NAVAL POSTGRADUATE SCHOOL

MONTEREY, CALIFORNIA

THESIS

**STOPPING THE NEXT ATTACK:
HOW TO GAIN INTELLIGENCE FROM
SUSPECTS DETAINED OVERSEAS**

by

James M. Fitzgerald

December 2019

Co-Advisors: Erik J. Dahl
Carolyn C. Halladay

THIS PAGE INTENTIONALLY LEFT BLANK

REPORT DOCUMENTATION PAGE	*Form Approved OMB No. 0704-0188*

1. AGENCY USE ONLY *(Leave blank)*	**2. REPORT DATE** December 2019	**3. REPORT TYPE AND DATES COVERED** Master's thesis

4. TITLE AND SUBTITLE STOPPING THE NEXT ATTACK: HOW TO GAIN INTELLIGENCE FROM SUSPECTS DETAINED OVERSEAS	**5. FUNDING NUMBERS**
6. AUTHOR(S) James M. Fitzgerald	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Naval Postgraduate School Monterey, CA 93943-5000	**8. PERFORMING ORGANIZATION REPORT NUMBER**
9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES) N/A	**10. SPONSORING / MONITORING AGENCY REPORT NUMBER**

11. SUPPLEMENTARY NOTES The views expressed in this thesis are those of the author and do not reflect the official policy or position of the Department of Defense or the U.S. Government.

12a. DISTRIBUTION / AVAILABILITY STATEMENT Approved for public release. Distribution is unlimited.	**12b. DISTRIBUTION CODE** A

13. ABSTRACT (maximum 200 words)

The United States often faces two competing choices when a terrorist is captured overseas: bring the person back to the United States immediately to face trial, or hold the person in military detention, where prosecutions are difficult and slow-moving. This thesis investigates which policy best allows the United States to reduce the threat posed by a terrorist captured overseas while maintaining the country's credibility. Recognizing the principal importance of preserving life and preventing future attacks after the detention of a suspected terrorist, this thesis used a policy options analysis method to determine which one of three approaches is best for handling terror suspects captured overseas: law of war detention, two-step intelligence and law enforcement interrogations, or arrest and extradition. The research determined that no single policy best allows the United States to reduce the threat posed by a terrorist captured overseas, takes into account the need to obtain information about looming attacks, preserves the opportunity for prosecution, and maintains the credibility of the United States. This thesis recommends the continued use of law of war detention for foreign fighters and recommends that two-step intelligence and law enforcement interrogations remain a viable option for terrorists captured overseas.

14. SUBJECT TERMS Guantanamo, Two-step, interrogations, Seibert, Bagram, Quarles	**15. NUMBER OF PAGES** 101
	16. PRICE CODE

17. SECURITY CLASSIFICATION OF REPORT	**18. SECURITY CLASSIFICATION OF THIS PAGE**	**19. SECURITY CLASSIFICATION OF ABSTRACT**	**20. LIMITATION OF ABSTRACT**
Unclassified	Unclassified	Unclassified	UU

NSN 7540-01-280-5500 Standard Form 298 (Rev. 2-89) Prescribed by ANSI Std. 239-18

THIS PAGE INTENTIONALLY LEFT BLANK

Approved for public release. Distribution is unlimited.

STOPPING THE NEXT ATTACK: HOW TO GAIN INTELLIGENCE FROM SUSPECTS DETAINED OVERSEAS

James M. Fitzgerald
Supervisory Special Agent, Federal Bureau of Investigation
BA, Norwich University, 1987

Submitted in partial fulfillment of the
requirements for the degree of

MASTER OF ARTS IN SECURITY STUDIES (HOMELAND SECURITY AND DEFENSE)

from the

NAVAL POSTGRADUATE SCHOOL
December 2019

Approved by: Erik J. Dahl
Co-Advisor

Carolyn C. Halladay
Co-Advisor

Erik J. Dahl
Associate Professor, Department of National Security Affairs

THIS PAGE INTENTIONALLY LEFT BLANK

ABSTRACT

The United States often faces two competing choices when a terrorist is captured overseas: bring the person back to the United States immediately to face trial, or hold the person in military detention, where prosecutions are difficult and slow-moving. This thesis investigates which policy best allows the United States to reduce the threat posed by a terrorist captured overseas while maintaining the country's credibility. Recognizing the principal importance of preserving life and preventing future attacks after the detention of a suspected terrorist, this thesis used a policy options analysis method to determine which one of three approaches is best for handling terror suspects captured overseas: law of war detention, two-step intelligence and law enforcement interrogations, or arrest and extradition. The research determined that no single policy best allows the United States to reduce the threat posed by a terrorist captured overseas, takes into account the need to obtain information about looming attacks, preserves the opportunity for prosecution, and maintains the credibility of the United States. This thesis recommends the continued use of law of war detention for foreign fighters and recommends that two-step intelligence and law enforcement interrogations remain a viable option for terrorists captured overseas.

THIS PAGE INTENTIONALLY LEFT BLANK

TABLE OF CONTENTS

I. INTRODUCTION....1
- **A. RESEARCH QUESTION....5**
- **B. PROBLEM STATEMENT....5**
- **C. LITERATURE REVIEW....6**
  - **1. The Need for Intelligence....7**
  - **2. Law and Legal Issues....8**
- **D. RESEARCH DESIGN....21**

II. LAW OF WAR DETENTION....23
- **A. LEGALITY....24**
- **B. THREAT REDUCTION....26**
- **C. OPPORTUNITY TO PROSECUTE....29**
- **D. OPPORTUNITY TO GAIN INTELLIGENCE....31**
- **E. EFFECT ON THE CREDIBILITY OF THE UNITED STATES....32**

III. TWO-STEP INTELLIGENCE AND LAW ENFORCEMENT INTERROGATIONS....35
- **A. LEGALITY....35**
- **B. THREAT REDUCTION....40**
- **C. OPPORTUNITY TO PROSECUTE....43**
- **D. OPPORTUNITY TO GAIN INTELLIGENCE....45**
- **E. EFFECT ON THE CREDIBILITY OF THE UNITED STATES....45**

IV. ARREST AND EXTRADITION OF TERROR SUSPECTS....49
- **A. LEGALITY....49**
- **B. THREAT REDUCTION....51**
- **C. OPPORTUNITY TO PROSECUTE....51**
- **D. OPPORTUNITY TO GAIN INTELLIGENCE....54**
- **E. EFFECT ON THE CREDIBILITY OF THE UNITED STATES....55**

V. ANALYSIS AND POLICY RECOMMENDATIONS....59
- **A. ANALYSIS....59**
  - **1. Legality....60**
  - **2. Threat Reduction....61**
  - **3. Opportunity to Prosecute....62**
  - **4. Opportunity to Gain Intelligence....63**
  - **5. Effect on the Credibility of the United States....64**

B. RECOMMENDATIONS.....65
C. CONCLUSION 66

LIST OF REFERENCES.....69

INITIAL DISTRIBUTION LIST 79

LIST OF TABLES

Table 1. Policy Evaluation.....65

THIS PAGE INTENTIONALLY LEFT BLANK

LIST OF ACRONYMS AND ABBREVIATIONS

AUMF	Authorization for the Use of Military Force
CIA	Central Intelligence Agency
CSRT	Combatant Status Review Tribunal
FBI	Federal Bureau of Investigation
MLAT	mutual legal assistance treaty
OIG	Office of the Inspector General

THIS PAGE INTENTIONALLY LEFT BLANK

EXECUTIVE SUMMARY

In broad terms, the United States faces two choices that often compete with each other when a terrorist is captured overseas: bring the person back to the United States immediately to face trial—with all of the procedural and legal protections that go along with such a trial—or hold the person in military detention as an enemy combatant, where prosecutions have been difficult and slow-moving and the process has been rife with criticism.

The choice often revolves around whether or not Miranda warnings are provided to the captured terrorist. If a person is detained by law enforcement officers, the officers must typically provide Miranda warnings before they can begin an interrogation.[1] If the officers interrogate a detainee without Miranda warnings in an effort to stop the next attack, and the suspected terrorist does make statements about future plots, they could potentially save lives. However, it is possible that the statement may not be admissible in court because, in the absence of Miranda warnings or other curative measures, a criminal court almost certainly would rule that the accused had been denied a fundamental trial right, the right against self-incrimination.[2] In this case, the suspected terrorist likely would be released soon, and therefore able to resume planning new attacks against the United States.

This thesis sought to determine which policy best allows the United States to reduce the threat posed by a terrorist captured overseas, takes into account the need to obtain information about looming attacks, preserves the opportunity for prosecution, and maintains the credibility of the United States. This thesis used a policy options analysis method, based on the premise that the most important objective after the detention of a person for terror-related offenses is to obtain information to preserve life and to stop a future terror attack. This thesis examined three different approaches for handling terror suspects captured overseas: law of war detention, two-step intelligence and law enforcement interrogations, and arrest and extradition. The criteria for evaluation were

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

[2] Missouri v. Seibert, 542 U.S. 600 (2004).

- Legality: whether or not the suggested approach is currently legal to conduct without further litigation.
- Threat reduction: determined by observing how long terror subjects are detained under each policy (the longer a terror subject is detained, the greater the presumed reduction in threat).
- Opportunity to gain intelligence: determined by evaluating if the course of action provides the United States with an opportunity to gather intelligence information.
- Opportunity to prosecute: whether or not the course of action provides the United States with an opportunity to prosecute a terror suspect.
- Credibility: determined by assessing whether or not the United States maintains moral and legal credibility with both allies and enemies.

A. LAW OF WAR DETENTION

Law of war detention was found to be lawful under the Authorization for the Use of Military Force (AUMF), which was enacted by Congress after the 9/11 attacks.[3] The Supreme Court's decision in *Hamdi v Rumsfeld* affirmed the ability of the executive branch to seize and hold persons under the AUMF.[4] As of approximately 2018, the detainees at Guantanamo Bay being held under law of war detention authority served, on average, a term of ninety-seven months.[5] This estimate is based on the calculation of the sentence for 392 of the approximately 780 Guantanamo detainees.[6] Because the estimation is based on

[3] Richard B. Zabel and James J. Benjamin Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts: 2009 Update and Recent Developments* (Washington, DC: Human Rights First, 2009), 22, http://www.humanrightsfirst.org/wp-content/uploads/pdf/090723-LS-in-pursuit-justice-09-update.pdf.

[4] Hamdi v. Rumsfeld, 542 U.S. 507 (June 28, 2004), 26.

[5] "Combatant Status Review Tribunal (CSRT) Documents," Office of the Secretary of Defense and Joint Staff, accessed December 16, 2019, https://web.archive.org/web/20090125032047/http://www.dod.mil/pubs/foi/detainees/csrt_arb/.

[6] "The Guantánamo Docket," *New York Times*, accessed April 3, 2016, http://projects.nytimes.com/guantanamo.

only about half of the total detainee population, it is made with medium confidence. As evidenced by hundreds of Combatant Status Review Tribunal (CSRT) summaries, a great deal of information was collected about each detainee, including the detainee's background, associates, details of travel, and circumstances of capture.[7] A review of these CSRT summaries revealed that many details were corroborated by other detainee summaries. It is clear that thousands of intelligence interrogations took place at Guantanamo Bay. Of the approximately 780 persons who have been held at Guantanamo Bay under law of war detention, eight have been prosecuted and seven are currently being prosecuted.[8] These fifteen people constitute approximately 2 percent of the total population of Guantanamo Bay. While effective at keeping detained persons from reentering the fight against the United States, the use of Guantanamo Bay as a detention center has been marked by scandals, including allegations of physical mistreatment.[9]

B. TWO-STEP INTELLIGENCE AND LAW ENFORCEMENT INTERROGATIONS

Two-step intelligence and law enforcement interrogations derive their authority in part from the AUMF. The detainees studied for the thesis were seized by U.S. military forces and held in military detention overseas. The recent successful prosecution of alleged Benghazi attacker Ahmed Abu Khattala provided the first judicial review of the practice of conducting an intelligence interrogation, followed by a Mirandized law enforcement interrogation.[10] The judge in this case found that Abu Khattala's statements were knowing,

---

[7] Office of the Secretary of Defense and Joint Staff, "Combatant Status Review Tribunal."

[8] Carol J. Williams, "Pentagon: Guantanamo Detainee Dies; Ninth Fatality at Facility," *Los Angeles Times*, September 10, 2012, http://articles.latimes.com/2012/sep/10/nation/la-na-nn-gitmo-death-20120910; *New York Times*, "The Guantánamo Docket."

[9] Adam Zagorin, "Exclusive: '20th Hijacker' Claims That Torture Made Him Lie," *TIME*, March 3, 2006, http://content.time.com/time/nation/article/0,8599,1169322,00.html.

[10] Spencer S. Hsu, "Benghazi Attack Suspect Ahmed Abu Khattala's Words Used against Him at Trial," *Pittsburgh Post-Gazette*, October 2, 2017, http://www.post-gazette.com/news/world/2017/10/02/Benghazi-attack-suspect-Ahmed-Abu-Khattala-s-words-used-against-him-at-trial/stories/201710020209; Thomas Joscelyn, "New Senate Report: Al Qaeda Network Attacked in Benghazi," *Washington Examiner*, January 15, 2014, http://www.weeklystandard.com/new-senate-report-al-qaeda-network-attacked-in-benghazi/article/774703.

willing, and voluntary.[11] The other cases profiled for two-step intelligence and law enforcement interrogations provide a small sample by which to evaluate threat reduction. Abu Khattala was convicted and was sentenced to twenty-two years in prison.[12] Ahmed Abdulkadir Warsame has plead guilty and is cooperating with the U.S. government.[13]

Two-step intelligence and law enforcement interrogations for the three cases examined (Abu Khattala, Warsame, and Abu Anas al-Libi) provided between one week and two months to conduct intelligence interrogations before law enforcement interrogations were started. Statements from the U.S. Attorney for the Southern District of New York described the later cooperation of Warsame as extensive.[14] There is no data about intelligence provided by Abu Khattala, Warsame, or al-Libi during their intelligence interrogations, but they did have the opportunity to provide intelligence. Two-step intelligence and law enforcement interrogation as a policy is a new development, and critics question the voluntariness of the process.[15] Additionally, some countries believe it is questionable for the United States to use military force to capture persons in sovereign countries that the United States is not at war with.

---

[11] Spencer S. Hsu, "U.S. Judge Upholds Ship-Based Interrogation of Benghazi Terror Suspect Seized Overseas," *Washington Post*, August 16, 2017, https://www.washingtonpost.com/local/public-safety/us-judge-upholds-ship-based-interrogation-of-benghazi-terror-suspect-seized-overseas/2017/08/16/94f851f4-829d-11e7-ab27-1a21a8e006ab_story.html?utm_term=.0b3d81af1dfe.

[12] Spencer S. Hsu, "Libyan Militia Leader Gets 22-Year Sentence in Benghazi Attacks That Killed U.S. Ambassador," *Washington Post*, June 27, 2018, https://www.washingtonpost.com/local/public-safety/libyan-militia-leader-to-be-sentenced-in-2012-benghazi-attacks-that-killed-us-ambassador/2018/06/27/55782e5c-789a-11e8-aeee-4d04c8ac6158_story.html?noredirect=on&utm_term=.f4fb4279eed5.

[13] "Manhattan U.S. Attorney Announces Guilty Plea of Ahmed Warsame, a Senior Terrorist Leader and Liaison between Al Shabaab And Al Qaeda in the Arabian Peninsula for Providing Material Support to Both Terrorist Organizations," Targeted News Service, March 25, 2013, http://search.proquest.com.libproxy.nps.edu/docview/1319578532/citation/989D230F0BC140A3PQ/54.

[14] Targeted News Service.

[15] Lee Ross Crain, "The Legality of Deliberate Miranda Violations: How Two-Step National Security Interrogations Undermine Miranda and Destabilize Fifth Amendment Protections," *Michigan Law Review* 112, no. 3 (2013): 453, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1034&context=mlr.

C. ARREST AND EXTRADITION (LAW ENFORCEMENT INTERROGATION ONLY)

Arrest and extradition is a policy that has been practiced for decades. The United States has extradition agreements with approximately 107 countries.[16] Countries enter into agreements to detain and extradite persons suspected of certain crimes. The agreements are reciprocal and are limited to only the crimes that the two countries agree to extradite for.[17] Arrest and extradition can reduce the threat of terrorism through the prosecution and incarceration of terrorists. As with intelligence and law enforcement interrogations, arrest and extradition's effectiveness is based upon federal conviction terms. Looking at federal terrorism convictions in general, 627 convictions for federal terrorism or terrorism-related offences were reviewed.[18] The average sentence was found to be approximately 116 months.[19] For arrest and extradition, intelligence is only gained if a person in custody decides to make a statement or decides to formally cooperate with the government. All of the cases reviewed regarding extradition—Abu Hamza Al Masri, Babar Ahmad, Syed Talha Ahsan, Abid Naseer and Ali Charaf Damache—resulted in a successful prosecution. Extradition is typically based on a treaty and is often accompanied by other assistance, such as access to witnesses and evidence.[20] Because so many countries willingly enter into these agreements with the United States and because the agreements are reciprocal, there is widespread support for this approach.[21]

D. RECOMMENDATIONS

To improve the viability of law of war detention to address captured terrorists, the United States should use prosecution as a tool to keep individuals in custody—not only

---

16 Michael John Garcia, *Extradition to and from the United States: Overview of the Law and Recent Treaties* (Collingdale, PA: Diane Publishing, 2010), 1.

17 Garcia, 1.

18 National Security Division, "Introduction to National Security Division Statistics on Unsealed International Terrorism and Terrorism-Related Convictions" (report, Department of Justice, 2012), 1, http://fas.org/irp/agency/doj/doj032610-stats.pdf.

19 National Security Division, 1–26.

20 Garcia, *Extradition to and from the United States*, 1.

21 Garcia, 1, 21.

those who have taken up arms against the United States but also those who have committed crimes while doing so.

Many steps have already been taken to improve the credibility of law of war detention; for instance, coercive interrogation techniques have been banned, public release of information regarding detainees and detention facilities has been required, and groups such as the International Red Cross are now permitted to access detainees.[22] Additional transparency, such as the declassification and release of some detainee statements, can improve public knowledge and perception of the nature of law of war detention.

The United States should further refine the two-step intelligence and law enforcement interrogation policy to ensure that intelligence interrogations remain viable and reasonable. Examples studied in this paper relied upon the authority of the AUMF to hold detained suspected terrorists for the intelligence interrogation. This authority must be maintained in order for these interrogations to continue.

E. CONCLUSION

The varied situations encountered by the United States during the war on terror demand varied responses. It is critical that decision-makers have options available to fit these circumstances. The advent of irregular, asymmetrical threats such as those from al Qaeda and ISIS make clear that the line between law enforcement and military operations is often difficult to discern. Terrorists exploit this vulnerability by attacking the United States, then sheltering under U.S. law. Each of the policies evaluated in this thesis depend on specific circumstances, including whether or not the military is able to take custody of a suspected terrorist, the cooperation of foreign countries, and many other factors. Having each of these policies as continued viable options will help leaders choose the best course of action based upon circumstances.

[22] Josh White and Dan Eggen, "US Admits Koran Abuse at Cuba Base," *Guardian*, June 5, 2005, https://www.theguardian.com/world/2005/jun/05/guantanamo.usa.

ACKNOWLEDGMENTS

I would like to express my sincere appreciation to the professors and staff at CHDS, and in particular to Dr. Erik Dahl, Dr. Carolyn Halladay, and Dr. Lauren Wollman. Their expertise, dedication, and support have made CHDS the outstanding institution it is today. I would also like to thank Aileen Houston for her grace, skill, and patience throughout the editing process.

