence failures of great significance in the lead up to the Iraq War. One that is indicative of the catastrophic problems that can flow from the failure to recruit competent translators occurred when the Iraqi Atomic Energy Commission sought clarification of the following nonsensical translation of a speech by Saddam Hussein that was quoted in the National Intelligence Estimate. The translation of Saddam's speech said,

The Atomic Energy Agency should come up with two things or two items at a time when others come up with one thing. This is because its personnel are basically Iraqis and because they owe this to me, at least between me and them. Although you are all Iraqis and we cannot discriminate between you, but because of the old relationship between me and them, your responsibility is doubled.

Id. at 123. The committee members could make no sense of this passage and asked the CIA for a retranslation, which the CIA was unable to provide. *Id.*

198. *See id.* at 152. "Curveball" is the code name for an Iraqi ex-patriot who is "credited" with providing faulty intelligence to various intelligence agencies which may have contributed to the rush to war.

199. *See generally id.*

200. *See* DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FBI'S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTANAMO BAY, AFGHANISTAN, AND IRAQ 72 (2008), available at <http://www.usdoj.gov/oig/special/s0805/final.pdf>.

and Humanitarian Assistance and the Coalition Provisional Authority to bring Sunnis into the political process as representing “the most important challenge,” which contributed to growing insurgency and violence throughout the country.²⁰¹ This exclusion from the political process, however, was quite benign in both intent and effect from that associated with the targeting policies of detention and inhumane interrogation. Matthew Alexander, a U.S. military interrogator working in Iraq, has recently noted that “the No. 1 reason foreign fighters flocked there to fight were the abuses carried out at Abu Ghraib and Guantanamo.”²⁰² Alexander went on to note that it was “no exaggeration to say that at least half of our losses and casualties in that country have come at the hands of foreigners who joined the fray because of our program of detainee abuse.”²⁰³

Alexander’s assessment is not just that of a single individual, albeit one who has conducted hundreds of interrogations, and supervised an additional thousand.²⁰⁴ His conclusions have been echoed and expanded upon by leading U.S. military officials including Alberto J. Mora, former General Counsel of the Department of the Navy. General Counsel Mora has described the use of harsh interrogation practices as “a mistake of massive proportions.”²⁰⁵ Mora details the ways in which U.S. detention and interrogation policies profoundly hampered “our national security strategy and our operational effectiveness in the War on Terror.”²⁰⁶ U.S. operational effectiveness was hampered by an inability to sustain military, intelligence, and law enforcement alliances because U.S. allies feared being tainted or compromised by association with U.S. practices. But, more to the point of this article’s focus, U.S. treatment of detainees directly affected its tactical and operational effectiveness because it served as the primary source of recruiting foreign fighters to Iraq.²⁰⁷

The manner in which this occurred is particularly pertinent, and

201. OLIKER ET AL., *supra* note 176, at 189. The book, *After Saddam*, specifically discusses how targeting the Sunni community led to violence and lack of cooperation from the relevant community. *Id.*

202. See Matthew Alexander, *An Interrogator Speaks: I’m Still Tortured by What I Saw in Iraq*, WASH. POST, Nov. 30, 2008, at B01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/28/AR2008112802242.html>.

203. *Id.*; see generally MATTHEW ALEXANDER, HOW TO BREAK A TERRORIST: THE U.S. INTERROGATORS WHO USED BRAINS, NOT BRUTALITY, TO TAKE DOWN THE DEADLIEST MAN IN IRAQ (2008).

204. MATTHEW ALEXANDER, HOW TO BREAK A TERRORIST, *supra* note 203, *passim*. Matthew Alexander was awarded the Bronze Star for his intelligence efforts in Iraq and is one of the individuals principally responsible for obtaining information that led directly to the U.S. strike that killed Abu Musab al Zarqawi. *Id.* at 280-82.

205. See *Hearing on the Treatment of Detainees in U.S. Custody Before S. Comm. on Armed Serv.*, 110th Cong. 2 (2008), available at <http://armed-services.senate.gov/statemnt/2008/June/Mora%2006-17-08.pdf> (statement of Alberto J. Mora, General Counsel, Dep’t of Navy).

206. *Id.* at 4.

207. *Id.* at 5.

