

LEGAL POLICY FOR A TWILIGHT WAR

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After the 9/11 attack on the United States, the U.S. government adopted a different approach to defending the country against attack from the al Qaeda organization, its affiliates, and its allies. The new approach was fundamentally sound. Yet, it was developed and implemented in a flawed manner, and these problems were then greatly compounded by the way law and lawyers were used to rationalize the policy and frame the debate.

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In 2006, the policy approach was greatly revised, though the character and significance of the changes are still largely unrecognized. A difficult, healthy transition is now well under way and will need to continue for some time to come.¹ As part of that transition, the U.S. government, and those who follow its work, should deeply reflect upon and reconsider the role that law and lawyers have played in framing the policy choices. I come at these issues as both a lawyer and former policymaker.

Before 9/11 our conceptual framework was mainly the framework of traditional American criminal justice. Usama Bin Ladin was indicted in the Southern District of New York.² Naturally, neither the Federal Bureau of Investigation (FBI) nor the U.S. Marshals service could apprehend him or his principal associates. Therefore, the U.S. government asked foreign governments to help and also secretly hired foreign friends to try to capture him, using deadly force only if necessary. There were brief exceptions to this approach in 1998, but the government had lapsed back into this default position by the middle of 1999. The story is recounted in the report of the 9/11 Commission.³

The 9/11 attack was at least the third major intercontinental operation that al Qaeda had carried out against the United States.⁴ Al Qaeda's leaders had asserted for years that their organization and its allies were at war with the United States.⁵

1. See *Extraordinary Rendition, Extraterritorial Detention, and Treatment of Detainees: Restoring Our Moral Credibility and Strengthening Our Diplomatic Standing: Hearing Before the Senate Foreign Relations Comm.*, 110th Cong. (2007), available at <http://www.senate.gov/~foreign/testimony/2007/ZelikowTestimony070726.pdf> (testimony of Philip Zelikow).

2. Indictment of Usama Bin Ladin, *United States v. Usama Bin Laden*, 98 Cr. (S.D.N.Y. Nov. 4, 1998) (indictment does not list traditional case number).

3. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* 108–20, 126, 132–134, 139, 142–43 (2004).

4. See *id.* at 115–16, 190 (discussing the Aug. 7, 1998 bombings of the U.S. embassies in Kenya and Tanzania and the Oct. 12, 2000 attack on the USS *Cole* in the Yemen port of Aden which killed 17 crew members).

5. See *id.* at 47–48 (citing *Jihad Against Jews and Crusaders: World Islamic Front Statement*, AL QUDS AL ARABI (London), Feb. 23, 1998, at 3, translation at <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>); Usama Bin Ladin, *Declaration of War Against the Americans Occupying the Land of the Two Holy Places*, Aug. 23, 1996, translation at http://www.globalsecurity.org/security/profiles/osama_bin_laden_declares_jihad_text.htm.

And after the 9/11 attack the U.S. government finally, completely agreed with them. The United States then began engaging in an armed conflict with al Qaeda, its affiliates, and its allies. That worldwide conflict continues today.

An enormous debate also began in this country and around the world about the appropriate way to conduct such a conflict. In this country, as in every other developed country, the debate has been dominated by lawyers arguing with other lawyers. Their debate is about what the law—U.S. law or international law—allows and does not allow.

I. HOW LAWYERS FOUND THEMSELVES AT THE CENTER OF THE POLICY DEBATE

The policy choices in the conduct of this armed conflict were novel. Put aside the rules governing combat operations in Afghanistan itself in 2001–2002. In other operations the administration had to set policies for lethal engagement of enemy members of al Qaeda, its affiliates, and its allies; for the transfer of captives to preferred jurisdictions; for the questioning of captives; and for their longer term detention. For many of these choices there was no established body of experience or precedents.

For the Central Intelligence Agency (CIA) and the Department of Defense (DOD) in particular, some of these activities involved developing entirely new organizational capacities that did not exist, or no longer existed, in their institutions. Any seasoned manager or student of organizations knows how challenging it can be for an organization to develop new capacities, with all the requirements to define tasks, guide implementation, build physical capacities, and recruit/train/manage people to perform these new jobs.

Operating under broad legal parameters set shortly after the 9/11 attacks, a series of policy choices were made, especially in 2002 and 2003, about how to conduct the armed conflict. Especially in the case of the CIA, it appears from publicly available sources that, responding to some informal guidance from the White House, the Agency designed, developed, and

implemented various techniques and capabilities with little substantive policy analysis or interagency consideration.⁶

Lawyers from other agencies and departments, as well as the White House, were apparently assembled to consider and approve the legality of the proposed methods as, or after, the critical policy choices were being or had already been made. The legal defense then became the public face of the policies. The debate became framed as a legal debate. Legal opinions became policy guides. Opinions to sustain the CIA program had an indirect effect on the guidelines developed for DOD activities as well, since DOD did not wish to develop positions inconsistent with those already in place.