THIS PAGE INTENTIONALLY LEFT BLANK

I. INTRODUCTION

A major criticism leveled at the intelligence community, and especially the Federal Bureau of Investigation (FBI), after the attacks of September 11, 2001, was its emphasis on prosecuting attackers rather than on preventing attacks. To illustrate their point, critics exemplified the arrest of Zacarias Moussaoui shortly before the attacks. Moussaoui was arrested in Minnesota by the agents from FBI's Joint Terrorism Task Force for immigration violations after a local flight training school called the FBI about Moussaoui's unusual behavior.[1] Moussaoui had gone through fifty-odd hours of training in a small, single-engine aircraft before enrolling in a Boeing 747 flight simulator course typically taken by far more experienced pilots. The Immigration and Naturalization Service agent and FBI agent who interviewed Moussaoui after his arrest were concerned that he was a radical Islamist and could be part of a plot to attack the United States. After two days of questioning, Moussaoui invoked his right to an attorney; any knowledge he may have been able to provide regarding the looming attacks was lost to officials.

Similar criticisms were levied after a Nigerian man named Umar Abdulmutallab attempted to down a U.S.-bound jetliner.[2] On December 25, 2009, Abdulmutallab attempted to destroy a Northwest Airlines flight headed from Amsterdam to Detroit with an improvised explosive device hidden in his underwear.[3] The bomb failed to explode but did catch fire, seriously burning Abdulmutallab. Abdulmutallab was overpowered by passengers and crew and was turned over to the FBI when the plane landed. After Abdulmutallab was arrested, but before he underwent surgery for his injuries, agents briefly interrogated him and revealed, according one senior official, a significant amount

---

[1] "Judge Warns Prosecutors in Moussaoui Trial," NBC News, March 9, 2006, http://www.nbcnews.com/id/11744129/ns/us_news-security/t/judge-warns-prosecutors-moussaoui-trial/#.W7E7r_lRfIU.

[2] Spencer S. Hsu and Jennifer Agiesta, "Intelligence Chief Says FBI Was Too Hasty in Handling of Attempted Bombing," *Washington Post*, January 21, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/01/20/AR2010012001364.html.

[3] Scott Lewis, "FBI Agents Reveal Underwear Bomber Abdulmutallab Wore Explosive Underwear for Three Weeks," WXYZ, September 27, 2012, https://www.wxyz.com/news/local-news/investigations/fbi-agents-underwear-bomber-abdulmutallab-wore-underwear-for-3-weeks.

of intelligence.[4] Abdulmutallab was provided with Miranda warnings later that day, and he stopped talking to investigators and invoked his right to an attorney.[5] Then Director of National Intelligence, Dennis Blair, as well as several Senate Republicans, criticized the actions of the FBI.[6] While Abdulmutallab later cooperated with the government and pled guilty to several charges, initial criticisms about the handling of the case were significant, as they exposed the dilemma of what to do when a terrorist is first captured.

The arrests of Moussaoui and Abdulmutallab are instructive because they show high-level government interest in trying to decide how to handle terrorists when they are captured. However, when it comes to terrorists arrested domestically, the U.S. government has generally only interrogated suspects for a short time before administering Miranda warnings and placing them in the criminal justice system—with all its process and protections. Former Attorney General Eric Holder, when asked about the handling of Abdulmutallab, explained in letter to Senator Mitch McConnell on February 3, 2010, that "the decision to charge Mr. Abdulmutallab in federal court, and the methods used to interrogate him, are fully consistent with the long-established and publically known policies and practices of the Department of Justice, the FBI, and the United States Government as a whole, as implemented for many years by Administrations of both parties."[7]

There is less consensus, however, about how to handle terror suspects captured overseas. The United States' goals are still the same: to obtain intelligence to stop any pending attacks and prevent the suspected terrorist from reengaging in the fight against Americans. The United States has tried different policies to accomplish these goals, including the three broad approaches explored in this thesis: law of war detention, a two-step intelligence-then-law-enforcement interrogation, or the simple arrest and extradition of a person to the United States to face charges in a criminal court. Law of war detention

---

[4] Hu and Agiesta, "Intelligence Chief Says FBI Was Too Hasty."

[5] Hu and Agiesta.

[6] Hu and Agiesta, 2.

[7] "Abdulmutallab: Cleric Told Me to Bomb Jet," CBS News, February 4, 2010, http://www.cbsnews.com/news/abdulmutallab-cleric-told-me-to-bomb-jet/.

can effectively reduce the threat of terrorism by helping officials gain intelligence while simultaneously preventing terrorists from rejoining the fight against the United States. However, law of war detention does not effectively facilitate prosecutions, and the credibility of this approach has suffered after a number of scandals. Two-step intelligence and law enforcement interrogations help the United States gain intelligence to stop the next attack and prosecute terrorists for crimes they have committed, but this approach has only been used occasionally. Given the cost and complexity of terror trials and the relatively new legal precedent, two-step intelligence and law enforcement interrogations are not a global solution. Arrest and extradition of a terrorist can effectively reduce the threat and provide the evidence needed to introduce a criminal case, but does little to help officials gain intelligence to stop the next attack. Depending on the circumstances, national leaders must decide which approach provides the best solution for the United States.

Law of war detention is a policy that was pursued by the United States in the immediate aftermath of the 9/11 attacks. With this policy, some of the persons who were captured on the battlefield during the war on terror were brought to facilities in Iraq, Afghanistan, and Guantánamo Bay, Cuba, for detention. It is significant to note that *battlefield* here is loosely defined. Some detainees were captured in foreign countries and handed over to U.S. military custody—that is, they were not captured by the U.S. military on a traditional battlefield in Afghanistan or Iraq. Once the detainees were in military detention, they were subject to interviews for intelligence-gathering purposes. The detainees were not provided Miranda warnings and, in general terms, prosecution of these detainees was not contemplated.

Beginning in the late 2000s, the United States began pursuing a different policy with some terrorism suspects captured overseas. This policy involved prolonged intelligence debriefing of the detainee, oftentimes aboard a U.S. naval vessel, followed by a law enforcement interview. During this hybrid, or two-step, process, the intelligence interview was a non-Mirandized interrogation designed to determine if the detainee had knowledge of impending attacks on the U.S. homeland, or a U.S. military base or embassy abroad. After the intelligence interrogation, a clean team of law enforcement officers interviewed the terror suspect after providing Miranda warnings. The team was called a

clean team because, by design, the members had no significant knowledge of what the terror suspect may have said to intelligence officers. The law enforcement officers sought to gain a Mirandized confession from the terror suspect for later use in prosecution.

Not every terrorism suspect detained overseas is held under law of war detention or held by the U.S. military for intelligence debriefings before being turned over to law enforcement officers. A third policy option for the United States is immediately to render a person back to the United States for trial. Several persons detained overseas for terrorism-related offenses have been brought directly to the United States by aircraft, provided with Miranda warnings, and interviewed en route.[8] In these cases, no separate intelligence interrogation is conducted.

Whatever policy the United States pursues, it is important that the United States maintains moral and legal credibility with the rest of the world. Military and law enforcement cooperation depends in large part on other countries and their citizens knowing that the United States will treat people humanely and fairly. Many western European countries have refused to cooperate with military prosecutions conducted by the Unites States due to a belief that force may have been used to obtain confessions and due to a belief that the military legal system does not provide all the due process of a federal civilian court in the United States.[9] To prosecute terrorists from overseas successfully, both military and federal prosecutors need witnesses and evidence in the form of business documents, financial records, telephone records, email records, and text records. Often, this evidence is only available from countries where the coconspirators planned their attacks. Countries that believe that the United States uses force to obtain information or denies basic legal protections will not share information or provide law enforcement cooperation.

---

[8] Jonathan Stempel, "Court Refuses to Dismiss Plot Case Against Bin Laden's Son-in-Law," Huffington Post, November 26, 2013, http://www.huffingtonpost.com/2013/11/26/suleiman-abu-ghaith-case_n_4346326.html.

[9] Tony Karon, "Why Guantanamo Has Europe Hopping Mad," *TIME*, January 24, 2002, http://content.time.com/time/world/article/0,8599,197210,00.html.

A. RESEARCH QUESTION

Which policy—law of war detention, two-step interrogations, or arrest and extradition—best allows the United States to reduce the threat posed by a terrorist captured overseas, take into account the need to obtain information about looming attacks, preserve the opportunity for prosecution, and maintain the credibility of the United States?

B. PROBLEM STATEMENT

In broad terms, the United States faces two choices that often compete with each other when a terrorist is captured overseas: bring the person back to the United States immediately to face trial—with all the procedural and legal protections that go along with such a trial—or hold the person in military detention as an enemy combatant in places such as Bagram, Afghanistan, and Guantánamo Bay, Cuba, where prosecutions have been difficult and slow-moving and the process has been heavily criticized.

One of the major differences between these policies revolves around whether or not Miranda warnings are provided. If a person is detained by law enforcement officers, the officers must typically provide Miranda warnings before they can interrogate the person. If the officers interrogate a detainee without Miranda warnings in an effort to stop the next attack and the suspected terrorist does make statements about future plots, they could potentially save lives. However, it is possible that such statements will not be admissible in court because, in the absence of Miranda warnings or other curative measures, a criminal court almost certainly would rule that the accused had been denied a fundamental trial right, namely the right against self-incrimination. In this case, the suspected terrorist likely would be released quickly, able to resume planning new attacks against the United States.

On the one hand, many suspected terrorists, given the legal opportunity to remain silent, lest anything they say become evidence against them in court, will refuse to answer questions.[10] If they have any knowledge that might save lives, it is therefore lost to investigators. On the other hand, if a suspected terrorist is detained and not advised of the

[10] Paul Cassell, "Handcuffing the Cops: Miranda's Harmful Effects on Law Enforcement," National Center for Policy Analysis, August 1, 1998, http://www.ncpathinktank.org/pub/st218.

Fifth Amendment rights of all criminally accused in the United States, he or she may or may not provide details regarding an impending attack. In other words, the tradeoff is not absolute or even. Michael Chertoff, a former federal judge and former secretary of the Department of Homeland Security, noted in a 2011 article that "civilian arrest and charging triggered the right to silence, which frustrates the process of questioning for intelligence gathering, which was a primary objective when capturing terrorists."[11]

C. LITERATURE REVIEW

This literature review identifies sources of information regarding the handling of terrorism suspects captured overseas by the United States. This information includes policy questions, legal issues, and the effects of U.S. detention and prosecution policies.

On its website, the FBI states that its number-one priority is to "protect the United States from terrorist attacks."[12] The Central Intelligence Agency (CIA) states succinctly that its mission is to "preempt threats and further U.S. national security objectives by collecting intelligence."[13] These agency mission statements reflect a common refrain in both public sentiment and government lessons learned: that the primary goal of the U.S. government when capturing a terror suspect overseas is the collection of intelligence to save lives by stopping a pending attack. Second to obtaining intelligence is preparing a prosecution, if appropriate, to take terror suspects off the street and prevent them from conducting a terrorist attack against the United States. The literature review summarizes current knowledge regarding two main topics: the need to obtain intelligence from terror suspects, and legal issues—including the different ways in which a terrorist suspect may be lawfully detained, and the law surrounding the president's authority to detain terror suspects, Miranda warnings, public-safety questioning of terror suspects, and two-step interrogations.

---

11 Michael Chertoff, "9/11: Before and After," *Homeland Security Affairs* 7 (September 2019): 3, https://www.hsaj.org/articles/584.

12 "Terrorism," Federal Bureau of Investigation, accessed November 10, 2018, https://www.fbi.gov/investigate/terrorism.

13 "CIA Vision, Mission, Ethos & Challenges," Central Intelligence Agency, accessed November 10, 2018, https://www.cia.gov/about-cia/cia-vision-mission-values.

1. The Need for Intelligence

The Department of Justice Office of the Inspector General (OIG) conducted an inquiry into the FBI's counterterrorism program as it was pursued before September 2001. The results are codified in an OIG memorandum titled "A Review of the FBI's Handling of Intelligence Information Prior to the September 11 Attacks."[14] This report details the FBI's role in U.S. counterterrorism efforts. It states: "Prevention of future terrorist acts rather than prosecution after the fact is the primary goal of the intelligence investigations with respect to international terrorism matters."[15] While the report generally addresses the use of the Foreign Intelligence Surveillance Act (or FISA) court orders as used by the FBI, it does also address intelligence priorities, and notes the primacy of gathering intelligence to stop pending attacks. The report also details how the FBI is organized to address terrorism threats and explores how the FBI conducted terrorism investigations before the 9/11 attacks. This special report identified the importance of "the collection of timely and accurate intelligence information" about terror groups.[16]

A separate report published by the Congressional Research Service at approximately the same time as the OIG memorandum notes the FBI's efforts to become a proactive intelligence agency, not simply one that responds to attacks and focuses on prosecution.[17] The report does not specifically address intelligence interrogations conducted overseas but does highlight a need for the opportunity to obtain intelligence. It also emphasizes the importance of gaining actionable intelligence to stop an attack over the desire to successfully prosecute a suspect. The report, titled *FBI Intelligence Reform Since September 11, 2001: Issues and Options for Congress*, notes the reform that has been conducted at the FBI and identifies options the FBI may consider to address its approach

---

[14] Office of the Inspector General, "A Review of the FBI's Handling of Intelligence Information Prior to the September 11 Attacks" (special report, U.S. Department of Justice, 2004), 2 https://oig.justice.gov/special/0506/final.pdf.

[15] Office of the Inspector General, 9.

[16] Office of the Inspector General, 8.

[17] Alfred Cumming and Todd Masse, *FBI Intelligence Reform since September 11, 2001: Issues and Options for Congress* (Washington, DC: Congressional Research Service, 2004), http://fas.org/irp/crs/RL32336.pdf.

to counterterrorism.[18] The report also provides detail on past FBI failures, intelligence reforms, and successes. The report notes the Joint Intelligence Committee Inquiry (JICI) assessment that the "FBI's deeply rooted law enforcement culture and its reactive practice of investigating crimes after the fact will undermine efforts to transform the FBI into a proactive agency able to develop and use intelligence to prevent terrorism."[19] The report supports the assertion that gaining intelligence on terror threats is of paramount importance.

Further evidence of the need for better intelligence-gathering is articulated in the *9/11 Commission Report*.[20] The report asserts that the FBI and Department of Justice were focused on prosecutions, and profiles the 1993 World Trade Center bombing case as an example.[21] The report states: "The process was meant, by its nature, to mark for the public the events as finished—case solved, justice done. It was not designed to ask if the events might be harbingers of worse to come."[22] The *9/11 Commission Report* notes the risk associated with prioritizing prosecution over gaining of intelligence.

2. Law and Legal Issues

The 1949 Geneva Convention Relative to the Treatment of Prisoners of War, commonly referred to as the Third Geneva Convention, impacts the legality of U.S. detention of persons pursuant to the Authorization for the Use of Military Force. The Third Geneva Convention, which was signed by Afghanistan on December 8, 1949, governs how nation-states treat persons captured during conflict.[23] Article 2 states: "Although one of

---

[18] Cumming and Masse, 2.

[19] Cumming and Masse, 2.

[20] National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report* (Washington, DC: Government Printing Office, 2004), 407, http://www.9-11commission.gov/report/911Report.pdf.

[21] National Commission on Terrorist Attacks upon the United States, 73.

[22] National Commission on Terrorist Attacks upon the United States, 73.

[23] *Geneva Convention Relative to the Treatment of Prisoners of War*, 6 U.S.T. 3316 (August 12, 1949), 91–92, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.32_GC-III-EN.pdf; "Treaties, States Parties and Commentaries: Convention (III) Relative to the Treatment of Prisoners of War," International Committee of the Red Cross, accessed November 12, 2016, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=375.

the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations."[24] Article 4 goes on to define prisoners of war as "[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces."[25] Article 4 also articulates the requirements of persons engaged in conflict to be considered prisoners of war. These requirements include wearing "a fixed distinctive sign recognizable at a distance" and "carrying arms openly," and being able to abide by the generally recognizable laws of war.[26] Article 17 delineates the responsibilities of prisoners of war and the capturing party. A prisoner of war is required to only provide name, date of birth, rank, and "serial number."[27] The capturing party is bound to ensure that it inflicts "no physical or mental torture, nor any other form of coercion" in order to "secure from them information of any kind whatever."[28]

George H. Aldrich, in an article published in *Humanitäres Völkerrecht*, analyzes the George W. Bush administration's decision not to treat al Qaeda and Taliban detainees as prisoners of war.[29] Aldrich notes that al Qaeda is, in essence, a covert organization present in multiple countries, which contains persons of many different nationalities, whose goal is to promote political change through the use of terrorist acts.[30] As such, al Qaeda is not, and cannot be, a party to the Geneva Conventions.[31] Further, members of al Qaeda, according to Aldrich, do not qualify as prisoners of war, but they are nonetheless entitled

---

[24] *Geneva Convention Relative to the Treatment of Prisoners of War*, 91.

[25] *Geneva Convention Relative to the Treatment of Prisoners of War*, 92.

[26] Director of National Intelligence, "Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba as of July 2016" (report, Director of National Intelligence, 2017), 1, https://www.dni.gov/index.php/newsroom/reports-publications/reports-publications-2017/item/1742-summary-of-the-reengagement-of-detainees-formerly-held-at-guantanamo-bay-cuba.

[27] *Geneva Convention Relative to the Treatment of Prisoners of War*, 98.

[28] *Geneva Convention Relative to the Treatment of Prisoners of War*, 98.

[29] George H. Aldrich, "The Taliban, Al Qaeda, and the Determination of Illegal Combatants," *Humanitäres Völkerrecht*, no. 4 (2002): 202, https://www.icrc.org/eng/assets/files/other/george_aldrich_3_final.pdf.

[30] Aldrich, 203.

[31] Aldrich, 203.

to humane treatment.[32] Aldrich describes al Qaeda as a "criminal organization" and posits that its members can be prosecuted under the laws of a nation that is in conflict with the group.[33] Aldrich disagrees with the Bush administration's determination that Taliban fighters do not qualify as prisoners of war because, as Aldrich believes, they do qualify under Article 4 as "members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces."[34]

In 2006, the *Hamdan v Rumsfeld* Supreme Court decision put to rest part of the argument regarding the applicability of the Geneva Conventions in the ongoing conflict between al Qaeda and the United States. Salim Ahmed Hamdan was captured on the battlefields of Afghanistan in late 2001 and transported to Guantánamo Bay, Cuba.[35] A native of Yemen, Hamdan was reportedly a driver for Osama Bin Laden, and he was charged in the military commissions system.[36] The military commission under which he was charged was convened based on a military order by President George W. Bush.[37] Attorneys appealed Hamdan's case and it was eventually heard by the Supreme Court. The court found, among other things, that the United States was bound by common Article 3 of the Geneva Conventions, which dictates that humane treatment be afforded to captured persons and that captured persons are entitled to be tried in a "regularly constituted court."[38] This meant that the military commission court as created by Bush was unlawful. In response, Congress enacted the Military Commissions Act of 2006, which authorized

---

[32] Aldrich, 203.

[33] Aldrich, 203.

[34] Aldrich, 203–5.

[35] Josh White and William Branigin, "Former Bin Laden Driver Hamdan to Leave Guantanamo Bay for Yemen," *Washington Post*, November 25, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/11/24/AR2008112403159.html.

[36] White and Branigin.

[37] Jennifer K. Elsea, *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues*, CRS Report No. R41163 (Washington, DC: Congressional Research Service, 2014), 1, https://fas.org/sgp/crs/natsec/R41163.pdf.