General Counsel Mora spelled it out in great detail before the Senate Armed Services Committee: “First, there are serving U.S. flag-rank officers who maintain that the first and second identifiable causes of U.S. combat deaths in Iraq—as judged by their effectiveness in recruiting insurgent fighters into combat—are, respectively the symbols of Abu Ghraib and Guantanamo.”²⁰⁸

These beliefs of “flag-rank officers”²⁰⁹ are in keeping with the observations of interrogators, such as Alexander who has noted that when it became clear that the U.S. was torturing Muslim prisoners, al Qaeda used “the fact that we torture people to recruit new members, and then we’re going to have to deal with a whole new wave of terrorists.”²¹⁰ It is this mechanism—recruitment based upon the outrage sparked by Abu Ghraib and Guantanamo—that has resulted in perhaps 80-90% of the foreign fighters coming to Iraq to kill Americans in suicide bombings and other attacks.²¹¹ This conclusion was borne out by a full study and report by the Inspector General of the Department of Justice which found that the torture and inhumane treatment at Guantanamo Bay and Abu Ghraib aided al Qaeda in recruitment and propaganda.²¹²

In a recently published book, *The Gamble: General David Petraeus and the American Military Adventure in Iraq, 2006-2008*, author Thomas Ricks recounts the story of Sarhan Hassan Wisme, who was reportedly responsible for planting 200 roadside bombs used to kill American soldiers. “He had started attacking the Americans in the spring of 2004, motivated by news of the American abuse of prisoners at the Abu Ghraib prison west of Baghdad.”²¹³

The ability of al Qaeda and other terrorist organizations to use Guantanamo and Abu Ghraib as recruiting tools to lure foreign jihadists to fight the U.S. forces in Iraq, Afghanistan, and elsewhere should come as no surprise. The U.S. has been fomenting discontent and animosity through incommunicado detention without recourse to legal process, as

208. *Id.* Mora went on to note that “there are other senior officers who are convinced that the proximate cause of Abu Ghraib was the legal advice authorizing abusive treatment of detainees that issued from the Department of Justice’s Office of Legal Counsel in 2002.” *Id.*

209. So-called “flag-rank officers” generally include those officers permitted to fly their own flags of command, typically officers with “Admiral” or “General” in their title.

210. Interview by Keith Olbermann with Matthew Alexander, on Countdown with Keith Olbermann (Dec. 3, 2008), available at <http://www.msnbc.msn.com/id/28054937/>. Moreover, allied nations reportedly refused to participate with the U.S. in combat operations that might include the capture of detainees, or even training sessions that might implicate them in connection with our detention and interrogation policies. See Alberto J. Mora, Weakening America: The Cost of Legalized Cruelty, Speech at the American Bar Association’s Center for Human Rights Fourth Annual House of Delegates Luncheon (Feb. 11, 2008), available at http://www.abavideo.org/ABA496/media/pdf/navycounsel_OMKall.pdf.

211. Interview with Matthew Alexander (Feb. 2, 2009) (on file with authors).

212. See DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, *supra* note 200, at 72.

213. Thomas E. Ricks, *The Insurgent Who Loved ‘Titanic’*, WASH. POST, Feb. 7, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/07/AR2009020701198.html> (quoting THOMAS E. RICKS, *THE GAMBLE: GENERAL DAVID PETRAEUS AND THE AMERICAN MILITARY ADVENTURE IN IRAQ, 2006-2008* (2009)).

well as promoting cruelty and torture. These activities are not only an affront to long-held U.S. historical moral and legal principles, they are inflammatory affronts to the dignity of all human beings. Affronts to dignity are particularly antagonistic when they are perceived to be directed at individuals because of their racial or religious identity. Affronts to confessional or tribal affiliations underlie some of the great conflicts of this era and every prior age. Systematic cruelty and degradation meted out along such communal lines causes deep and long-lasting injury and resentment.

V. CONCLUSION

As General Counsel Mora has made clear, the most significant source of the animosity driving these foreign fighters is a “policy of cruelty.”²¹⁴ It is this policy of cruelty that the Obama Administration must reverse. There are initial indications that President Obama appears committed to that objective. However, it must be reiterated, as was noted above, that members of the Obama Administration have claimed that the President is intent on using the policy of rendition as a tool to fight terrorism.²¹⁵ Much like the use of detention without legal process and the use of cruelty and torture in interrogations, rendition has also proven particularly controversial with U.S. allies and others around the world, precisely because rendition has been used to transfer individuals suspected of involvement in terrorist activities to countries that have tortured them.