Able bureaucratic players in the Bush administration were able to use legal opinions to provide formal policy cover for Agency operations and deal with internal dissent and unease ('the Attorney General has said it is legal'). Above all, using the legal defenses as the public face of the issue moved the terrain of debate to the President's legal powers in wartime—strong ground indeed. Also interesting is that opponents of the policies found this battleground congenial too. Habits of thinking in legal terms were reinforced. Constitutional and civil liberties lawyers eagerly stepped forward, and they could do so without having to soil their hands by confronting the concrete policy necessities at hand. Thus the public debate was decisively framed—and deformed.

II. REFRAMING THE DEBATE: FROM "CAN" TO "SHOULD"

In other words, instead of asking: What *can* we do?, start by asking: What *should* we do? Just this difference, changing "can or cannot" to "should or should not" changes the framework of debate, changes the evidence and reasoning you use, and changes the role that lawyers should play in the policy process.

By "legal policy," I mean those policies for the enforcement of international, criminal, or civil law and the policies for the effective administration of justice.

6. David Johnston, *C.I.A. Tells of Bush's Directive on the Handling of Detainees*, N.Y. TIMES, Nov. 15, 2006 at A14; Barton Gellman & Jo Becker, *The Unseen Path to Cruelty*, WASH. POST, June 25, 2007.

Lawyers are not generally trained in legal policy. Even some of the finest lawyers cannot be considered experts in it. Confronted with a novel problem, the habit of thought developed in law school and practice is to spot the legal issue and determine an authoritative, or at least arguable, position on what the law requires.⁷ It is important for lawyers, and those who use them, to know the strengths and limitations of these skills. Two examples:

First, moral reasoning. Moral reasoning, which most people think has something to do with “right and wrong,”⁸ is not taught in law school. The relationship of law to morality is an interesting question, wonderfully explored by thinkers as diverse as Edmond Cahn and James Q. Wilson.⁹ But, for better or worse, moral reasoning is not generally taught in law school. Nor is it generally taught—by the way—in schools of public policy. “Ethics” is taught, but that is actually a different set of ideas, though the two subjects overlap.¹⁰

Second, policing and public order. Generally law schools do not teach about policing or how societies go about preserving public order. Of course you will find courses on criminal law and criminal procedure, but that is quite different. In fact, in our most elite universities, policing is vaguely regarded as left to

7. See Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413, 440–41 (2007) (confirming that most law students follow the style of writing known as IRAC, in which he or she identifies the issue, states the rule pertaining to that issue, analyzes the given facts according to the rule, and comes to a conclusion).

8. Henry S. Richardson, *Moral Reasoning*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2007), available at <http://plato.stanford.edu/entries/reasoning-moral/> (defining moral reasoning as a form of practical reasoning, in which one determines a question involving right or wrong, virtuous or vicious, and then acts on his or her determination).

9. See, e.g., JAMES Q. WILSON, *THE MORAL SENSE* 247–49 (The Free Press 1993); EDMOND CAHN, *THE MORAL DECISION: RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW* 190 (Ind. Univ. Press 1955).

10. See STANDARDS FOR APPROVAL OF LAW SCH. § 302(a)(5) (2007), available at <http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%203.pdf> (requiring law schools to instruct students in “the history, goals, structure, values, rules and responsibility of the legal profession and its members”); Leonard M. Niehoff, *The Lessons of Legal Ethics*, CHRON. OF HIGHER EDUC., May 12, 2006, at 5 (describing law students’ understanding in a legal ethics class that attorneys may need to compromise personal morality in order to fulfill professional obligations).

vocational schools. To be even blunter, it's perceived as a blue-collar subject. There are rare exceptions. And there are rare policemen and policewomen, or court administrators or corrections officers, who can step up to engage in the wider issues of public policy that frame what they do. But I've seen firsthand—in places like Iraq and Afghanistan—just how difficult it has been for this country to find experts and help others in tackling the basic policy issues of policing and public order that are so evident in so much of the world.

So, as the U.S. government developed a new approach to combating Islamist terrorists around the world, many of the formative deliberations were defaulted to being conducted, at the subcabinet level and below, by lawyers—mainly constitutional lawyers. It was the hour of experts like John Yoo, a creative scholar, who has recently published an illustrative memoir of these experiences.¹¹

And these lawyers tended to look for the legal answer. And so the problem tended to be framed less as a detailed analysis of what *should* be done, and more as a problem of what *could* be done.

And the lawyers naturally look to *legal sources* to find the answers. Then they construct whatever answers they can from the available legal sources and pronounce it as a legal opinion.