[38] Hamdan v. Rumsfeld, 548 U.S. 557 (2006), slip opinion, 65–68, https://www.supremecourt.gov/opinions/05pdf/05-184.pdf.

military commissions as a "regularly constituted court."[39] This act was later amended by the Military Commissions Act of 2009, which added additional rights for defendants and explicitly referred common Article 3 of the Geneva Convention to define standards of treatment for detained persons.[40]

Attorney John B. Bellinger III, a legal advisor for the Department of State from 2005 to 2009, lead a team that discussed the Third Additional Protocol to the Geneva Conventions.[41] In a 2010 article, Bellinger suggested that the United States "accept specific provisions of the Conventions and engage other countries to develop new rules where the Geneva Conventions do not apply."[42] Further, Bellinger states, "[I]t is true that the Conventions, and even the Additional Protocols, do not provide clear guidance for countries engaged in conflicts with terrorist groups like al Qaeda, such as who qualifies as a combatant and what legal process should be given."[43] Bellinger's comments highlight the difficulty of applying the Geneva Conventions to multinational terrorist groups whose operations are conducted in many different countries by individuals who do not purport to represent a specific nation. While it is difficult to determine the applicability of the Geneva Conventions to the current conflict between the United Stated and al Qaeda due to its asymmetric nature, the courts and the Congress have made clear that common Article 3 of the convention is relevant and in force.

Several federal laws are also relevant to law of war detention, habeas corpus, military commissions, and *Miranda v. Arizona*.

- *Ex parte Quirin*. Richard Quirin was part of a group of eight German saboteurs who secretly entered the United States by submarine in 1942

---

[39] Military Commissions Act of 2006, S. 3930 § 948a, 109 Cong. 2nd sess., 2006, https://www.gpo.gov/fdsys/pkg/BILLS-109s3930es/pdf/BILLS-109s3930es.pdf.

[40] Elsea, *Military Commissions Act of 2009*, 1, 39.

[41] John B. Bellinger III, "Obama, Bush, and the Geneva Conventions," *Foreign Policy*, August 11, 2010, https://foreignpolicy.com/2010/08/11/obama-bush-and-the-geneva-conventions/.

[42] Bellinger, 1.

[43] Bellinger, 3.

while the United States was at war with Germany.[44] Quirin and his seven coconspirators had been trained and directed by the German government to conduct sabotage missions against U.S. industries that produced war materiel.[45] After their arrest, Quirin and his codefendants sought to be tried by civilian courts in the United States, not by military commission.[46] The Supreme Court's decision was handed down on July 31, 1942, finding, in part, that a person who is acting at the direction "of any nation at war with the United States" and is charged with violating the law of war "shall be subject to the law of war and to the jurisdiction of military tribunals."[47]

- *Johnson v. Eisentrager*. *Johnson v. Eisentrager* concerned the actions of German citizens (nonresident enemy aliens) in China at the end of the Second World War. These German nationals, who alleged that they were under the direction of German civilian organizations, were accused of assisting Japanese forces after the surrender of Germany, but before the capitulation of Japan.[48] The Supreme Court found, in part, that military tribunals have the authority to try nonresident enemy aliens overseas.[49]

- *Rasul v. Bush*. After the 2001 U.S. invasion of Afghanistan, a British national named Shafiq Rasul was captured and later detained at Guantanamo Bay.[50] Rasul sought to have U.S. civilian courts determine whether or not he was wrongfully held by the United States at

---

[44] "Nazi Saboteurs Trial," Library of Congress, accessed October 8, 2016, https://www.loc.gov/rr/frd/Military_Law/nazi-saboteurs-trial.html.

[45] Library of Congress.

[46] Library of Congress.

[47] Ex Parte Quirin, 317 U.S. 1 (1942).

[48] Johnson v. Eisentrager 339 U.S. 763 (1950).

[49] Johnson v. Eisentrager.

[50] Rasul v Bush 542 U.S. 466 (2004).

Guantanamo.[51] The Supreme Court determined that detainees held at Guantanamo Bay are entitled to challenge the legitimacy of their detention via U.S. civilian courts.[52]

- *Hamdi v. Rumsfeld.* Yaser Esam Hamdi was captured on the battlefields of Afghanistan in late 2001 by members of the Northern Alliance.[53] Hamdi, born in Louisiana, had been raised in Saudi Arabia.[54] According to Hamdi's father, his son had gone to Afghanistan to become a relief worker.[55] After Hamdi was captured, he was sent to Guantanamo Bay. When it became known that Hamdi was a U.S. citizen, he was transferred to the United States, eventually landing at the U.S. Navy brig in Charleston, South Carolina.[56] While Hamdi was there, his father filed a habeas corpus petition to dispute his detention. The case moved between the U.S. District and Fourth Circuit Court of Appeals and was eventually appealed to the Supreme Court, which agreed to hear the case. The Supreme Court found that detainees are entitled to challenge their characterization as enemy combatants.

- *Miranda v. Arizona*. In the *Rasul v. Bush* and *Hamdi v. Rumsfeld* cases, the court addressed detention issues surrounding detainees captured during the war on terror. Well before the current war on terror, however, the court system addressed the admissibility of confessions in criminal court proceedings. The landmark *Miranda v. Arizona* case determined that defendants must be advised of their right to remain silent (or right against self-incrimination) and their right to an attorney before they are questioned

---

[51] Rasul v Bush.

[52] Rasul v Bush.

[53] Hamdi v. Rumsfeld, 542 U.S. 507 (June 28, 2004).

[54] Hamdi v. Rumsfeld.

[55] Hamdi v. Rumsfeld.

[56] Hamdi v. Rumsfeld.

by police.[57] Ernesto Miranda had been arrested for rape and was later identified by a witness.[58] Miranda was questioned by police for two hours and confessed to the crime.[59] He was convicted sentenced to twenty to thirty years. The case was appealed and eventually heard by the Supreme Court. The court specifically held that:

> the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[60]

Miranda v. Arizona is an important factor when terror suspects are captured, as these warnings must usually be provided if a confession by a suspect is later to be used in court.

While Miranda warnings are typically required upon arrest and interrogation, there are instances when the court has found that statements made by arrested persons before the administration of Miranda warnings may still be admissible in court. One of those exceptions was highlighted in the *New York v. Quarles* case. Late one night in September 1980, two New York City police officers were stopped by a woman who claimed that she had been raped, that the man who raped her was carrying a gun, and that the man had fled into a nearby market.[61] One of the officers, Frank Craft, entered the market and spotted a man who matched the description the woman had provided. Kraft chased the man through

---

[57] Alex McBride, "Landmark Cases: Miranda v. Arizona (1966)," Thirteen, accessed August 14, 2018, https://www.thirteen.org/wnet/supremecourt/rights/landmark_miranda.html.

[58] McBride.

[59] McBride.

[60] Miranda v. Arizona, 384 U.S. 436 (1966).

[61] "Arrest in Queens the Catalyst," *New York Times*, June 13, 1984, http://www.nytimes.com/1984/06/13/us/arrest-in-queens-the-catalyst.html.

the store and caught him after a brief foot pursuit.[62] Kraft had lost sight of the man for a brief period and, when he caught him, the officer noted that the suspect had an empty shoulder holster.[63] Kraft asked the man where the gun was, and the man, later identified as Benjamin Quarles, stated that the gun was "over there."[64] Officer Kraft went to the area indicated by Quarles and recovered a .38 caliber pistol.[65]

The trial court in New York suppressed Quarles's statement, however, determining it inadmissible because it was obtained before the provision of Miranda warnings.[66] The New York appellate court and appellate division of the New York Supreme Court agreed with the trial court's judgment.[67] The U.S. Supreme Court granted certiorari and heard the case. Upon hearing the facts and circumstances, the Supreme Court found "that this case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."[68] Justice Rehnquist further stated, "We conclude that, under the circumstances involved in this case, overriding considerations of public safety justify the officer's failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon."[69]

This decision established the public safety exception to Miranda warnings. Law enforcement officers are thus allowed to ask limited questions of a person before Miranda warnings are issued to protect themselves and the public from "immediate danger."[70] The public safely exception does not depend on a law enforcement officer's subjective motivation for asking questions but rather on an objective view of whether or not a danger

---

62 *New York Times*.

63 New York v. Quarles 467 U.S. 649 (1984).

64 New York v. Quarles.

65 *New York Times*, "Arrest in Queens the Catalyst."

66 New York v. Quarles.

67 New York v. Quarles.

68 New York v. Quarles, 653.

69 New York v. Quarles, 651.

70 Carl A. Benoit, "The Public Safety Exception to Miranda," *FBI Law Enforcement Bulletin*, February 1, 2011, https://leb.fbi.gov/2011/february/the-public-safety-exception-to-miranda.

to the public exists.[71] Significantly, the questions asked by law enforcement officers must be limited to those that seek to determine if there is an immediate danger to public safety, and any statements by the person being held must be voluntary.[72]

It can be difficult to determine how Miranda rights must be applied overseas, where legal precedent is mixed. Perhaps one of the better case studies is the interrogation of Mohamed Rasheed Daoud Al-Owhali. Al-Owhali was arrested by Kenyan authorities after the attack upon the U.S. embassy in August 1998. Al-Owhali was interrogated by Kenyan and U.S. agents, and, after two weeks of interrogation, confessed to his role in the attack. The U.S. agents conducting the interrogation provided Al-Owhali with modified Miranda warnings.[73] In sum, the agents advised Al-Owhali that since they were not physically in the United States, they could not guarantee that a lawyer would be available to him before questioning.[74] Assistant Federal Public Defender David Keenan discusses the matter in the *Hastings Law Journal*, explaining that Al-Owhali was taken to the United States and prosecuted in New York. There, Judge Leonard Sand presided over the case and had to decide on the admissibility of Al-Owhali's statement. Judge Sand first had to decide if Miranda warnings must be provided by U.S. agents overseas during a custodial interrogation. Next, the judge had to determine if a person in custody abroad must be advised of a "right to counsel if the host country does not provide such counsel as a matter of right."[75] Judge Sand determined that Miranda does, indeed, apply, and that the warnings that the agents provided were inadequate.[76] The statements were to be excluded from use at trial.[77] The judge reconsidered his decision shortly after, however, and reversed himself based on representations that one FBI agent had verbally advised Al- Owhali of his right

---

[71] Benoit.

[72] Benoit.

[73] David Keenan, "Miranda Overseas: The Law of Coerced Confessions Abroad," *Hastings Law Journal* 67 (August 2016): 1723, http://www.hastingslawjournal.org/wp-content/uploads/Keenan-67.6.pdf.

[74] Keenan, 1723.

[75] Keenan, 1723.

[76] Keenan, 1723.

[77] Keenan, 1724.

to an attorney.[78] When the case was reviewed on appeal, the Second Circuit stated, according to Keenan, that Miranda warnings "might" apply in situations outside the United States.[79] Further, the Second Circuit decided that U.S. agents overseas have only to make a "good faith effort" and that, historically, Miranda warnings had "been 'applied in a flexible fashion to accommodate the exigencies of local conditions."[80]

Keenan also addresses what he terms "two-step interrogations" and profiles a different case in which he was personally involved. The case concerned Mohamed Ibrahim Ahmed, who had been arrested by Nigerian authorities.[81] Ahmed was an Eritrean native who also had residency status in Sweden.[82] Ahmed contended that he was held for approximately 100 days, during which he was interrogated by both Nigerians and Americans on almost twenty occasions.[83] Ahmed was eventually charged with providing material support to al Qaeda affiliate al-Shabaab. During a subsequent hearing, the U.S. government strove to introduce statements made by Ahmed. These statements, Keenan writes, were part of a "two-step interrogation strategy."[84] This strategy involved the use of a "dirty team" and a "clean team." The dirty team, according to Keenan, "purposefully avoided administering Miranda warnings so that Ahmed would more freely 'confess,' followed by the insertion of a second team of interrogators to purportedly 'clean' Ahmed's statements of their taint so they could be used against him in a criminal trial."[85]

In a separate article, published in 2011 and written by Benjamin Weiser, some of the details of the Ahmed's interviews were revealed. In December 2011, the agent who conducted the "clean team" interrogation of Ahmed testified in court. The agent understood

---

[78] Keenan, 1724.

[79] Keenan, 1724.

[80] Quoting the Second Circuit's decision in Terrorist Bombings of U.S. Embassies in E. Afr., F.3d 177, 205 (2d. Cir. 2008). Keenan, 1724.

[81] Keenan, 1728.

[82] Keenan, 1728.

[83] Keenan, 1729.

[84] Quoting Benjamin Weiser, who quoted the testimony. Keenan, 1729.

[85] Keenan, 1729.

that he was slated to "be part of the so-called dirty team" and "would question the suspect for intelligence purposes without advising him of his Miranda rights to remain silent or have a lawyer."[86] However, the agent soon learned that he would actually "be part of a 'clean' team, which would read the man his rights and conduct a traditional law enforcement interrogation."[87] In preparation for conducting a "clean" interrogation, the agent testified that he "asked that his interviews be held at a different location; that no one involved in the earlier session participate; and that his first interrogation be 'scheduled as far apart as possible' from the earlier one."[88] The agent further stated that he "wanted to make sure that there was a clear distinction between the previous interview and mine, since I was going to read him his Miranda rights."[89] The agent also indicated that he told another agent who had participated in the un-Mirandized interview to not share the details of the un-Mirandized statement with him.

Prosecutors advised the court that the agent had "reviewed a summary of earlier interrogations by Nigerian officials, but was told only a few details about a December 31 intelligence interrogation—that it had occurred, was conducted in English and had lasted about three hours."[90] The prosecution also advised the court that the agent had met "a number of times" with people who had conducted the intelligence interview on December 31, but that the agent "'deliberately avoided asking any questions or gaining any information'" about what Ahmed said in that interrogation.[91] The judge noted that "it becomes implausible if he had a series of four to five meetings with them, and they discussed nothing other than what was in a printed piece of paper that the Nigerians had prepared, and nothing else."[92] In a subsequent hearing, the judge was prepared to issue his

---

[86] Benjamin Weiser, "Interview Was 'Clean," F.B.I. Agent Testifies," *New York Times*, December 24, 2011, https://www.nytimes.com/2011/12/24/nyregion/mohamed-ibrahim-ahmed-had-clean-interview-agent-testifies.html.

[87] Weiser.

[88] Weiser.

[89] Weiser.

[90] Weiser.

[91] Weiser.

[92] Weiser.

ruling on the admissibility of the statements, but was preempted by a guilty plea by the defendant, Ahmed. With the plea, the decision on the admissibility of the statements was moot and the opinion of the judge was not heard.

Richard Zabel and James Benjamin also studied the applicability of Miranda warnings overseas in their white paper, *In the Pursuit of Justice: Prosecuting Terrorism Cases in Federal Courts.*[93] Zabel and Benjamin note that it was important to determine who was conducting the interrogation—U.S. interrogators or foreign ones. If U.S. officials do not participate, statements obtained by foreign law enforcement officers are usually able to be admitted so long as the statements were made voluntarily.[94] However, if U.S. officials do participate and wish to use any statements made by a defendant in a U.S. court, Miranda warnings are likely necessary.[95] Zabel and Benjamin also considered the previously discussed case of Mohamed Daoud Al-Owhali and Judge Sand's findings. Interestingly, when the government proffered that the administration of Miranda warnings might "impede intelligence gathering," the judge stated that "Miranda only prevents an unwarned or involuntary statement from being used as evidence in a domestic criminal trial; it does not mean that such statements are never to be elicited in the first place."[96]

The Mohamed Daoud Al-Owhali case and the Mohamed Ibrahim Ahmed case indicate that some form of Miranda warnings are necessary for a statement to be used in court. Ahmed's case also emphasizes that when there are bifurcated intelligence and law enforcement interrogations, care must be given to ensure that that the right to remain silent and right to an attorney are waived knowingly and voluntarily. These waivers can be corroborated by a change in location and change of interrogator during subsequent law enforcement interrogations. These observations are supported by the *Missouri v. Seibert* Supreme Court decision. While the case struck down the use of the two-step interrogation

---

[93] Richard B. Zabel and James J. Benjamin Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (Washington, DC: Human Rights First, 2008), 101, http://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf.

[94] Zabel and Benjamin, 102.

[95] Zabel and Benjamin, 102.

[96] Zabel and Benjamin, 102.

by the police in Seibert's case, the Court noted ways in which law enforcement could employ curative measures during a two-step interrogation to ensure that any waiver of Miranda is knowing, willing, and voluntary.

The influence of Miranda warnings on a person's likelihood to speak to police is difficult to measure.[97] Some estimates indicate that as many as 80 percent or more of people arrested and interrogated waive their right to remain silent.[98] In a paper for the *UCLA Law Review*, Paul G. Cassell and Bret S. Hayman study the effects of Miranda on confessions. They note: "Although broad generalizations are hazardous, that evidence suggests that interrogations were successful, very roughly speaking, in about 55% to 60% of interrogations conducted before the Miranda decision."[99] Cassell and Hayman also refer to other studies in their paper, one of which estimates a pre-Miranda rate of 56 percent.[100] Their research shows that that interrogations were successful between 33.3 percent and 42.2 percent after Miranda, indicating a significant drop in successful interrogations after the imposition of Miranda warnings.[101] Yet another paper, this one published in *Crime and Justice: A Review of Research*, disputes Cassell and Hayman's research, positing that Miranda has little effect on interrogations.[102]

---

97 Meghan Finnerty, "Fight to Remain Silent: People Often Waive Miranda Rights, Experts Say," AZ Central, August 10, 2016, https://www.azcentral.com/story/news/local/arizona/2016/08/10/miranda-rights-people-often-waive/88512774/.

98 Jan Hoffman, "Police Tactics Chipping Away at Suspects' Rights," *New York Times*, March 29, 1998, https://www.nytimes.com/1998/03/29/nyregion/police-tactics-chipping-away-at-suspects-rights.html.

99 The data the paper refers to was collected by one of the authors in an earlier study. Paul G. Cassell and Bret S. Hayman, "Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda," *UCLA Law Review* 43 (1996): 871, https://papers.ssrn.com/abstract=1885129.

100 Cassell and Hayman, 871.

101 Cassell and Hayman, 871–72.

102 George C. Thomas III and Richard A. Leo, *Effects of Miranda v. Arizona: "Embedded" in Our National Culture?* (Chicago: University of Chicago Press, 2002), 271, https://www.ncjrs.gov/App/publications/Abstract.aspx?id=198379.

D. RESEARCH DESIGN

This thesis uses a policy options analysis research design. The research design is based on the premise that the most important objective after the detention of a person for terror-related offenses is to obtain information that will help to preserve life and to stop a future terror attack. The objective of a prosecution is, in part, to prevent the suspect from reengaging in terrorist activities against the United States and, if the suspect cooperates with the government, to gain intelligence.

This thesis examines three approaches, seeking to determine which one presents the best method for handling terror suspects captured overseas: law of war detention, two-step intelligence and law enforcement interrogations, and arrest and extradition. The criteria for evaluating the approaches were as follows:

- Legality: Whether or not the suggested solution is currently legal to enact without further litigation.

- Threat reduction: This thesis seeks to measure threat reduction by observing how long terror subjects are detained under each policy – law of war detention, hybrid intelligence and law enforcement cases and Mirandized law enforcement interrogations cases. The longer a terror subject is detained, the greater the presumed reduction in threat since the subject is prevented from reengaging in hostilities against the United States.

- Opportunity to gain intelligence: Does the course of action provide the United States with an opportunity to gather intelligence information without providing Miranda warnings?

- Opportunity to prosecute: Does the course of action provide the United States with an opportunity to prosecute a terror suspect for crimes committed?

- Credibility: Does the United States maintain moral and legal credibility with both allies and enemies?

This thesis does not study the effectiveness of intelligence interrogations conducted in an attempt to stop the next attack; however, it does examine whether an opportunity to gather intelligence was created. Most of the intelligence information from terror suspects is classified and unavailable for review.

The thesis also does not address the effectiveness, or ineffectiveness, of coercion as an interview tactic. All the cases considered herein concern interrogation without the use of force. Because of different laws, the thesis does not consider cases in which a suspected terrorist is captured domestically. Terrorism suspects who are arrested within the United States have specific rights under the Constitution. For the purpose of this paper, the suspected terrorists captured overseas are presumed to be enemies of the United States as defined by the Authorization to Use Military Force, passed in September 2001.[103]

[103] Authorization for the Use of Military Force, Pub. L. 107-40 (September 18, 2001).