The International Commission of Jurists has recently issued a report calling on the U.S. and other nations to reverse these policies of torture, cruel and inhumane treatment, and arbitrary detention. The Report of the Eminent Jurists Panel on Terrorism stated:

Practices referred to in the evidence given to the Panel—torture and cruel, inhuman or degrading treatment, secret detentions, abductions, illegal transfers, *refoulement*, arbitrary, prolonged and *incommunicado* detention, unfair trials, and enforced disappearances—are not legitimate responses to the threat of terrorism. Such practices are not only inconsistent with established principles of international law, and undermine the values on which free and democratic societies are based, but as the lessons of history show, they put the possibility of short term gains from illegal actions, above the more enduring long term harm that they cause. Steps must be taken nationally and internationally to ensure that the prohibition on torture and cruel, inhuman or degrading treatment,

214. *Hearing on the Treatment of Detainees in U.S. Custody*, *supra* note 205, at 2, 5. Mora makes clear that the use of the terms “enhanced” or “harsh” interrogation are euphemisms for cruelty and torture. *Id.* at 2.

215. The policy of rendition, or “extraordinary rendition,” where people are essentially kidnapped and transported to foreign nations, has proven particularly controversial and harmed U.S. relationships with European allies. *See, e.g.*, Miller, *supra* note 28. This policy has been particularly controversial where the individuals kidnapped have been sent to countries that have tortured them.

and other such serious human rights violations again become the unquestioned norm.²¹⁶

The U.S. must make a clean break with these past policies of cruelty, torture, and detention without legal process. The parameters of what constitutes such a break are debatable, but achieving this break may require investigations and prosecutions. At a minimum, the U.S. must end these practices by U.S. personnel and ensure that the U.S. is not implicated and compromised by cooperation with, solicitation to, or willful blindness to such practices conducted by others in an attempt to further its own goals. The U.S. cannot regain the moral high ground and eliminate the stain of our involvement in cruelty and torture by ritually washing our hands if the U.S. remains knee deep in the mud and blood of the world's dungeons. This is not only essential if the U.S. is to once again claim title to our nation's fundamental principles, it is a practical necessity if we want to avoid creating more terrorists than we can possibly capture or kill.

As our research makes clear, those with the most negative opinions of the U.S. and its actions in the GWOT are young, uneducated Muslims and Arabs living in the Middle East. This represents a grave long-term danger, for our research in Northern Ireland showed that the effects of torture and targeting a community for arbitrary detention are lasting. Internment began in 1971 and violence increased exponentially in Northern Ireland as a result. Although internment began to be phased out a few years later, levels of terrorist violence would not fall below the pre-internment level until the political process of reconciliation took hold in the mid-1990s.²¹⁷

The lessons of Northern Ireland are important. The government's tactics in Northern Ireland are invoked as examples to emulate by the apologists for the U.S. government's policies of torture and arbitrary detention without any regard for the abject failure those policies represent.²¹⁸ In presenting the International Commission of Jurists' Report on Terrorism, Mary Robinson, former President of Ireland and member of the Eminent Jurists Panel on Terrorism, knowingly reminded everyone of the true results of the detention and interrogation policies in Northern Ireland when she stated, "The police themselves said that [internment] was an unmitigated disaster."²¹⁹ Likewise, the policies adopted by the Bush Administration in the GWOT have been an unmitigated disaster that will take us many years from which to recover.

216. EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS, ASSESSING DAMAGE URGING ACTION 160 (2009).

217. O'Connor & Rumann, *Into the Fire*, *supra* note 7, at 1700 n.199.

218. See *supra* note 16.

219. Unrepresented Nations & Peoples Organization, *International Jurists Reflect on Counter-Terrorism Instruments* (2009), <http://www.unpo.org/content/view/full/9251/236/>.

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We have alienated many potential allies, encouraged recruitment of terrorists, and increased violence against our own citizens and allies.

It will not be hard for al Qaeda to use the United States' past actions against it as recruiting tools. The U.S. must clearly and unequivocally reject the policy of detention without recourse to legal process and the cruelty and torture that have so often accompanied those detentions. The U.S. must renounce the hypocrisy of euphemism and legal justifications for practices all decent human beings know to be immoral and unjust. Only then can the U.S. hope to regain the moral high ground and begin to truly win the hearts and minds of Muslims and Arabs throughout the world.