II. LAW OF WAR DETENTION

This chapter explains why law of war detention is legal and how it effectively prevents foreign fighters from returning to the battlefield for years at a time, although not as long as it does for persons convicted of federal terror offenses. The recidivism rate of law of war detention detainees is considerably lower than the recidivism rate of persons convicted of federal crimes in the United States.[104] Also, law of war detention allows for interrogations of captured combatants, which can provide information that may help officials prevent a pending attack. However, law of war detention at Guantanamo Bay has not been an effective tool to facilitate prosecutions, and related detainee mistreatment allegations have tarnished the reputation of the United States. In this chapter, law of war detention at Guantanamo Bay is examined to determine if it is legal, if it reduces the threat posed by captured terror suspects, and if it provides the United States with an opportunity to gather intelligence about impending attacks. This chapter also examines how law of war detention affects the credibility of the United States.

The law of war, as defined by the U.S. Department of Defense, describes "that part of international law that regulates the resort to armed force, the conduct of hostilities and the protection of war victims."[105] This body of law, based in part on the Geneva Conventions, allows for the detention of combatants participating in armed conflict, to include the ongoing fight against al Qaeda and its affiliates.[106]

Since shortly after the 9/11 attacks, the president of the United States has exercised his authority under the law of war and the Authority to Use Military Force to hold persons who have engaged in hostilities against the United States. "Engaging in hostilities" could mean that the person was actively fighting U.S. or coalition forces in Afghanistan, or that

---

[104] Director of National Intelligence, "Detainees Formerly Held at Guantanamo Bay"; United States Sentencing Commission, *Recidivism among Federal Offenders: A Comprehensive Overview* (Washington, DC: United States Sentencing Commission, 2016), 3, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

[105] Department of Defense, *Law of War Manual* (Washington, DC: Department of Defense, June 2015), 7, http://archive.defense.gov/pubs/law-of-war-manual-june-2015.pdf.

[106] Department of Defense, 505.

the person assisted al Qaeda, wherever they happened to be located. In the weeks and months after the United States attacked al Qaeda strongholds in Afghanistan, fighters from a multitude of nations were captured in and around Afghanistan. Some of these fighters were former Taliban members from Afghanistan, but many others were men who left their home countries to attend military-style training camps in Afghanistan and began fighting American troops after the U.S. ground war began. Several of these training camps were funded and directed by Osama Bin Laden and his al Qaeda organization. Law of war detention is not intended to be punitive but rather to hold combatants who have been captured to prevent them from rejoining the fight. Since al Qaeda is not a signatory to the Geneva Conventions, and since its members are from many nations, the persons captured are not considered prisoners of war but rather enemy combatants. Because the war between the United States and al Qaeda, a radical Islamist organization, is different than any other war in U.S. history, members of al Qaeda have been targeted, killed, and captured in many different countries. The primary place that captured persons have been detained, for the purpose of this paper, is the Guantanamo Bay detention center in Cuba. Other detention centers, such as Bagram Airbase in Afghanistan, were not considered in this paper.

The detention center at the United States Naval Station in Guántanamo Bay, Cuba, no longer receives new detainees. The center, opened in early 2002 in response to the war on terrorism waged by the United States, received almost 800 detainees.[107] Of these, only forty remain in custody.[108]

A. LEGALITY

The United States has several authorities by which it can lawfully detain terror suspects. In 2008, attorneys Zabel Benjamin examined the ability of the federal criminal justice system to effectively deal with international terrorism cases.[109] As part of this examination, they identified four different methods for detaining terrorist suspects: as

---

107 "The Guantánamo Docket," *New York Times*, accessed April 3, 2016, http://projects.nytimes.com/guantanamo.

108 *New York Times*.

109 Zabel and Benjamin, *In Pursuit of Justice*, 1.

defendants in a criminal prosecution, as aliens (non-U.S. citizens who are unlawfully present in the United States), as material witnesses to a federal crime, or as enemy combatants captured and detained as part of military operations.[110] Zabel and Benjamin identify that the government may seize and detain "enemy combatants" pursuant to the law of war.[111] Quoting the court case *In re Terito,* they note: "The object of capture is to prevent the captured individual from serving the enemy."[112] In a 2009 update to their paper, Zabel and Benjamin state, "[I]t is becoming increasingly clear that the law of war affords a manageable and credible framework for determining whether adherents of al Qaeda or associated groups can be detained by the military to prevent them from harming the United States."[113]

In general terms, the law of war is based on international laws and treaties, including the Geneva Conventions.[114] The Department of Defense manual on the law of war states that for "persons who have participated in hostilities or belong to armed groups that are engaged in hostilities, the circumstance that justifies their continued detention is the continuation of hostilities."[115] Further, the manual states that "even after hostilities have ceased, other circumstances may warrant continued detention. For example, persons who have participated in hostilities on behalf of non-State armed groups might be detained pending law enforcement proceedings."[116] Law of war detention of detainees at the United States Naval Station, Guantanamo Bay, derives further authority from the Authorization for the Use of Military Force (AUMF), a joint resolution by Congress after the attacks of 9/11. This law, also known as Public Law 107-40, provides the president the authority to use "all necessary and appropriate force against those nations, organizations or persons he

---

110 Zabel and Benjamin, 65.

111 Zabel and Benjamin, 65.

112 Zabel and Benjamin, 65.

113 Richard B. Zabel and James J. Benjamin Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts: 2009 Update and Recent Developments* (Washington, DC: Human Rights First, 2009), 20, http://www.humanrightsfirst.org/wp-content/uploads/pdf/090723-LS-in-pursuit-justice-09-update.pdf.

114 Department of Defense, *Law of War Manual*, 7.

115 Department of Defense, 505.

116 Department of Defense, 505.

determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored any such organizations or persons."[117]

Hamdi v. Rumsfeld allowed detainees to challenge their status as an enemy combatant through a review tribunal.[118] In the Supreme Court's decision, justices also noted that the AUMF gave the government the authority to hold enemy combatants "for the duration of the relevant conflict."[119] Together, international and national law—including the Geneva Conventions, the AUMF, and the *Hamdi v Rumsfeld* decision—provides a sound legal basis on which the United States can capture and then detain persons who are engaged in hostilities against the country.

B. THREAT REDUCTION

This chapter seeks to measure threat reduction by observing how long terror subjects are detained under law of war detention. As mentioned previously, the longer a terror subject is detained, the greater the presumed reduction in threat since the subject is prevented from reengaging in hostilities against the United States. Research was conducted to attempt to determine how long each of the detainees at Guantanamo was held, which first involved calculating the total number of persons detained at the facility, and then assessing the prisoners' dispositions.

In response to a Freedom of Information Act request, in May 2006 the Department of Defense released an official, comprehensive list of all detainees who had been held at Guantanamo Bay between January 2002 and May 2006. This list contained the names of 759 persons.[120] In September 2006, by order of President Bush, Guantanamo Bay received

---

[117] Zabel and Benjamin, *In Pursuit of Justice: 2009 Update*, 22.

[118] Hamdi v. Rumsfeld, 26.

[119] Hamdi v. Rumsfeld, 10.

[120] "List of Individuals Detained by the Department of Defense at Guantanamo Bay, Cuba from January 2002 through May 15, 2006," Department of Defense, February 28, 2010, 18, http://web.archive.org/web/20100228102504/http://www.dod.mil/pubs/foi/detainees/detaineesFOIArelease15May2006.pdf.

fourteen high-value detainees who had previously been held in CIA detention facilities.[121] In April 2007 and March 2008, the detention center at Guantanamo received an additional two high-value detainees.[122] These numbers (775 total detainees) closely approximate the numbers reported by national news media. The *New York Times* has maintained a list called the "Guantanamo Docket," where it has identified and listed names of individuals who were detained at Guantanamo at some point since the detention center opened in approximately January 2002.[123] According to this list, roughly 780 persons have been detained at Guantanamo.[124] Of the 780 detainees, 9 died in custody, 739 were released, and 40 remain in custody at Guantanamo.[125]

The Department of Defense website does not provide information about the dates of capture for each detainee. The previously mentioned list of detainees, which was released by the Department of Defense in May 2006, does not reveal detention dates either. To determine when a particular person was captured, a review was undertaken of the Guantanamo Bay detainees' Combatant Status Review Tribunal documentation, which is available online.[126] The Combatant Status Review Tribunal (CSRT) is a proceeding that the U.S. military conducts to see if a person can be considered an enemy combatant. The CSRT is not a trial. In 2004, CSRTs were conducted for each detainee at Guantanamo Bay to ensure that there was continued cause to hold a person. Many of the CSRTs provide information about particular detained persons, including when they were captured, the

---

121 Jonathan Karl, "'High-Value' Detainees Transferred to Guantanamo," ABC News, September 6, 2006, http://abcnews.go.com/International/story?id=2400470.

122 Jim Garamone, "Defense.Gov News Article: Defense Department Takes Custody of High-Value Al Qaeda Operative," Department of Defense, March 14, 2008, http://archive.defense.gov/news/newsarticle.aspx?id=49283.

123 *New York Times*, "The Guantánamo Docket."

124 *New York Times*.

125 Carol J. Williams, "Pentagon: Guantanamo Detainee Dies; Ninth Fatality at Facility," *Los Angeles Times*, September 10, 2012, http://articles.latimes.com/2012/sep/10/nation/la-na-nn-gitmo-death-20120910; *New York Times*, "The Guantánamo Docket."

126 "Combatant Status Review Tribunal (CSRT) Documents," Office of the Secretary of Defense and Joint Staff, accessed December 16, 2019, https://web.archive.org/web/20090125032047/http://www.dod.mil/pubs/foi/detainees/csrt_arb/.

circumstances under which they were captured, and information that may indicate that a particular person engaged in hostilities against the United States.

The CSRTs reviewed for this thesis were based on proceedings that occurred between approximately July and November 2004. If a detainee had already been released by this time, no CSRT was available for review. Many CSRTs did not explicitly state the date of capture or did not provide enough information to reasonably estimate the date of capture. However, after the review of approximately 475 CSRTs, an approximate month of capture was determined for 243 of the detainees.

According to the *New York Times* "Guantanamo Docket," and backed up by Department of Defense press releases of detainee repatriations, 123 detainees were released by July 2004 (not including Yaser Esam Hamdi, who was determined to be a U.S. citizen). The earliest these 123 detainees could have been captured is October 2001, at the beginning of the U.S. ground campaign in Afghanistan. This means that these 123 detainees could have been held for not more than thirty-three months (October 2001 to July 2004).

There are currently twenty-six detainees at Guantanamo Bay who are being held under law of war detention and who are considered too dangerous to release.[127] For the purpose of calculating the length of detention, these detainees were considered in this paper to have received a life sentence. The United States Sentencing Commission's document *Life Sentences in the Federal System* was consulted to approximate the length of a life sentence. The commission addresses the occurrence of "de facto life sentences" in its review of federal life sentence statistics, noting that the average age of a person sentenced to life in the federal system is thirty-seven.[128] Further, the commission states that for the purpose of analysis, it considered a sentence of 470 months (approximately thirty-nine years) or more to be a de facto life sentence.[129]

---

[127] *New York Times*, "The Guantánamo Docket."

[128] United States Sentencing Commission, *Life Sentences in the Federal System* (Washington, DC: United States Sentencing Commission, 2015) 10, 7, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf.

[129] United States Sentencing Commission, 10.

When looked at together, the 243 detainees for whom a term of detention could be reasonably estimated, plus the 123 detainees for whom a maximum possible term of detention was calculated, plus the 26 detainees who are being held indefinitely, comes to a total of 392 terms of detention. The average length of detention for these 392 detainees was calculated to be approximately ninety-seven months. This represents a reduction in the threat posed by these detainees for the time that they were held. Thus, the detainees at Guantanamo Bay were prevented from reengaging in their fight against the United States for approximately eight years. This reduced the potential threat against the United States, as al Qaeda was not able to use these men to attack the United States.

Recidivism is also a factor in threat reduction. If a particular policy discourages recidivists, the threat posed by them is reduced. According to a report produced by the Office of the Director of National Intelligence, as of July 2016, 122 former Guantanamo detainees were confirmed to have reengaged in terrorist activities since their release from the detention center.[130] In addition, the report indicates that another eighty-six detainees were suspected of returning to hostilities against the United States.[131] This equates to a recidivism rate of between 16 and 27 percent.

C. OPPORTUNITY TO PROSECUTE

As noted above, of the approximately 780 detainees held at Guantanamo Bay, only fifteen have been, or are being, prosecuted.[132] These fifteen detainees comprise approximately 2 percent of the total number of detainees ever held at the Guantanamo Bay detention center. Of those prosecuted, Majid Khan, Ahmed Al Darbi, Omar Khadr, Noor Uthman Muhammed, and Ibrahim Al Qosi pled guilty.[133] Salem Hamdan and David Hicks were prosecuted, found guilty of material support to terrorism, and later had their

130 Director of National Intelligence, "Detainees Formerly Held at Guantanamo Bay," 1.

131 Director of National Intelligence, 1.

132 "Cases," Office of Military Commissions, accessed October 9, 2016, http://www.mc.mil/CASES.aspx.

133 Office of Military Commissions.

convictions overturned.[134] Ali Hamza Al Bahlul was convicted, had his conviction vacated, and an appeal pending.[135]

In 2009, President Barack Obama created the Guantanamo Review Task Force to review detainee cases at Guantanamo to determine if any of the 240 detainees at the time could be released or prosecuted.[136] The task force was composed of some sixty individuals from agencies across the intelligence and law enforcement communities.[137] This task force had access to information from the Departments of Defense, State, Justice, and Homeland Security, as well as intelligence agencies. Among its findings, the task force recommended that forty-four of the detainees be prosecuted in either military proceedings or federal court.[138]

In July 2016, there were approximately seventy-six detainees held at Guantanamo.[139] Of those, twenty-three were reviewed by the Department of Defense's Periodic Review Board and determined to be ineligible for release.[140] These detainees, sometimes referred to as "forever prisoners," are considered to be a continuing threat to the United States and its interests and are not contemplated for release.[141]

Not all persons captured are considered only to be enemy combatants. Some detainees engaged in potentially criminal behavior as well. It is useful, here, to try to distinguish between foot soldiers and those persons who have engaged in serious criminal activity that may be punishable either in federal court or in a military commission as a war crime. Because al Qaeda is not a sovereign nation and because its attacks have targeted

---

134 Office of Military Commissions.

135 Office of Military Commissions.

136 Department of Justice et al., "Final Report: Guantanamo Review Task Force" (report, Department of Justice, 2010), i, https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf.

137 Department of Justice et al., i.

138 Department of Justice et al., ii.

139 "Guantánamo Periodic Review Guide," *Miami Herald*, accessed October 9, 2016, http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article68333292.html.

140 *Miami Herald*.

141 *Miami Herald*.

civilians, it is essentially a criminal organization. The people who belong to and support al Qaeda are supporting criminal acts by a terrorist organization. The Taliban, by virtue of harboring al Qaeda and allowing the criminal organization to use training camps in Afghanistan, materially supported al Qaeda's efforts to attack the United States in East Africa, Aden, Yemen, and in the United States on September 11th. Arguably, fighters from the Taliban and low-level fighters from al Qaeda could be charged with crimes based on their support of an organization that targeted civilians in violation of federal laws and in violation of the laws of war. The opportunity to prosecute, here, is directed not at these low-level fighters but at those individuals who directly supported and participated in terrorist attacks. Based upon the numbers described above, out of a possible forty-four detainees whose acts rose to the level of meriting a prosecution, only fifteen have been so charged after some seventeen years of detention.

D. OPPORTUNITY TO GAIN INTELLIGENCE

A review of the U.S. Army's standard operating procedures at the Guantanamo Bay detention facility reveals the importance placed upon obtaining intelligence. The Camp Delta Standard Operating Procedures, dated March 28, 2003, and signed by then commander Major General Geoffrey D. Miller, states that the commander's intent was to "conduct detention operations in a manner that supports the intelligence gathering efforts of the Joint Interrogation Group (JIG), the Criminal Investigation Task Force (CITF) and the Counter-Terrorism Cell (CTC) while providing for the safety, security and care of the detainees."[142]

A March 2011 article written by Thomas Joscelyn references two documents obtained by Judicial Watch from the Department of Defense pursuant to a Freedom of Information Act request. One of the documents from the Department of Defense, a draft PowerPoint titled "Guantanamo Detainees," provided examples of some of the intelligence collected at Guantanamo Bay. The PowerPoint states that "during the questioning of detainees, new information is constantly revealed, confirmed and analyzed to determine its

[142] Joint Task Force-Guantanamo, "Camp Delta Standard Operating Procedures (SOP)" (SOP, Department of Defense, 2003), 1.1, http://hrlibrary.umn.edu/OathBetrayed/SOP%201-238.pdf.

reliability."[143] The presentation also claims that "relevant information is critical to the successful conduct of the Global War on Terrorism and flows from Guantanamo regularly."[144]

The efforts to gather intelligence at Guantanamo were not limited to debriefings of detainees. The *Washington Post* reported on attempts by U.S. intelligence agencies to recruit double agents at Guantanamo and send them back to the Middle East to penetrate al Qaeda.

> In the early years after Sept. 11, 2001, the CIA turned some Guantanamo Bay prisoners into double agents, sending them home to help the United States kill terrorists, current and former U.S. officials said…. The program and the handful of men who passed through had various official CIA code names. But those who were aware of the cluster of cottages knew it best by its sobriquet: Penny Lane. Some of the men who passed through Penny Lane helped the CIA find and kill many top al Qaeda operatives, current and former officials said. Others stopped providing useful information, and the agency lost touch with them.[145]

E. EFFECT ON THE CREDIBILITY OF THE UNITED STATES

The United States has struggled to maintain credibility after opening the detention center at Guantanamo Bay. Tom Malinowski, an advocacy director at Human Rights Watch and former special assistant to President Clinton, wrote in *The Annals of the American Academy of Political and Social Science* that the United States needs to restore its "moral authority" after experiences in Iraq, Afghanistan, and Guantanamo tainted the U.S. image.[146] Malinowski notes that the Bush administration initially believed that the Geneva Conventions did not apply to persons captured during the war against al Qaeda in

---

[143] Thomas Joscelyn, "The Value of Guantanamo's Intelligence," *The Weekly Standard*, March 3, 2011, http://www.weeklystandard.com/blogs/value-guantanamo-s-intelligence_552817.html.

[144] Joscelyn.

[145] Adam Goldman and Matt Apuzzo, "Double Agents: CIA Turned Some Terrorism Suspects into Spies, AP Says," *Washington Post*, November 26, 2013, https://www.washingtonpost.com/world/national-security/cia-turned-some-guantanamo-bay-prisoners-into-double-agents-against-al-qaeda-ap-reports/2013/11/26/e98163b2-56ac-11e3-8304-caf30787c0a9_story.html.

[146] Tom Malinowski, "Restoring Moral Authority: Ending Torture, Secret Detention, and the Prison at Guantanamo Bay," *The Annals of the American Academy of Political and Social Science* 618, no. 1 (2008): 149, https://doi.org/10.1177/0002716208317118.

Afghanistan.[147] Further, Malinowski observes that the Bush administration sought to place detainees at Guantanamo beyond the reach of U.S. courts.[148] Malinowski argues that the abuse reported in Iraq, Afghanistan, and Guantanamo has undermined the legitimacy of operations there, and notes that both U.S. Army and Marine Corps field manuals warn against abuse of enemy prisoners.[149]

In 2006, at the height of the war in Iraq, an article by David Jackson noted that only 37 percent of Germans had a positive view of the United States, largely due to the war in Iraq and the detention of terror suspects at Guantanamo Bay.[150] Earlier in 2006, German Chancellor Angela Merkel stated that the detention center at Guantanamo Bay should not "exist in the long term."[151] A 2008 article in the *International Herald Tribune* noted that Merkel believed that Guantanamo was "morally wrong and politically damaging."[152]

The detention centers at Guantanamo Bay and Bagram, Afghanistan, are intricately linked to the policy of law of war detention. While persons may be detained by the U.S. military at other places, the use of law of war detention to hold captured enemy combatants is most closely associated with Guantanamo Bay and Bagram. Malinowski noted in his article that, due to allegations of abuse, places like Guantanamo and Abu Ghraib have seriously harmed the image and prestige of the United States.[153] Malinowski identifies military professionals, such as General David Petraeus, who believe that the United States must uphold a strict moral code to maintain legitimacy.[154]

---

147 Malinowski, 149.

148 Malinowski, 149.

149 Malinowski, 149.

150 David Jackson, "German Leader Emerges as Key Bush Ally in EU," *USA Today*, July 13, 2006, sec. News.

151 Hans M. Wuerth, "German Chancellor Is Right Woman at Right Time," *Morning Call*, March 20, 2006, sec. Opinion.

152 Judy Dempsey and Nicholas Kulish, "Bush and Merkel Will Stay Low-Key No Major Speeches or Sorties Planned," *International Herald Tribune*, June 10, 2008, sec. Opinion.

153 Malinowski, "Restoring Moral Authority," 149.

154 Malinowski, 149.

A number of scandals have reflected negatively on both Guantanamo and Bagram. Former detainees have complained of harsh interrogation techniques and demeaning treatment. In June 2005, *TIME* published excerpts from a leaked interrogation log detailing the treatment of alleged "twentieth hijacker" and Guantanamo detainee Mohammed al Qahtani.[155] The interrogation log detailed instances of humiliation, sleep deprivation, solitary confinement, threats by barking dogs, the use of stress positions, and other tactics.[156] These allegations, supported by the leaked interrogation log, cast a pall over interrogations at Guantanamo. Al Qahtani is not the only detainee to complain about harsh treatment at Guantanamo.

While the use of law of war detention at Guantanamo Bay has been criticized, detention of enemy combatants there has had strong legal footing. From its inception, the detention center at Guantanamo has sought to conduct interrogations of detainees in an effort to gain intelligence. The production and publishing of the details of Combatant Status Review Tribunals shows some of the intelligence gained from detainees. The use of law of war detention at Guantanamo has demonstrably reduced the threat posed by its detainees by holding them for an average of just over eight years. Further, recidivism is estimated to be between 16 to 27 percent, lower than the recidivism rate of federal prisoners held in the United States. While successful at detaining enemy combatants, law of war detention has been far less successful in providing an opportunity to prosecute individual detainees, with just 2 percent of the approximately 800 detainees having been prosecuted. Finally, while law of war detention has provided an opportunity to gain intelligence and has demonstrably reduced the threat posed by detainees, allegations of mistreatment and other scandals have tarnished the credibility of the United States.

---

155 Adam Zagorin, "Exclusive: '20th Hijacker' Claims That Torture Made Him Lie," *TIME*, March 3, 2006, http://content.time.com/time/nation/article/0,8599,1169322,00.html.

156 "al Qahtani v. Obama," Center for Constitutional Rights, accessed October 31, 2016, https://ccrjustice.org/node/1548.

III. TWO-STEP INTELLIGENCE AND LAW ENFORCEMENT INTERROGATIONS

Since 2011, the United States has pursued an informal policy of holding terror suspects aboard a U.S. naval vessel for intelligence debriefing. Once captured by U.S. military forces, the suspects are taken aboard the ship, where they undergo an intelligence interrogation by a specialized interview team. The team is composed of individuals from the CIA, FBI, Department of Defense, and other agencies.[157] After this intelligence interrogation, a law enforcement interrogation begins. The law enforcement officers provide the terror suspect with Miranda warnings, then attempt to interrogate the suspect. This informal policy has been used in at least three instances regarding three separate terror suspects: Ahmed Abdulkadir Warsame, Abu Anas al-Libi and Ahmed Abu Khattala.

This chapter first explores the legality of two-step intelligence and law enforcement interrogations, then how effective this approach has been at reducing the threat posed by terror subjects. Further, the chapter attempts to determine if this approach provides an opportunity to prosecute terror subjects as well as an opportunity to gain intelligence. Finally, the chapter analyzes how the approach has affected the credibility of the United States.

A. LEGALITY

Spencer Ackerman, in his article "Drift: How This Ship Became a Floating Gitmo," notes the "legal ambiguity" that surrounds the two-step interrogation policy and points to legal issues that have affected the process in both Iraq and Afghanistan.[158] Ackerman notes that Guantanamo Bay seems to no longer be an option to hold detainees and that detention aboard ships may become a new norm.[159] Central to the legality argument is whether or

---

[157] Aaron Katersky and Lee Ferran, "Terrorist Held in Secret on Ship Pleaded Guilty," ABC News, March 25, 2013, http://abcnews.go.com/Blotter/terrorist-held-secret-ship-pleaded-guilty/story?id=18807861.

[158] Spencer Ackerman, "Drift: How This Ship Became a Floating Gitmo," WIRED, July 6, 2011, http://www.wired.com/2011/07/floating-gitmo/.

[159] Ackerman.

not the detained terror suspects are in military custody or civilian custody. Benjamin Wittes, in his *Lawfare* blog, notes that the *New York Times* has repeatedly referred to detention of terror suspects seized by the U.S. armed forces as being held in "extralegal detention."[160] He offers that suspects captured by the U.S. military are in military custody pursuant to the authority under the Authorization for the Use of Military Force (AUMF), not extralegal custody.[161] The *Hamdi v. Rumsfeld* Supreme Court decision makes clear that the U.S. military is authorized to capture and detain combatants for the duration of hostilities.[162]

A similar article published by the Maritime Executive, "Somali Terrorist Suspect Held on U.S. Navy Ship for 2 Months Faces Trial," confirms that al-Shabaab terror suspect Ahmed Abdulkadir Warsame was held under U.S. military detention authorities. The article further notes that Warsame was the subject of an intelligence interrogation conducted under the guidance of Army regulations.[163]

In September 2012, U.S. Ambassador Christopher Stevens and three other Americans were killed during attacks upon a diplomatic facility and a CIA facility in Benghazi, Libya, after being attacked by Islamist militia forces that were reportedly associated with al Qaeda.[164] Several weeks after the attacks, investigators visited the diplomatic facility as part of an investigation into the circumstances that led to the death of

---

[160] Benjamin Wittes, "New York Times Calls Warsame Detention 'Extralegal,'" *Lawfare*, September 9, 2011, https://www.lawfareblog.com/new-york-times-calls-warsame-detention-extralegal.

[161] Benjamin Wittes, "Seven Errors in Today's New York Times Editorial," *Lawfare*, July 17, 2011, https://www.lawfareblog.com/seven-errors-todays-new-york-times-editorial.

[162] Hamdi v. Rumsfeld.

[163] "Somali Terrorist Suspect Held on U.S. Navy Ship For 2 Months Faces Trial," The Maritime Executive, July 7, 2011, http://www.maritime-executive.com/article/somali-terrorist-suspect-held-on-u-s-navy-ship-for-2-months-faces-trial.

[164] Spencer S. Hsu, "Benghazi Attack Suspect Ahmed Abu Khattala's Words Used against Him at Trial," *Pittsburgh Post-Gazette*, October 2, 2017, http://www.post-gazette.com/news/world/2017/10/02/Benghazi-attack-suspect-Ahmed-Abu-Khattala-s-words-used-against-him-at-trial/stories/201710020209; Thomas Joscelyn, "New Senate Report: Al Qaeda Network Attacked in Benghazi," *Washington Examiner*, January 15, 2014, http://www.weeklystandard.com/new-senate-report-al-qaeda-network-attacked-in-benghazi/article/774703.

the four Americans.[165] By August 2013, criminal charges were brought against Libyan militia leader Ahmed Abu Khattala.[166] Almost a year later, in June 2014, U.S. military forces captured Abu Khattala and transported him to the United States aboard a U.S. Navy ship.[167] During the almost two-week voyage to the United States, Abu Khattala was interviewed first by intelligence officers seeking to gain perishable national security information, then by criminal investigators seeking to obtain a Mirandized statement usable in court.[168]

The capture of Abu Khattala presented legal issues similar to those surrounding the capture of Ahmed Warsame. Abu Khattala was captured by U.S. special operations soldiers in Libya, and was detained under the authority of the AUMF.[169] Significantly, the scope of the AUMF seems to be expanded with Khattala's detention and subsequent interrogation. The Obama administration has interpreted the AUMF to provide the authority to detain and interrogate, then transfer to civilian custody, terror suspects whose connection to al Qaeda may be attenuated.

Abu Khattala's trial provided a significant decision regarding the legality of conducting intelligence interviews before conducting a Mirandized interrogation. In August 2017, U.S. District Court Judge Christopher R. Cooper affirmed the admissibility of Abu Khattala's statements, noting that the suspect had been provided Miranda warnings multiple times and had not been subjected to coercive treatment or threats.[170] The judge

---

165 "Benghazi Mission Attack Fast Facts," CNN, September 10, 2013, http://www.cnn.com/2013/09/10/world/benghazi-consulate-attack-fast-facts/index.html.

166 CNN.

167 CNN.

168 Eric Tucker, "Benghazi Militant Case Draws Scrutiny of U.S. Interrogation Strategy," PBS, August 15, 2015, http://www.pbs.org/newshour/rundown/benghazi-militant-cases-draws-scrutiny-u-s-interrogation-technique/.

169 Lolita Baldor and Nancy Benac, "U.S. Aims for Trial of Benghazi Suspect Held on Navy Ship," *Navy Times*, June 18, 2014, http://archive.navytimes.com/article/20140618/NEWS08/306180068/U-S-aims-trial-Benghazi-suspect-held-Navy-ship.

170 Spencer S. Hsu, "U.S. Judge Upholds Ship-Based Interrogation of Benghazi Terror Suspect Seized Overseas," *Washington Post*, August 16, 2017, https://www.washingtonpost.com/local/public-safety/us-judge-upholds-ship-based-interrogation-of-benghazi-terror-suspect-seized-overseas/2017/08/16/94f851f4-829d-11e7-ab27-1a21a8e006ab_story.html?utm_term=.0b3d81af1dfe.

further noted that Abu Khattala's transportation by ship was reasonable after efforts to move him by aircraft proved fruitless.[171]

Another significant case that tested the legality of the two-step intelligence-then-law-enforcement approach is the case of Nazih Abdul-Hamed al-Ruqai, also known as Abu Anas al-Libi. Al-Libi was captured by U.S. forces in Libya and transferred to a ship in the Mediterranean Sea. Al-Libi's case differs from those of Warsame and Abu Khattala in that al-Libi had previously been indicted by a federal court in New York for his role in the 1998 embassy bombings in east Africa. A *New York Times* article, "Lawyer Sought for Terror Suspect Held on Navy Ship," captured the essence of the issue when it articulated that al-Libi might be required to be brought before a judge immediately.[172] Chief public defender David Patton, speaking on behalf of al-Libi, stated, "'I am not aware of any lawful basis for the delay in his appearance and the appointment of counsel,' … adding that his office wanted 'to assert any rights' he might have 'with respect to his current detention and the government's decision not to produce him for an initial appearance in this case.'"[173]

This case highlights a central issue in the detention of terror suspects: if suspects are arrested, they must be brought before a magistrate judge for arraignment without delay. To support the policy of intelligence interrogations, one must rely on the authority of the U.S. military to detain persons captured during the ongoing war on terror, as authorized by the AUMF. The interrogation is thus conducted under military authority as part of ongoing military operations. A separate *New York Times* article identified the authority under which al-Libi was being detained: the law of war.[174]

The U.S. Supreme Court addressed two-step interrogations, as well, in a case decided in 2004. In *Missouri v. Seibert*, the court heard the case of a woman, Patrice

---

171 Hsu.

172 Benjamin Weiser, "Lawyer Sought for Terror Suspect Held on Navy Ship," *New York Times*, October 8, 2013, http://www.nytimes.com/2013/10/09/nyregion/lawyer-sought-for-terror-suspect-held-on-navy-ship.html.

173 Weiser.

174 Benjamin Weiser and Eric Schmitt, "U.S. Said to Hold Qaeda Suspect on Navy Ship," *New York Times*, October 6, 2013, http://www.nytimes.com/2013/10/07/world/africa/a-terrorism-suspect-long-known-to-prosecutors.html.

Seibert, who was interrogated by police after the murder of a young man living in her family's mobile home.[175] A police officer interrogated Seibert for about thirty minutes, during which time she confessed to prior knowledge of the plan to murder the young man.[176] The police officer had purposely not provided Seibert with Miranda warnings, hoping the woman would speak about the crime.[177] The woman made incriminating statements, after which the officer took a twenty-minute break from the interrogation.[178] Afterward, the officer administered Miranda warnings and conducted a second interrogation, reminding Seibert of the statements that she had made during the first interrogation before the Miranda warnings were given.[179] Seibert again made incriminating statements and was later convicted of second-degree murder.[180] Justice Souter, in writing for the plurality of the court, noted that Seibert did not knowingly or voluntarily waive her Miranda rights, and that "it is likely that warnings withheld until after interrogation and confession will be ineffective in preparing a suspect for successive interrogation, close in time and similar in content."[181] The decision further noted that "it would be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because Miranda warnings formally punctuate them in the middle."[182] Justice Kennedy concurred, but felt that the plurality's opinion was too broad.[183] Further, as the decision says, "the admissibility of postwarning statements should continue to be governed by Elstad's principles unless the deliberate two-step strategy is employed. The, the postwarning statements must be excluded unless curative measures are taken before they

---

[175] Missouri v. Seibert, 542 U.S. 600 (2004).

[176] Missouri v. Seibert.

[177] Missouri v. Seibert.

[178] Missouri v. Seibert.

[179] Missouri v. Seibert.

[180] Missouri v. Seibert.

[181] Missouri v. Seibert, 601.

[182] Missouri v. Seibert, 601.

[183] Missouri v. Seibert, 603.

were made."[184] The opinion also provides possible curative measures, such as "a substantial break in time and circumstances between the prewarning statement" and the subsequent warning and second interrogation.[185] An additional potential curative measure may be to have the police advise a subject that the first (un-Mirandized) statement is likely inadmissible.[186]

While the AUMF provides the legal authority to hold these subjects in military custody, U.S. jurisprudence supports the use of two-step intelligence and law enforcement interrogations. The Supreme Court's *Missouri v. Seibert* decision notes that, for statements from a second, Mirandized interrogation to be admitted as evidence, Miranda warnings must have been presented in a manner in which the subject could knowingly and voluntarily waive the rights if they so decided. The judge in the Abu Khattala case noted that the suspect had been advised of his Miranda rights multiple times and had not been exposed to any coercion. Further, the government's use of a separate interrogation team that did not participate in or benefit from the fruits of the initial interrogation aligns with the curative measures recommended by the Court.

B. THREAT REDUCTION

Intelligence and law enforcement interrogations have arguably reduced threats to the United States in two ways. First, by being detained in U.S. custody, Warsame, al-Libi, and Abu Khattala were physically prevented from returning to the battlefield. If terror suspects are able to be bailed out, they could potentially continue pose a threat to the United States. However, the federal criminal justice system is well positioned to address this potential vulnerability. In the case of a criminal prosecution, once a person "is charged with a federal crime, a federal magistrate judge must promptly convene a hearing, at which the defendant is entitled to be represented by counsel, to determine whether the defendant should be detained or released on bail."[187] Bail is then governed by the Bail Reform

[184] Missouri v. Seibert, 603.

[185] Missouri v. Seibert, 603.

[186] Missouri v. Seibert, 603.

[187] Zabel and Benjamin, *In Pursuit of Justice*, 66.

Act.[188] In general terms, the decision to allow bail is based upon the court's goals of having the defendant appear before the court in future proceedings and protecting public safety.[189] Risk of flight and the defendant's potential danger to the public are weighed by the court. The Bail Reform Act "also includes a legislatively mandated presumption that a defendant charged with federal terrorism offenses should be detained."[190] Further, the task of proving that a person does not pose a public danger or will flee is placed upon the defendant, not the government.[191]

Warsame was captured in 2011 and pleaded guilty. He has been held pending sentencing since then.[192] Al-Libi was captured by U.S. forces in Libya in 2013 and died in U.S. custody in 2015 from complications of hepatitis C that he contracted before his detainment.[193] Abu Khattala was captured in 2014 and faced trial in the United States for terrorism and murder charges; his trial ended in November 2017, when he was convicted for the terrorism charges but found not guilty of murder charges.[194] Abu Khattala received a twenty-two-year sentence in June 2018.[195]

Second, at least one of the three men, Warsame, provided substantial intelligence to investigators.[196] Preet Bharara, the United States Attorney for the Southern District of

---

188 Zabel and Benjamin, 66.

189 Zabel and Benjamin, 66.

190 Zabel and Benjamin, 66.

191 Zabel and Benjamin, 66.

192 Benjamin Weiser, "Since 2011 Guilty Plea, Somali Terrorist Has Cooperated with Authorities," *New York Times*, March 25, 2013, http://www.nytimes.com/2013/03/26/nyregion/since-2011-guilty-plea-somali-terrorist-has-cooperated-with-authorities.html.

193 Jomana Karadsheh, "Family: Abu Anas Al Libi Dies in U.S. Hospital," CNN, January 3, 2015, http://www.cnn.com/2015/01/03/us/us-libya-al-libi/index.html.

194 Spencer S. Hsu, "Judge Sets Sept. 2017 Trial Date for Benghazi Terror Suspect Abu Khattala," *Washington Post*, June 23, 2016, https://www.washingtonpost.com/world/national-security/judge-sets-sept-2017-trial-date-for-benghazi-terror-suspect-abu-khattala/2016/06/23/20dfa3b4-3986-11e6-a254-2b336e293a3c_story.html.

195 Spencer S. Hsu, "Libyan Militia Leader Gets 22-Year Sentence in Benghazi Attacks That Killed U.S. Ambassador," *Washington Post*, June 27, 2018, https://www.washingtonpost.com/local/public-safety/libyan-militia-leader-to-be-sentenced-in-2012-benghazi-attacks-that-killed-us-ambassador/2018/06/27/55782e5c-789a-11e8-aeee-4d04c8ac6158_story.html?noredirect=on&utm_term=.f4fb4279eed5.

196 Weiser, "Since 2011 Guilty Plea."

New York, described Warsame's cooperation as "an intelligence watershed."[197] Assistant Attorney General John Carlin further described Warsame as a "critical link" between al-Shabaab and al Qaeda in the Arabian Peninsula through his position as a leader, trainer, and operational supporter.[198] A 2013 Associated Press article notes that Warsame had agreed to plead guilty to several terror charges and also agreed to testify for the U.S. government as part of his deal.[199]

Gathering intelligence is one way to potentially reduce the threat posed by terrorists; another way is to lawfully detain terrorists to prevent them from returning to the battlefield. As with law of war detention, research for this thesis attempted to determine how long persons charged with terrorism crimes were held. Documentation from the Department of Justice's National Security Division—namely, a chart titled "Statistics on Unsealed International Terrorism and Terrorism-Related Convictions"—indicates how a federal prosecution could potentially mitigate a threat by imprisoning a convicted offender.[200] The above referenced chart lists terrorism and terrorism-related convictions between September 11, 2001, and December 31, 2015, and includes 627 convictions of defendants for these type of offenses.[201] The chart also lists the sentence, if known, of each person convicted.[202] Calculating the average sentence for terrorism and terrorism-related convictions meant converting the length of the sentence from years to months (e.g., a sentence of three years was converted to thirty-six months); if no sentence was recorded, the conviction was not included in the calculation. Of the 627 defendants who were convicted, only 549 defendants' sentences were listed, and so only those 549 were used to

---

197 "Manhattan U.S. Attorney Announces Guilty Plea of Ahmed Warsame, a Senior Terrorist Leader and Liaison between Al Shabaab And Al Qaeda in the Arabian Peninsula for Providing Material Support to Both Terrorist Organizations," Targeted News Service, March 25, 2013, http://search.proquest.com.libproxy.nps.edu/docview/1319578532/citation/989D230F0BC140A3PQ/54.

198 Targeted News Service.

199 "U.S. Interrogators Sent to Question Al-Qaida Suspect," *The Ledger*, October 7, 2013, http://search.proquest.com.libproxy.nps.edu/docview/1440037232/abstract/989D230F0BC140A3PQ/34.

200 National Security Division, "Introduction to National Security Division Statistics on Unsealed International Terrorism and Terrorism-Related Convictions" (report, Department of Justice, 2012), 1, http://fas.org/irp/agency/doj/doj032610-stats.pdf.

201 National Security Division, 1–26.

202 Pending sentences are not listed. National Security Division, 1–26.

calculate the average sentence. Any defendant who was sentenced to probation was recorded as having received zero months of incarceration. Finally, a number of defendants were listed as having received a life sentence. As described in the previous chapter, the United States Sentencing Commission's documentation was used to calculate the length of a life sentence.[203] The same figure that was used to approximate a life sentence for a detainee at Guantanamo Bay was used to approximate a life sentence in the federal system. As noted, the Commission states that, for the purpose of analysis, a life sentence is considered 470 months (approximately thirty-nine years).[204]

The average sentence for the 549 defendants convicted of terrorism or terrorism-related offenses was calculated to be approximately 116 months, which means these federal terrorism defendants were prevented from reengaging in their fight against the United States for approximately eight years. This reduced the potential threat against the United States by preventing al Qaeda from using these men to attack the United States.

As with law of war detention, recidivism was researched to determine how often a person was re-arrested after being convicted of a federal crime. A 2016 study by the United States Sentencing Commission of 25,431 federally convicted offenders determined that some 49.3 percent "were rearrested within eight years for either a new crime or for some other violation of their probation or release conditions."[205]

C. OPPORTUNITY TO PROSECUTE

By their nature, two-step intelligence and law enforcement interrogations are intended to provide officials with an opportunity to prosecute the person being detained. Before an operation is launched to capture and interrogate a suspected terrorist, a criminal case must be prepared to ensure that law enforcement officers will have enough evidence to arrest a detained person once the person is transferred from military custody to law enforcement custody. As a practical matter, if a detained person chooses not to speak with

---

[203] United States Sentencing Commission, *Life Sentences in the Federal System*, 1.

[204] United States Sentencing Commission, 10.

[205] United States Sentencing Commission, *Recidivism among Federal Offenders*, 3.

law enforcement officers, the officers should already possess enough evidence to arrest and charge the person. The officers cannot expect that the person will provide incriminating statements.

Ahmed Abdulkadir Warsame was indicted in the Southern District of New York for conspiracy to provide material support to terrorism, for providing material support to a foreign terrorist organization, and on several other charges.[206] Warsame pled guilty and is awaiting sentencing. In 2017, Abu Khattala was tried and convicted of providing material support to terrorism, conspiracy to provide material support to terrorism, destroying property, and carrying a firearm during a crime of violence; however, he was acquitted of other charges, including the murders of the four Americans killed in the Benghazi attacks.[207] He was sentenced to twenty-two years in prison.[208] Abu Anas al-Libi had been indicted in federal court in New York before he was captured by U.S. special forces, so officials already had significant evidence of wrongdoing. In October 2013, U.S. special operations forces seized al-Libi in Libya, and he was taken aboard a U.S. naval vessel and then transported to the United States.[209] Once in the United States, he was turned over to federal custody.

The two-step intelligence and law enforcement interrogation approach, in these cases, provided U.S. officials with an opportunity to prosecute each of these terror suspects. Of the three cases reviewed, two defendants were successfully prosecuted and one was indicted, but died before going to trial.

---

206 United States v. Ahmed Abdulkadir Warsame, 11 Crim. 559 (11 Cir. 2013), 15, https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/Warsame%2C%20Ahmed%20Indictment.pdf.

207 Adam Goldman and Charlie Savage, "Libyan Convicted of Terrorism in Benghazi Attacks but Acquitted of Murder," *New York Times*, November 28, 2017, https://www.nytimes.com/2017/11/28/us/politics/benghazi-attacks-trial-verdict-khattala.html.

208 Hsu, "Libyan Militia Leader Gets 22-Year Sentence."

209 Rob Wise, "The Capture of Abu Anas Al-Libi," Center for Strategic and International Studies, October 7, 2013, https://www.csis.org/analysis/capture-abu-anas-al-libi; "Profile: Anas al-Liby," BBC, January 3, 2015, http://www.bbc.com/news/world-africa-24418327.

D. OPPORTUNITY TO GAIN INTELLIGENCE

Warsame, a Somali citizen, was held aboard a U.S. warship for approximately two months and interrogated by intelligence officers before being transferred to law enforcement custody and provided with Miranda warnings.[210] Abu Khattala, from Libya, spent almost two weeks aboard the USS *San Antonio* as it made its way back to the United States.[211] Finally, accused embassy bomber al-Libi was held for approximately one week after being captured by U.S. commandos.[212] Each capture allowed intelligence officers more than a week to question the suspected terrorist, granting considerably more time than would be possible had the person not been in military custody.

E. EFFECT ON THE CREDIBILITY OF THE UNITED STATES

The intelligence and law enforcement interrogations described in this chapter do not suffer from the same damaged reputation as Guantanamo, but there are still skeptics who question the legality of the interrogation approach. Central to their argument is whether or not a detained person is under the control of the U.S. military, or under arrest by law enforcement officers. A former federal prosecutor, David Deitch, commented that the process tries to strike a balance between treating captured terrorism suspects as "intelligence assets" and persons to be prosecuted in court.[213]

Other criticisms of this approach are leveled at the two-step process itself. Attorney Lee Ross Crain, in a paper published by the University of Michigan Law School, argues that this practice undermines the Fifth Amendment and the application of Miranda.[214] Crain observes that Justice Kennedy, in the *Missouri v. Seibert* decision, stated that the intent, or "motive," for the use of the two-step interrogation policy was important. Further,

---

210 *The Ledger*, "U.S. Interrogators Sent to Question Al-Qaida Suspect."

211 Tucker, "Benghazi Militant Case."

212 BBC, "Profile: Anas al-Liby."

213 Tucker, "Benghazi Militant Case."

214 Lee Ross Crain, "The Legality of Deliberate Miranda Violations: How Two-Step National Security Interrogations Undermine Miranda and Destabilize Fifth Amendment Protections," *Michigan Law Review* 112, no. 3 (2013): 453, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1034&context=mlr.

some courts had already found Kennedy's test to be the controlling opinion.[215] Crain also argues that "similar interrogation processes have been used in many high-profile antiterrorism cases, including the questioning of the Detroit 'Undergarment Bomber,' the 'Times Square Bomber,' and, it appears, the surviving Boston Marathon bomber."[216] Crain concludes that "[c]ourts should not allow prosecutors to admit confessions derived from two-step national security interrogations. Individual rights should not be so liberally sacrificed at the altar of the collective good."[217]

There are competing arguments, however. Justice Kennedy, in his opinion in the *Seibert* case, notes that statements taken as part of an intentional two-step interrogation must be "excluded *unless* curative measures are taken before they were made."[218] Justice Kennedy then provides examples of the types of curative measures that could be employed by law enforcement to ensure that a Miranda warning would still be effective: "a substantial break in time and circumstances between the prewarning statement and the warning may suffice in most instances, as may an additional warning explaining the likely inadmissibility of the prewarning statement."[219]

The two-step intelligence and law enforcement interrogations reviewed in this chapter employed these curative measures. In each case there was a change in circumstances, such as a change in interrogation personnel and a gap in time between the intelligence and law enforcement interrogations. *Missouri v. Seibert* notes that the two interrogations of Patrice Seibert were "integrated and proximately conducted."[220] In contrast, officials conducting the law enforcement interrogation in the cases reviewed did not participate in, nor use information from, the previously conducted intelligence interrogation. Further, steps were taken to separate the two interrogations, including issuing

---

215 Crain, 456.

216 Crain, 458.

217 Crain, 488.

218 Emphasis added. Missouri v. Seibert, 542 U.S. 600 (2004), 601.

219 Missouri v. Seibert, 601.

220 Missouri v. Seibert, 9–12.

multiple Miranda warnings or separating the circumstances of the two interrogations. The police in the *Seibert* case reminded the defendant of her previous confession to encourage her to again confess after the provision of Miranda warnings. The two-step intelligence and law enforcement interrogations were separated and the statements from any previous intelligence interrogations were not used by the law enforcement officers.

As previously mentioned, Crain speculates that "similar interrogation processes" were used in the cases of the undergarment bomber, the Times Square bomber, and the Boston Marathon bombers.[221] A review of these cases reveals that law enforcement did not use a two-step intelligence and law enforcement interrogation strategy. Rather, the officers asked general public-safety-related questions, as allowed under *New York v. Quarles*.[222] Intelligence interrogations conducted as part of the two-step intelligence and law enforcement interrogation tend to be much longer and more detailed, although both share the common goal of public safety. It is also significant that persons being detained for the purpose of intelligence interrogations (as part of the two-step process) are under military control and are being asked questions relevant to ongoing military and counterterrorism operations.

---

[221] Crain, "The Legality of Deliberate Miranda Violations," 458.

[222] Quarles allows for a limited inquiry of a person under arrest to ask questions related to immediate public safety concerns prior to issuing Miranda warnings. New York v. Quarles.

THIS PAGE INTENTIONALLY LEFT BLANK

IV. ARREST AND EXTRADITION OF TERROR SUSPECTS

A third option for the United States to consider when capturing terrorist suspects overseas is to immediately arrest them and transport them back to the United States for prosecution in federal court. This option typically means that law enforcement officers will provide Miranda warnings to terror suspects upon their arrest, and does not allow for a prolonged intelligence interrogation. As with the previous two chapters, this chapter assesses the approach using the five criteria of legality, threat reduction, opportunity to prosecute, opportunity to gain intelligence, and effects upon the credibility of the United States.

Arrest and extradition is a good option when it is not possible to conduct two-step intelligence and law enforcement interrogations and when there is already ample evidence to bring a person to trial. Unless there is an indication of an imminent danger to public safety, it is unlikely that even a *Quarles*-type inquiry could be made. This reduced opportunity to solicit intelligence means that any information known by the terror subject is lost unless that person decides to cooperate with the government.

A. LEGALITY

Arresting and extraditing a terrorism suspect from an overseas location back to the United States has been part of American policy for some time. While a particular country may have a treaty with the United States that requires specific circumstances to be met before a person is extradited for trial, a U.S. court is not necessarily concerned with how a person came to be before the court.[223] In fact, the court is typically only concerned with the matter at hand: the pending criminal charges to be heard.[224]

Khalfan Khamis Mohamed, who had been indicted for his role in the attacks upon U.S. embassies in Kenya and Tanzania, was arrested by South African authorities on

---

[223] Julie Philippe and Laurent Tristan, "International Law, Extraterritorial Abductions and the Exercise of Criminal Jurisdiction in the United States," *Willamette Journal of International Law and Dispute Resolution* 11, no. 1 (2004): 74.

[224] Philippe and Tristan, 66.

October 5, 1999.[225] Shortly after the arrest, Mohamed was interviewed by South African authorities, then by American investigators who advised Mohamed of his rights.[226] After the interviews, Mohamed was almost immediately transported to the United States for prosecution.[227] Although Mohamed voluntarily accompanied U.S. investigators to New York, the extradition was later found to be illegal by the Constitutional Court of South Africa, in part because the South African government opposed the death penalty.[228] Despite opposition from the South African court, the death penalty trial against Mohamed in the United States went forward. U.S. law does not require a treaty to be in effect for the United States to extradite a non-U.S. citizen for a crime of violence.[229]

Under *New York v. Quarles,* law enforcement investigators may conduct a limited inquiry of a person under arrest to ask questions related to immediate public safety concerns before they issue Miranda warnings. It does not appear that any *Quarles*-type questions were asked during U.S. law enforcement interviews with Mohamed.[230] His arrest and subsequent transfer to the United States for prosecution were consistent with U.S. law. Although there is no evidence of an intelligence interview, a detailed confession was obtained, which was subsequently used during trial.[231]

Although U.S. law does not require a treaty for extradition, the United States government usually operates within the construct of a treaty to obtain a fugitive from justice. As mentioned, however, use of the death penalty can hamper U.S. efforts to

---

225 Phil Hirschkorn, "S. Africa Court Says Defendant's Rights Violated," CNN, May 29, 2001, http://www.cnn.com/2001/LAW/05/29/embassy.bombings.01/index.html.

226 United States v. Usama Bin Laden, S(7) 98 Cr. 1023 (2001), http://cryptome.org/usa-v-ubl-mwo.htm.

227 United States v. Usama Bin Laden.

228 "National Implementation of IHL: Mohamed v. President of the Republic of South Africa, Constitutional Court, 28 May 2001," International Committee of the Red Cross, accessed January 1, 2018, https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=1B186A518CE57ECDC1257648004888B2&action=openDocument&xp_countrySelected=ZA&xp_topicSelected=GVAL-992BU6&from=state.

229 "International Extradition and Related Matters," U.S. Department of Justice, accessed January 1, 2018, https://www.justice.gov/usam/usam-9-15000-international-extradition-and-related-matters.

230 United States v. Usama Bin Laden.

231 United States V. Usama Bin Laden.

extradite a fugitive. Many nations, including nations in the European Union, do not support the death penalty and will not extradite a person to the United States if that person faces the possibility of the death penalty. Also, some nations will not share evidence if it is to be used in a death penalty case. Because many terrorism cases are death penalty cases, the United States often has to use only the evidence that it has gathered on its own.

B. THREAT REDUCTION

The arrest and immediate extradition of a terrorist subject to the United States reduces the danger posed by terrorist groups, as it removes the arrested subject as a threat. Under questioning after his arrest, Mohamed told the FBI agent that he would have continued to target Americans had he not been caught.[232]

Threat reduction can also be achieved if a terrorism suspect who has been arrested formally cooperates with the U.S. government. In the case of Ahmed Abdulkadir Warsame, the suspect's cooperation was a boon for counterterrorism experts. As noted previously, Warsame's cooperation was described as highly significant by former U.S. Attorney Preet Bharara.[233]

As described in the previous chapters, sentences for terrorism and terrorism-related offenses in the U.S. federal system were used to gauge threat reduction as well. The average sentence for a terrorism or terrorism-related conviction in the U.S. federal system was calculated to be approximately 116 months.

C. OPPORTUNITY TO PROSECUTE

Because an arrest-and-extradite model is based upon the ability to bring a person to court, this approach provides an opportunity to prosecute by definition. Many of the arrest-and-extradite scenarios are conducted only after prior detailed coordination with a foreign government.

---

232 Alan Feuer, "Bombing Suspect Is Said to Admit He Felt 'Duty to Kill Americans,'" *New York Times*, March 20, 2001, https://www.nytimes.com/2001/03/20/nyregion/bombing-suspect-is-said-to-admit-he-felt-duty-to-kill-americans.html.

233 Targeted News Service, "Manhattan U.S. Attorney Announces Guilty Plea."

Abu Hamza al-Masri, a radical Islamist who preached terror for years at the Finsbury Park Mosque in the United Kingdom, was wanted by U.S. authorities for supporting terrorism.[234] Specifically, he was believed to have helped establish a terror training camp in the United States and was thought to have supported a hostage-taking in Yemen in 1998.[235] The extradition took years and al-Masri was finally sent to the United States in 2012.[236] No intelligence interview took place when the United States took custody of al-Masri. Significantly, the British Metropolitan Police reportedly provided a great deal of support to this prosecution, including evidence and access to witnesses.[237] Al-Masri was convicted in 2015 of material support to terrorism and received life imprisonment.[238]

Babar Ahmad and Syed Talha Ahsan were wanted by the United States for setting up a website that supported radical Islamists, including fighters from the Taliban and the Arab Mujahideen in Chechnya.[239] Both Ahmad and Ahsan were extradited from the United Kingdom and sent to the United States in 2012 to be tried before a court in Connecticut.[240] Both men pleaded guilty to running a website that sought to obtain military gear for jihadists.[241]

Another terror suspect who was extradited from the United Kingdom to the United States was Abid Naseer. Naseer was wanted in connection with a plot to bomb Manchester in the United Kingdom and to bomb the New York City subway system in the United

---

234 Larry Neumeister, "5 Terrorism Suspects Extradited from England to U.S.," *USA Today*, October 4, 2012, https://www.usatoday.com/story/news/world/2012/10/05/uk-abu-hamza-extradition/1615163/.

235 Neumeister.

236 Neumeister.

237 "Cleric Abu Hamza Jailed for Life," BBC News, January 9, 2015, http://www.bbc.com/news/world-us-canada-30754959.

238 BBC.

239 Michael P. Mayko, "2 with Terror Ties to State Lose Extradition Appeal," *Connecticut Post*, September 24, 2012, http://www.ctpost.com/local/article/2-with-terror-ties-to-state-lose-extradition-3890884.php.

240 Diane Orson, "Two British Terror Suspects Plead Guilty in New Haven Federal Court," Connecticut Public Radio, December 11, 2013, http://wnpr.org/post/two-british-terror-suspects-plead-guilty-new-haven-federal-court.

241 Orson.

States.[242] Although the police in the United Kingdom had a great deal of information regarding Naseer, they did not believe that they had enough to obtain a conviction.[243] Further, because Naseer was a Pakistani citizen, the British could not deport Naseer for fear that he could be tortured in Pakistan.[244] By mid-2009, authorities in the United Kingdom were stuck: they did not want to let Naseer go and they could not deport him. The situation changed in 2010, however, when law enforcement in the United States found cooperating witnesses who could implicate Naseer.[245] Because authorities in the United States had already prosecuted several men in connection with the same plot in which Naseer was implicated, they believed they could successfully prosecute him.[246] Naseer was extradited to the United States in 2013, and convicted on material support to terrorism in March 2015.[247]

The United Kingdom is not the only country to extradite persons wanted for terror-related crimes. In July 2017, Spain sent Ali Charaf Damache, an Irish-Algerian citizen to the United States for prosecution.[248] Damache was wanted in the United States for recruiting Americans, including the infamous "Jihad Jane" in Philadelphia, for an attack against a Swedish artist who had mocked the Islamic prophet Muhammad.[249] Interestingly, before Damache traveled to Spain he had been residing in Ireland, where he had dual citizenship.[250] The Irish government had refused a U.S. extradition request due to

---

[242] Steve Swann, "Terror Suspect Extradited to US," BBC, January 3, 2013, http://www.bbc.com/news/uk-20902387.

[243] Swann.

[244] Swann.

[245] Swann.

[246] Swann.

[247] Swann; Laura Ly, "Abid Naseer Convicted in 2009 Bomb Plot," CNN, March 4, 2015, http://www.cnn.com/2015/03/04/us/new-york-terror-trial/index.html.

[248] Jeremy Roebuck, "Terror Suspect in 'Jihad Jane' Case Extradited to Philly," Philly.com, July 21, 2017, http://www.philly.com/philly/news/pennsylvania/philadelphia/terror-suspect-in-jihad-jane-case-extradited-to-philly-20170721.html.

[249] Roebuck.

[250] Roebuck.

objections over the conditions of U.S. prisons.[251] Damache left Ireland and traveled to Spain, however, where he was arrested by Spanish authorities in 2015.[252]

D. OPPORTUNITY TO GAIN INTELLIGENCE

The arrest and extradition of a terrorist subject to the United States gives U.S. authorities the opportunity to gain intelligence if that person cooperates with authorities and provides a statement. In the case of Khalfan Khamis Mohamed, the statement provided to investigators was detailed and included information regarding how the suspect ground up TNT to make the bomb, and how he helped load the bomb-truck.[253] Mohamed did not cooperate with the U.S. government, but the statement that he made after being arrested was significant.

Ramzi Yousef, who was convicted of bombing the World Trade Center in 1993, also made incriminating statements after being captured in Pakistan in 1995.[254] U.S. Secret Service Agent Brian Parr testified that, on his flight to the United States, Yousef boasted about attacking the World Trade Center tower and how he had hoped to cause the collapse of the tower.[255] However, Yousef's statement did not identify how the plot was financed or who directed the bombing.[256] While neither Mohamed nor Yousef cooperated with the U.S. government, they did make incriminating statements that also had intelligence value.

---

[251] Roebuck.

[252] Roebuck.

[253] Feuer, "Bombing Suspect Felt 'Duty to Kill Americans.'"

[254] Feuer.

[255] Benjamin Weiser, "The Trade Center Verdict: The Overview; 'Mastermind' and Driver Found Guilty in 1993 Plot to Blow up Trade Center," *New York Times*, November 13, 1997, https://www.nytimes.com/1997/11/13/nyregion/trade-center-verdict-overview-mastermind-driver-found-guilty-1993-plot-blow-up.html.

[256] Weiser.

E. EFFECT ON THE CREDIBILITY OF THE UNITED STATES

The arrest-and-extradite approach has been a longstanding practice by the United States—not just for terrorism suspects but for other criminal offenses also.[257] Because the process of extraditing a person is often dictated by a mutual legal assistance treaty (MLAT), the terms under which a person is turned over to the United States are spelled out in detail. The purpose of extradition is "for prosecution or punishment," and as such follows a strict protocol agreed to by nations that have signed an MLAT.[258] While this protocol varies from country to country and from treaty to treaty, the protocol for detaining a person usually involves a review or hearing of evidence against the person to be extradited.[259] In the United States, this means that there must be probable cause that a particular person committed the crime for which he or she is being extradited.[260]

Since there are extensive legal and diplomatic burdens for each nation to bear when requesting the extradition of a fugitive, there is great confidence in the process. Each nation, due to given its MLAT with the United States, knows in advance the evidence that will be presented against a fugitive. Further, the actions of the signers of the treaty are specifically spelled out in the treaty itself. Treaties not only specify the circumstances of the extradition of a fugitive, they often also involve requests for evidence gathered in the respective countries.[261] This means that a criminal case against a fugitive can be significantly enhanced by the provision of evidence and business records. Again, this process leads to the credibility of extraditions based upon an MLAT.

---

257 Michael John Garcia, *Extradition to and from the United States: Overview of the Law and Recent Treaties* (Collingdale, PA: Diane Publishing, 2010), 1.

258 Garcia, 1.

259 Garcia, 21.

260 Garcia, 21.

261 Garcia, 16.

In 2015, the Department of Justice stated that "requests for assistance from foreign authorities" such as MLATs or letters rogatory had increased by almost 60 percent.[262] Further, the Department of Justice was increasing the amount of financial and personnel resources devoted to the fulfillment of these requests.[263]

Several issues, however, have recently come up with extraditions. The first, and one of the most difficult to surmount, is the potential application of the death penalty by the United States.[264] Many countries, including all European Union nations, forbid the use of the death penalty and will not extradite a person who may face capital charges.[265] A second issue is the conditions of U.S. jails. The Irish government refused to extradite Damache based on concerns over perceived austere conditions in U.S. prisons.[266] The British government, prior to extraditing al-Masri, noted that it had reservations regarding U.S. jails, especially the Administrative Maximum (ADX) prison in Florence, Colorado.[267] In some part, these reservations were overcome by negotiation between U.S. and UK authorities.[268]

Because MLATs, and through them extraditions, are closely negotiated agreements based upon reciprocity and criminal procedure, they allow no venue for any sort of intelligence interview. Any statement made by a fugitive would likely be the result of advice from an attorney, or the result of a negotiated cooperation agreement. Extraditions are treated as a criminal procedure issue, not an intelligence opportunity.

---

262 "U.S. Department of Justice FY 2015 Budget Request: Mutual Legal Assistance Treaty Process Reform," U.S. Department of Justice, July 13, 2014, 1, https://www.justice.gov/sites/default/files/jmd/legacy/2014/07/13/mut-legal-assist.pdf.

263 U.S. Department of Justice, 2.

264 Garcia, *Extradition to and from the United States*, 9.

265 Garcia, 2, 3, 9.

266 Roebuck, "Terror Suspect in 'Jihad Jane' Case Extradited to Philly."

267 BBC, "Cleric Abu Hamza Jailed for Life."

268 BBC.

The United States does not always have the opportunity to conduct two-step intelligence and law enforcement interrogations of a terror suspect. The arrest and extradition of a terror suspect provides the United States with a good opportunity to neutralize a potential terror threat through prosecution. As a result of the cooperation between the United States and the country that extradited the terror subject, the criminal cases built against the terror subjects are usually strong. There is little opportunity to gain intelligence about pending attacks, other terror subjects, or the terrorist organization unless the terror subject decides to cooperate with the government in exchange for clemency in sentencing. Usually, military detention of a terror suspect extradited to the United States is not an option because such military detention is unpopular with many countries. Also, many of the terror suspects who are in custody around the world were not captured on a traditional battlefield and are not viewed by other countries as enemy combatants. This leaves the arrest-and-extradite approach a good option for bringing a terror suspect to justice.

THIS PAGE INTENTIONALLY LEFT BLANK

V. ANALYSIS AND POLICY RECOMMENDATIONS

The Department of Justice Inspector General's report on the FBI's performance before the attacks of 9/11 notes the primacy of preventing terrorist attacks over prosecution.[269] Further, the *9/11 Commission Report*—which reviews the roots of al Qaeda and analyzes the 1993 World Trade Center bombing—notes of the investigation into the 1993 attack: "The process was meant, by its nature, to mark for the public the events as finished—case solved, justice done. It was not designed to ask if the events might be harbingers of worse to come."[270] These findings have highlighted an important debate in this country over how to treat suspected terrorists, and part of this debate concerns where the United States should place its priority: preventing future attacks or prosecuting those who committed past attacks. The decision often requires a delicate balance between the two. If the United States focuses solely on gaining intelligence to prevent an attack, it may lose an opportunity to capture and neutralize terrorists who could latter attack the country. If the United States focuses solely on prosecution, opportunities may be lost to gain intelligence that will help prevent future attacks. Whichever policy is chosen, to be successful, the United States must follow the law and strict ethical standards. In this way, the United States can maintain credibility and secure the cooperation of other nations to protect itself against the threat of terror attacks.

A. ANALYSIS

With the objective being the safety of the American people, this thesis described three different approaches and attempted to determine which best allows the United States to handle terror suspects. Each policy was evaluated and rated on its legality, its ability to reduce the threat of a terror attack, the opportunity it provides for officials to gain intelligence, the opportunity it provides to prosecute a person, and its effect on the credibility of the United States. The rating for each field is described in this section as either *good*, *fair*, or *poor*.

---

[269] Office of the Inspector General, "FBI's Handling of Intelligence Information," 2.

[270] National Commission on Terrorist Attacks upon the United States, *9/11 Commission Report*, 73.

1. Legality

Is the suggested solution currently legal to enact without further litigation?

Law of war detention is lawful under the Authorization for the Use of Military Force, which was enacted by Congress after 9/11. The *Hamdi v Rumsfeld* decision by the Supreme Court affirmed the executive branch's authority to seize and hold persons under the AUMF. Overall, the legal standing of law of war detention is rated as *good*.

Two-step intelligence and law enforcement interrogations, as detailed in this thesis, derive their authority in part from the AUMF. The detainees described here were seized by U.S. military forces and held in military detention overseas. One of the issues with continued reliance on the AUMF for the authority to detain terrorists overseas is that Congress limits its scope to "nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001."[271] As the United States moves away from the strict war on the elements that conducted the 9/11 attacks, new authority may need to be sought. The recent successful prosecution of Ahmed Abu Khattala provided the first judicial review of the practice of conducting an intelligence interrogation followed by a Mirandized law enforcement interrogation. The judge in this case found that Abu Khattala's statements were knowing, willing, and voluntary. The legality of intelligence and law enforcement interrogations is rated as *good*.

Arrest and extradition (law enforcement interrogation only) has been based on treaties for centuries. Countries enter into agreements to detain and extradite persons suspected of certain crimes. The agreements are reciprocal and are limited to only the crimes that the two countries agree to extradite for. The legality of arrest and extradition is rated as *good*.

[271] Authorization for the Use of Military Force, Pub. L. 107-40 (September 18, 2001).

2. Threat Reduction

Is the terror suspect likely removed as a long-term risk—i.e., is the suspect unlikely to be a re-offender?

The detainees at Guantanamo Bay being held under law of war detention authority served, on average, a term of ninety-seven months. Because this estimation is based on only about half of the total detainee population (see details about the calculations in Chapter II), it is made with medium confidence. According to the Director of National Intelligence, recidivism rates for Guantanamo detainees are estimated to be between approximately 16 and 27 percent, which is approximately half the rate of federally convicted offenders.[272] Based upon these numbers, the ability of the law of war detention approach to remove a terror suspect as a possible threat is rated as *good*.

The three cases profiled for two-step intelligence and law enforcement interrogations provide a small sample by which to evaluate threat reduction. Ahmed Abu Khattala was convicted and sentenced to twenty-two years in prison.[273] Ahmed Abdulkadir Warsame has plead guilty and is cooperating with the U.S. government while awaiting sentencing.[274] Finally, Abu Anas al-Libi died of complications with hepatitis while awaiting trial. Looking at federal terrorism convictions in general, 627 convictions for federal terrorism or terrorism-related offences were reviewed. The sentences for these convictions were found to be approximately 116 months, on average. Based upon this average sentence, threat reduction for two-step intelligence and law enforcement interrogations followed by federal prosecution is rated as *good*.

Arrest and extradition (law enforcement interrogation only) reduces the threat of terrorism through prosecution. As with intelligence and law enforcement interrogations, arrest and extradition effectiveness is based upon federal conviction terms. Looking at federal terrorism convictions in general, 627 convictions for federal terrorism or terrorism-

---

[272] Director of National Intelligence, "Detainees Formerly Held at Guantanamo Bay"; United States Sentencing Commission, *Recidivism among Federal Offenders.*

[273] Hsu, "Libyan Militia Leader Gets 22-Year Sentence."

[274] Targeted News Service, "Manhattan U.S. Attorney Announces Guilty Plea."

related offences were reviewed. The average sentence was found to be approximately 116 months. Based upon this average sentence, intelligence and law enforcement interrogations followed by federal prosecution is rated as *good*.

3. Opportunity to Prosecute

Does the course of action provide the United States with an opportunity to prosecute a terror suspect for his or her crimes?

Of the approximately 780 persons who have been held at Guantanamo Bay under law of war detention, eight have been prosecuted and seven are currently being prosecuted. These fifteen people constitute approximately 2 percent of the total population of Guantanamo Bay. Further, a task force appointed by President Obama in 2009 to see if some detainees could be prosecuted identified forty-four cases as viable for prosecution.[275] Based upon the low number of prosecutions of detainees at Guantanamo Bay and based upon the fact that only fifteen of forty-four viable cases have been pursued, law of war detention is rated as *poor* in this field.

All three individuals profiled in the intelligence and law enforcement interrogation chapter were prosecuted. Warsame plead guilty, Khattala was convicted after a trial, and al-Libi died of hepatitis during the wait for his trial. Because each person was prosecuted in some fashion, intelligence and law enforcement interrogation is rated as *good*.

For arrest and extradition (law enforcement interrogation only), prosecution, not intelligence collection, is the goal. All of the cases reviewed regarding extradition—Abu Hamza Al Masri, Babar Ahmad, Syed Talha Ahsan, Abid Naseer, and Ali Charaf Damache—resulted in a successful prosecution. Based upon this, arrest and extradition is rated as *good*.

[275] Department of Justice et al., "Final Report: Guantanamo Review Task Force."

4. Opportunity to Gain Intelligence

Does the course of action provide the United States with an opportunity to gather intelligence information without providing Miranda warnings?

As noted by then Joint Task Force commander Major General Geoffrey Miller, one of the purposes of the detention center at Guantanamo Bay was to support the collection of intelligence.[276] As evidenced by hundreds of Combatant Status Review Tribunal summaries, a great deal of information was collected about each detainee, including background, associates, details of travel and circumstances of capture. A review of these CSRT summaries revealed that many provided details which were corroborated by other detainee summaries. It is clear that thousands of intelligence interrogations took place at Guantanamo Bay. Law of war detention is rated as *good* in this category.

Two-step intelligence and law enforcement interrogations for the three cases examined provided between one week and two months to conduct intelligence interrogations before law enforcement interrogations were started. Statements from the U.S. Attorney for the Southern District of New York described the later cooperation of Ahmed Abdulkadir Warsame as being extensive. No data exists for any intelligence that may have been provided by Warsame, Khattala or Al Libi during their intelligence interrogation, but it is noted that the opportunity was provided. Based upon this, intelligence and law enforcement interrogations are rated as *fair*.

For arrest and extradition (law enforcement interrogation only), intelligence is only gained if a person in custody decides to make a statement or decides to formally cooperate with the government. There is no opportunity for an intelligence interview. The opportunity to gain intelligence is assessed to be *poor*.

[276] Joint Task Force-Guantanamo, "Camp Delta Standard Operating Procedures," 1.

5. Effect on the Credibility of the United States

Does the approach allow the United States to maintain moral and legal credibility with both allies and enemies?

The Guantanamo Bay detention center has been marked by scandals, including allegations of physical mistreatment. For example, the purported interrogation log of Mohammed al-Qahtani was leaked to *TIME* magazine, and the subsequent article detailed treatment that embarrassed the Department of Defense.[277] Additional allegations of mistreatment of the Koran further embarrassed Department of Defense officials.[278] Based upon the many articles articulating problems at Guantanamo Bay, law of war detention at Guantanamo is rated as *poor* for credibility.

Two-step intelligence and law enforcement interrogation is a comparatively new approach. While the trial of Abu Khattala affirmed that it is possible to conduct an intelligence and then a law enforcement interrogation that produces a knowing, willing, and voluntary statement, it is still the only case of its kind that has gone to trial thus far. Critics question the voluntariness of the process. Additionally, some countries believe it is questionable for the United States to use military force to capture persons in sovereign countries that the United States is not at war with. Based upon this, intelligence and law enforcement interrogations is rated as *fair*.

The United States has extradition agreements with approximately 107 countries.[279] Extradition is typically based on a treaty and is often accompanied by other assistance, such as access to witnesses and evidence. Because many countries willingly enter into these agreements with the United States and because the agreements are reciprocal, there is widespread support for this approach. Arrest and extradition is therefore rated as *good* in preserving the credibility of the United States.

---

[277] Zagorin, "20th Hijacker."

[278] Josh White and Dan Eggen, "US Admits Koran Abuse at Cuba Base," *Guardian*, June 5, 2005, https://www.theguardian.com/world/2005/jun/05/guantanamo.usa.

[279] Garcia, *Extradition to and from the United States*, 1.

Table 1 shows the policy ratings across the categories.

Table 1. Policy Evaluation

	Legality	Threat Reduction	Intelligence	Prosecution	Credibility
Law of War Detention	Good	Good	Good	Poor	Poor
Intelligence and Law Enforcement Interrogations	Good	Good	Fair	Good	Fair
Arrest and Extradite	Good	Fair	Poor	Good	Good

B. RECOMMENDATIONS

To improve the viability of law of war detention to address captured terrorists, the United States should use prosecution as a tool to hold accountable those who have committed crimes while participating in armed conflict. This will require a review similar to the Combatant Status Review Tribunal to determine if a captured person should be prosecuted.

Many steps have already been taken to improve the credibility of law of war detention; for instance, coercive interrogation techniques have been banned, public release of information regarding detainees and detention facilities has been required, and groups such as the International Red Cross are now permitted to access detainees. Additional transparency, such as the declassification and release of some detainee statements, can improve public knowledge and perception of the nature of law of war detention.

The two-step intelligence and law enforcement interrogation policy should be further refined to ensure that intelligence interrogations remain viable and reasonable. Also, care should continue to be taken to ensure there is a definite separation between the two processes and that a waiver of rights for a law enforcement interrogation remains

knowing, willing, and voluntary. Examples studied in this paper relied upon the authority of the AUMF to hold detained suspected terrorists for the intelligence interrogation. This authority must be maintained if these interrogations are to continue, and so the AUMF must be reviewed to ensure that the president has the authority to continue to use military forces to address terror threats beyond the organizers of the 9/11 attacks, such as ISIS.

C. CONCLUSION

The varied situations encountered by the United States during the war on terrorism demand varied responses. When the national command authority encounters a threat posed by a captured individual, they must decide the best course of action based on the situation at hand. It is critical that decision-makers have options available to fit these circumstances. The advent of irregular, asymmetrical threats such as those from al Qaeda and ISIS make clear that the line between law enforcement and military operations is often difficult to discern. Terrorists exploit this vulnerability by attacking the United States, then sheltering under U.S. law. The courts have demonstrated reasonableness and flexibility in their application of the law under complex circumstances and have recognized the obligation of military members and other public servants to protect the public. An example is the previously noted *Quarles* case, which, according to the Supreme Court, "presented a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."[280]

For the people who worked on behalf of Bin Laden, or for those who supported al Qaeda in some way, various options other than military actions could be reasonable for the United States. Lower-level soldiers, like those in the Taliban, may be best dealt with by law of war detention. Others, such as al Qaeda fighters and organizers, may be best neutralized by capture, interrogated for intelligence information to preserve lives from pending terror attacks, then provided Miranda warnings and interrogated for criminal prosecution. Still other individuals may be captured by nonmilitary forces in allied countries, when extradition and prosecution may be a reasonable option.

---

[280] New York v. Quarles, 653.

Each of the policies evaluated depend on specific circumstances—including whether or not the military is able to take custody of a suspected terrorist, the existence of evidence that makes prosecution possible without confessions, the existence of armed conflict between the Unites States and others, the cooperation of foreign countries, and many other factors. Having each of these policies as continued viable options will help leaders choose the best course of action based upon circumstances.

Thus, there is no one policy that best allows the United States to reduce the threat posed by a terrorist captured overseas, takes into account the need to obtain information about looming attacks, preserves the opportunity for prosecution, and maintains the credibility of the United States. Law of war detention, two-step intelligence and law enforcement interrogations, and arrest and extradition all provide excellent options to deal with these complex threats.

THIS PAGE INTENTIONALLY LEFT BLANK

LIST OF REFERENCES

Ackerman, Spencer. “Drift: How This Ship Became a Floating Gitmo.” WIRED, July 6, 2011, http://www.wired.com/2011/07/floating-gitmo/.

Aldrich, George H. “The Taliban, Al Qaeda, and the Determination of Illegal Combatants.” *Humanitäres Völkerrecht*, no. 4 (2002): 202–06. https://www.icrc.org/eng/assets/files/other/george_aldrich_3_final.pdf.

Baldor, Lolita, and Nancy Benac. “U.S. Aims for Trial of Benghazi Suspect Held on Navy Ship.” *Navy Times*, June 18, 2014. http://archive.navytimes.com/article/20140618/NEWS08/306180068/U-S-aims-trial-Benghazi-suspect-held-Navy-ship.

BBC. “Cleric Abu Hamza Jailed for Life.” January 9, 2015. http://www.bbc.com/news/world-us-canada-30754959.

———. “Profile: Anas al-Liby.” January 3, 2015. http://www.bbc.com/news/world-africa-24418327.

Bellinger, John B. III. “Obama, Bush, and the Geneva Conventions.” *Foreign Policy*, August 11, 2010. https://foreignpolicy.com/2010/08/11/obama-bush-and-the-geneva-conventions/.

Benoit, Carl A. “The Public Safety Exception to Miranda.” *FBI Law Enforcement Bulletin*, February 1, 2011. https://leb.fbi.gov/2011/february/the-public-safety-exception-to-miranda.

Cassell, Paul. “Handcuffing the Cops: Miranda’s Harmful Effects on Law Enforcement.” National Center for Policy Analysis, August 1, 1998. http://www.ncpathinktank.org/pub/st218.

Cassell, Paul G., and Bret S. Hayman. “Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda.” *UCLA Law Review* 43 (1996): 839–924. https://papers.ssrn.com/abstract=1885129.

CBS News. “Abdulmutallab: Cleric Told Me to Bomb Jet.” February 4, 2010. http://www.cbsnews.com/news/abdulmutallab-cleric-told-me-to-bomb-jet/.

Center for Constitutional Rights. “al Qahtani v. Obama.” Accessed October 31, 2016. https://ccrjustice.org/node/1548.

Central Intelligence Agency. “CIA Vision, Mission, Ethos & Challenges.” Accessed November 10, 2018. https://www.cia.gov/about-cia/cia-vision-mission-values.

Chertoff, Michael. “9/11: Before and After.” *Homeland Security Affairs* 7 (September 2019). https://www.hsaj.org/articles/584.

CNN. “Benghazi Mission Attack Fast Facts.” September 10, 2013. http://www.cnn.com/2013/09/10/world/benghazi-consulate-attack-fast-facts/index.html.

Crain, Lee Ross. “The Legality of Deliberate Miranda Violations: How Two-Step National Security Interrogations Undermine Miranda and Destabilize Fifth Amendment Protections.” *Michigan Law Review* 112, no. 3 (2013): 453–88. https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1034&context=mlr.

Cumming, Alfred, and Todd Masse. *FBI Intelligence Reform since September 11, 2001: Issues and Options for Congress*. Washington, DC: Congressional Research Service, 2004. http://fas.org/irp/crs/RL32336.pdf.

Dempsey, Judy, and Nicholas Kulish. “Bush and Merkel Will Stay Low-Key No Major Speeches or Sorties Planned.” *International Herald Tribune*, June 10, 2008, sec. Opinion.

Department of Defense. *Law of War Manual*. Washington, DC: Department of Defense, June 2015. http://archive.defense.gov/pubs/law-of-war-manual-june-2015.pdf.

———. “List of Individuals Detained by the Department of Defense at Guantanamo Bay, Cuba from January 2002 through May 15, 2006.” February 28, 2010. http://web.archive.org/web/20100228102504/http://www.dod.mil/pubs/foi/detainees/detaineesFOIArelease15May2006.pdf.

Department of Justice, Department of Defense, Department of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff. “Final Report: Guantanamo Review Task Force.” Report, Department of Justice, 2010. https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf.

Director of National Intelligence. “Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba as of July 2016.” Report, Director of National Intelligence, 2017. https://www.dni.gov/index.php/newsroom/reports-publications/reports-publications-2017/item/1742-summary-of-the-reengagement-of-detainees-formerly-held-at-guantanamo-bay-cuba.

Elsea, Jennifer K. *The Military Commissions Act of 2009 (MCA 2009): Overview and Legal Issues*. CRS Report No. R41163. Washington, DC: Congressional Research Service, 2014. https://fas.org/sgp/crs/natsec/R41163.pdf.

Federal Bureau of Investigation. “Terrorism.” Accessed November 10, 2018. https://www.fbi.gov/investigate/terrorism.

Feuer, Alan. “Bombing Suspect Is Said to Admit He Felt ‘Duty to Kill Americans.’” *New York Times*, March 20, 2001. https://www.nytimes.com/2001/03/20/nyregion/bombing-suspect-is-said-to-admit-he-felt-duty-to-kill-americans.html.

Finnerty, Meghan. “Fight to Remain Silent: People Often Waive Miranda Rights, Experts Say.” AZ Central, August 10, 2016. https://www.azcentral.com/story/news/local/arizona/2016/08/10/miranda-rights-people-often-waive/88512774/.

Garcia, Michael John. *Extradition to and from the United States: Overview of the Law and Recent Treaties*. Collingdale, PA: Diane Publishing, 2010.

Garamone, Jim. “Defense.Gov News Article: Defense Department Takes Custody of High-Value Al Qaeda Operative.” Department of Defense, March 14, 2008. http://archive.defense.gov/news/newsarticle.aspx?id=49283.

Goldman, Adam, and Matt Apuzzo. “Double Agents: CIA Turned Some Terrorism Suspects into Spies, AP Says.” *Washington Post*, November 26, 2013. https://www.washingtonpost.com/world/national-security/cia-turned-some-guantanamo-bay-prisoners-into-double-agents-against-al-qaeda-ap-reports/2013/11/26/e98163b2-56ac-11e3-8304-caf30787c0a9_story.html.

Goldman, Adam, and Charlie Savage. “Libyan Convicted of Terrorism in Benghazi Attacks but Acquitted of Murder.” *New York Times*, November 28, 2017. https://www.nytimes.com/2017/11/28/us/politics/benghazi-attacks-trial-verdict-khattala.html.

Joint Task Force-Guantanamo. “Camp Delta Standard Operating Procedures (SOP).” SOP, Department of Defense, 2003. http://hrlibrary.umn.edu/OathBetrayed/SOP%201-238.pdf.

Hirschkorn, Phil. “S. Africa Court Says Defendant’s Rights Violated.” CNN, May 29, 2001. http://www.cnn.com/2001/LAW/05/29/embassy.bombings.01/index.html.

Hoffman, Jan. “Police Tactics Chipping Away at Suspects’ Rights.” *New York Times*, March 29, 1998. https://www.nytimes.com/1998/03/29/nyregion/police-tactics-chipping-away-at-suspects-rights.html.

Hsu, Spencer S. “Benghazi Attack Suspect Ahmed Abu Khattala’s Words Used against Him at Trial.” *Pittsburgh Post-Gazette*, October 2, 2017. http://www.post-gazette.com/news/world/2017/10/02/Benghazi-attack-suspect-Ahmed-Abu-Khattala-s-words-used-against-him-at-trial/stories/201710020209

———. “Judge Sets Sept. 2017 Trial Date for Benghazi Terror Suspect Abu Khattala.” *Washington Post*, June 23, 2016. https://www.washingtonpost.com/world/national-security/judge-sets-sept-2017-trial-date-for-benghazi-terror-suspect-abu-khattala/2016/06/23/20dfa3b4-3986-11e6-a254-2b336e293a3c_story.html.

———. “Libyan Militia Leader Gets 22-Year Sentence in Benghazi Attacks That Killed U.S. Ambassador. *Washington Post*, June 27, 2018. https://www.washingtonpost.com/local/public-safety/libyan-militia-leader-to-be-sentenced-in-2012-benghazi-attacks-that-killed-us-ambassador/2018/06/27/55782e5c-789a-11e8-aeee-4d04c8ac6158_story.html?noredirect=on&utm_term=.f4fb4279eed5.

———. “U.S. Judge Upholds Ship-Based Interrogation of Benghazi Terror Suspect Seized Overseas.” *Washington Post*, August 16, 2017. https://www.washingtonpost.com/local/public-safety/us-judge-upholds-ship-based-interrogation-of-benghazi-terror-suspect-seized-overseas/2017/08/16/94f851f4-829d-11e7-ab27-1a21a8e006ab_story.html?utm_term=.0b3d81af1dfe.

Hsu, Spencer S., and Jennifer Agiesta. “Intelligence Chief Says FBI Was Too Hasty in Handling of Attempted Bombing.” *Washington Post*, January 21, 2010. http://www.washingtonpost.com/wp-dyn/content/article/2010/01/20/AR2010012001364.html.

International Committee of the Red Cross. “National Implementation of IHL: Mohamed v. President of the Republic of South Africa, Constitutional Court, 28 May 2001.” Accessed January 1, 2018. https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=1B186A518CE57ECDC1257648004888B2&action=openDocument&xp_countrySelected=ZA&xp_topicSelected=GVAL-992BU6&from=state.

———. “Treaties, States Parties and Commentaries: Convention (III) Relative to the Treatment of Prisoners of War.” Accessed November 12, 2016. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=375.

Jackson, David. “German Leader Emerges as Key Bush Ally in EU.” *USA Today*, July 13, 2006, sec. News.

Joscelyn, Thomas. “New Senate Report: Al Qaeda Network Attacked in Benghazi.” *Washington Examiner*, January 15, 2014. http://www.weeklystandard.com/new-senate-report-al-qaeda-network-attacked-in-benghazi/article/774703.

———. “The Value of Guantanamo’s Intelligence.” *The Weekly Standard*, March 3, 2011. http://www.weeklystandard.com/blogs/value-guantanamo-s-intelligence_552817.html.

Karadsheh, Jomana. “Family: Abu Anas Al Libi Dies in U.S. Hospital.” CNN, January 3, 2015. http://www.cnn.com/2015/01/03/us/us-libya-al-libi/index.html.

Karl, Jonathan. “‘High-Value’ Detainees Transferred to Guantanamo.” ABC News, September 6, 2006. http://abcnews.go.com/International/story?id=2400470.

Karon, Tony. “Why Guantanamo Has Europe Hopping Mad.” *TIME*, January 24, 2002. http://content.time.com/time/world/article/0,8599,197210,00.html.

Katersky, Aaron, and Lee Ferran. “Terrorist Held in Secret on Ship Pleaded Guilty.” ABC News, March 25, 2013. http://abcnews.go.com/Blotter/terrorist-held-secret-ship-pleaded-guilty/story?id=18807861.

Keenan, David. “Miranda Overseas: The Law of Coerced Confessions Abroad.” *Hastings Law Journal* 67 (August 2016): 1695–1732. http://www.hastingslawjournal.org/wp-content/uploads/Keenan-67.6.pdf.

The Ledger. “U.S. Interrogators Sent to Question Al-Qaida Suspect.” October 7, 2013. http://search.proquest.com.libproxy.nps.edu/docview/1440037232/abstract/989D230F0BC140A3PQ/34.

Lewis, Scott. “FBI Agents Reveal Underwear Bomber Abdulmutallab Wore Explosive Underwear for Three Weeks.” WXYZ, September 27, 2012. https://www.wxyz.com/news/local-news/investigations/fbi-agents-underwear-bomber-abdulmutallab-wore-underwear-for-3-weeks.

Library of Congress. “Nazi Saboteurs Trial.” Accessed October 8, 2016. https://www.loc.gov/rr/frd/Military_Law/nazi-saboteurs-trial.html.

Ly, Laura. “Abid Naseer Convicted in 2009 Bomb Plot.” CNN, March 4, 2015. http://www.cnn.com/2015/03/04/us/new-york-terror-trial/index.html.

Malinowski, Tom. “Restoring Moral Authority: Ending Torture, Secret Detention, and the Prison at Guantanamo Bay.” *The Annals of the American Academy of Political and Social Science* 618, no. 1 (2008): 148–59. https://doi.org/10.1177/0002716208317118.

The Maritime Executive. “Somali Terrorist Suspect Held on U.S. Navy Ship For 2 Months Faces Trial.” July 7, 2011. http://www.maritime-executive.com/article/somali-terrorist-suspect-held-on-u-s-navy-ship-for-2-months-faces-trial.

Mayko, Michael P. “2 with Terror Ties to State Lose Extradition Appeal.” *Connecticut Post*, September 24, 2012. http://www.ctpost.com/local/article/2-with-terror-ties-to-state-lose-extradition-3890884.php.

McBride, Alex. “Landmark Cases: Miranda v. Arizona (1966).” Thirteen, accessed August 14, 2018. https://www.thirteen.org/wnet/supremecourt/rights/landmark_miranda.html.

Miami Herald. “Guantánamo Periodic Review Guide.” Accessed October 9, 2016. http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article68333292.html.

National Commission on Terrorist Attacks upon the United States. *The 9/11 Commission Report*. Washington, DC: Government Printing Office, 2004. http://www.9-11commission.gov/report/911Report.pdf.

National Security Division. "Introduction to National Security Division Statistics on Unsealed International Terrorism and Terrorism-Related Convictions." Report, Department of Justice, 2012. http://fas.org/irp/agency/doj/doj032610-stats.pdf.

NBC News. "Judge Warns Prosecutors in Moussaoui Trial." March 9, 2006. http://www.nbcnews.com/id/11744129/ns/us_news-security/t/judge-warns-prosecutors-moussaoui-trial/#.W7E7r_lRfIU.

Neumeister, Larry. "5 Terrorism Suspects Extradited from England to U.S." *USA Today*, October 4, 2012. https://www.usatoday.com/story/news/world/2012/10/05/uk-abu-hamza-extradition/1615163/.

New York Times. "Arrest in Queens the Catalyst." June 13, 1984. http://www.nytimes.com/1984/06/13/us/arrest-in-queens-the-catalyst.html.

———. "The Guantánamo Docket." *New York Times*, accessed April 3, 2016. http://projects.nytimes.com/guantanamo.

Office of the Inspector General. "A Review of the FBI's Handling of Intelligence Information Prior to the September 11 Attacks." Special report, U.S. Department of Justice, 2004. https://oig.justice.gov/special/0506/final.pdf.

Office of Military Commissions. "Cases." Accessed October 9, 2016. http://www.mc.mil/CASES.aspx.

Office of the Secretary of Defense and Joint Staff. "Combatant Status Review Tribunal (CSRT) Documents." Accessed December 16, 2019. https://web.archive.org/web/20090125032047/http://www.dod.mil/pubs/foi/detainees/csrt_arb/.

Orson, Diane. "Two British Terror Suspects Plead Guilty in New Haven Federal Court." Connecticut Public Radio, December 11, 2013. http://wnpr.org/post/two-british-terror-suspects-plead-guilty-new-haven-federal-court.

Philippe, Julie, and Laurent Tristan. "International Law, Extraterritorial Abductions and the Exercise of Criminal Jurisdiction in the United States." *Willamette Journal of International Law and Dispute Resolution* 11, no. 1 (2004).

Roebuck, Jeremy. "Terror Suspect in 'Jihad Jane' Case Extradited to Philly." Philly.com, July 21, 2017. http://www.philly.com/philly/news/pennsylvania/philadelphia/terror-suspect-in-jihad-jane-case-extradited-to-philly-20170721.html.

Stempel, Jonathan. “Court Refuses to Dismiss Plot Case Against Bin Laden’s Son-in-Law.” Huffington Post, November 26, 2013. http://www.huffingtonpost.com/2013/11/26/suleiman-abu-ghaith-case_n_4346326.html.

Swann, Steve. “Terror Suspect Extradited to US.” BBC, January 3, 2013. http://www.bbc.com/news/uk-20902387.

Targeted News Service. “Manhattan U.S. Attorney Announces Guilty Plea of Ahmed Warsame, a Senior Terrorist Leader and Liaison between Al Shabaab And Al Qaeda in the Arabian Peninsula for Providing Material Support to Both Terrorist Organizations.” March 25, 2013. http://search.proquest.com.libproxy.nps.edu/docview/1319578532/citation/989D230F0BC140A3PQ/54.

Thomas, George C. III, and Richard A. Leo, *Effects of Miranda v. Arizona: “Embedded” in Our National Culture?* Chicago: University of Chicago Press, 2002. https://www.ncjrs.gov/App/publications/Abstract.aspx?id=198379.

Tucker, Eric. “Benghazi Militant Case Draws Scrutiny of U.S. Interrogation Strategy.” PBS, August 15, 2015. http://www.pbs.org/newshour/rundown/benghazi-militant-cases-draws-scrutiny-u-s-interrogation-technique/.

United States Sentencing Commission. *Life Sentences in the Federal System.* Washington, DC: United States Sentencing Commission, 2015. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf.

———. *Recidivism among Federal Offenders: A Comprehensive Overview*. Washington, DC: United States Sentencing Commission, 2016. https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

U.S. Department of Justice. “International Extradition and Related Matters.” Accessed January 1, 2018. https://www.justice.gov/usam/usam-9-15000-international-extradition-and-related-matters.

———. “U.S. Department of Justice FY 2015 Budget Request: Mutual Legal Assistance Treaty Process Reform.” U.S. Department of Justice, July 13, 2014. https://www.justice.gov/sites/default/files/jmd/legacy/2014/07/13/mut-legal-assist.pdf.

Weiser, Benjamin. “Interview Was ‘Clean,” F.B.I. Agent Testifies.” *New York Times*, December 24, 2011. https://www.nytimes.com/2011/12/24/nyregion/mohamed-ibrahim-ahmed-had-clean-interview-agent-testifies.html.

———. “Lawyer Sought for Terror Suspect Held on Navy Ship.” *New York Times*, October 8, 2013. http://www.nytimes.com/2013/10/09/nyregion/lawyer-sought-for-terror-suspect-held-on-navy-ship.html.

———. “Since 2011 Guilty Plea, Somali Terrorist Has Cooperated with Authorities.” *New York Times*, March 25, 2013. http://www.nytimes.com/2013/03/26/nyregion/since-2011-guilty-plea-somali-terrorist-has-cooperated-with-authorities.html.

———. “The Trade Center Verdict: The Overview; ‘Mastermind’ and Driver Found Guilty in 1993 Plot to Blow up Trade Center.” *New York Times*, November 13, 1997. https://www.nytimes.com/1997/11/13/nyregion/trade-center-verdict-overview-mastermind-driver-found-guilty-1993-plot-blow-up.html.

Weiser, Benjamin, and Eric Schmitt. “U.S. Said to Hold Qaeda Suspect on Navy Ship.” *New York Times*, October 6, 2013. http://www.nytimes.com/2013/10/07/world/africa/a-terrorism-suspect-long-known-to-prosecutors.html.

White, Josh, and Dan Eggen. “US Admits Koran Abuse at Cuba Base.” *Guardian*, June 5, 2005. https://www.theguardian.com/world/2005/jun/05/guantanamo.usa.

White, Josh, and William Branigin. “Former Bin Laden Driver Hamdan to Leave Guantanamo Bay for Yemen.” *Washington Post*, November 25, 2008. http://www.washingtonpost.com/wp-dyn/content/article/2008/11/24/AR2008112403159.html.

Williams, Carol J. “Pentagon: Guantanamo Detainee Dies; Ninth Fatality at Facility.” *Los Angeles Times*, September 10, 2012. http://articles.latimes.com/2012/sep/10/nation/la-na-nn-gitmo-death-20120910.

Wise, Rob. “The Capture of Abu Anas Al-Libi.” Center for Strategic and International Studies, October 7, 2013. https://www.csis.org/analysis/capture-abu-anas-al-libi.

Wittes, Benjamin. “New York Times Calls Warsame Detention ‘Extralegal.’” *Lawfare*, September 9, 2011. https://www.lawfareblog.com/new-york-times-calls-warsame-detention-extralegal.

———. “Seven Errors in Today’s New York Times Editorial.” *Lawfare*, July 17, 2011. https://www.lawfareblog.com/seven-errors-todays-new-york-times-editorial.

Wuerth, Hans M. “German Chancellor Is Right Woman at Right Time.” *Morning Call*, March 20, 2006, sec. Opinion.

Zabel, Richard B., and James J. Benjamin Jr. *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*. Washington, DC: Human Rights First, 2008. http://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf.

———.*In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts: 2009 Update and Recent Developments*. Washington, DC: Human Rights First, 2009. http://www.humanrightsfirst.org/wp-content/uploads/pdf/090723-LS-in-pursuit-justice-09-update.pdf.

Zagorin, Adam. “Exclusive: ‘20th Hijacker’ Claims That Torture Made Him Lie.” *TIME*, March 3, 2006. http://content.time.com/time/nation/article/0,8599,1169322,00.html.

THIS PAGE INTENTIONALLY LEFT BLANK

INITIAL DISTRIBUTION LIST

1. Defense Technical Information Center
   Ft. Belvoir, Virginia

2. Dudley Knox Library
   Naval Postgraduate School
   Monterey, California