The worldwide conduct of armed conflict and other actions against al Qaeda, its affiliates, and its allies presents an exceptionally complex and uncertain set of rules. There are arguments over the scope and reach of international law and the meaning of the relevant international legal concepts even if they do apply. There are arguments over the boundaries between international law, military law, and ordinary domestic (“municipal” is the technical term) laws. And the arguments over these boundaries set off various theological disputes about the application and binding power of constitutional and international law, disputes that have political resonance in the United States and other countries.

11. See generally JOHN YOO, WAR BY OTHER MEANS (2006).

So by applying legal interpretation to this set of issues, instead of legal policymaking, we do so in an area where the legal sources are few and fragmentary, uncertain, and contested. The arguments immediately become polarized, because they invoke clashing philosophies of international and constitutional law.

To the public at large, the arguments quickly become technical. And they are therefore coarsened into: Are you for civil liberties? Are you for fighting terrorism? And the polarization of “liberty versus security” is one of the most vicious byproducts of the debate. This can be politically useful, but it is bad policy.

The direct results were indeed simple and bipolar. For the administration, in such a murky and contested area of law, it was easy to make plausible arguments that a great many things *could* be done. Indeed the administration feared it would set limiting legal precedents to take any other view as a matter of law.

For the enemies of the administration, it was obvious that they should argue established legal protections were being trampled. And if one takes the view that the original pre-9/11 paradigm—criminal justice plus diplomacy—remains in force, then everything needs to be done in accordance with established precedents, Article III courts, and the Bill of Rights.

III. A LEGAL POLICY PERSPECTIVE: SHOULD WE TREAT THIS AS AN ARMED CONFLICT?

The first stage after 9/11 was the transition of the core paradigm from criminal justice to the paradigm of armed conflict. Viewed from a policy perspective that transition needs to be defended as something we *should* do, and continue doing, not just as something we *can* do and are legally *able* to continue doing. From this same policy perspective, it would be wise to achieve the essential assent of the Congress and key allies that it was—and is now—necessary to deal with this problem as an armed conflict, and then work with relevant partners to develop effective, common rules of engagement.

Why should we treat this struggle as an armed conflict?

- The criminal justice framework has been developed for use against a finite group with a relatively small number of individuals who are within a given jurisdiction. With al Qaeda, its affiliates, and its allies, the United States confronted large, transnational substate groups that had a partnership with at least one former regime (Taliban Afghanistan). These groups still prefer to operate in areas where nominal state sovereignty is ineffective or nonexistent.
- There are special problems of scale. The problem is well beyond the scale we would traditionally associate with a criminal conspiracy, even with the kind of terrorist groups that we had become used to dealing with in the 1980s, which tended to be associated more with state sponsors of terrorism.
- The threat is also qualitatively different. Societies tolerate certain risks and limitations when they deal with more ordinary crime. But now the United States was confronting groups with the demonstrated capacity to carry out acts that can kill thousands of Americans on a beautiful fall morning and inflict at least tens of billions of dollars worth of prompt, direct damage to the American economy just within the first hour.¹² That level of risk challenges the usual assumptions in fashioning legal policy.
- It is harder to apprehend suspects. The problem with al Qaeda in Afghanistan was obvious, but other, similar challenges exist today. In some cases local governments cannot or will not arrest enemies planning to attack the United States or its friends. In some cases the local governments may wish to help, but such arrests or judicial extraditions are beyond their capacity. The governments involved will often concede their incapacity—in private.

12. Robert Looney, *Economic Costs to the United States Stemming From the 9/11 Attacks*, STRATEGIC INSIGHTS, Aug. 2002, <http://www.ccc.nps.navy.mil/si/aug02/homeland.asp>.

- Then there are problems in gathering evidence. Some of the pre-9/11 indictments were triumphs of investigation under extremely adverse circumstances.¹³ But in many circumstances, it will be hard to overcome those limits or be able to find the resources for the fantastically labor intensive effort that's required to construct the criminal case from so many scattered fragments, when dealing with large numbers of individuals involved in many different kinds of violent acts.
- And those evidentiary investigations were all after the fact. Often they were triumphs of forensic reconstruction. But policymakers aren't paid to wait for the bodies and debris.

There were and are compelling reasons to sustain the armed conflict approach, complemented by respect for local laws and responsible sovereignty.

It is therefore striking and regrettable that the United States has not persuaded most states, including many of our allies, to agree that a policy of armed conflict is appropriate. This is partly their fault, partly ours.

- Many governments, including practically all of Western Europe, have never accepted any change from the pre-9/11 criminal justice/diplomacy approach. Many of their leading politicians and lawyers are fundamentally pacifist and believe that armed conflict is rarely, if ever, a solution to a problem—and certainly not if it is proposed by Americans.

13. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 3, at 71–76 (covering the indictments in connection with the explosion of Pam Am Flight 103 over Lockerbie, Scotland in 1988, the World Trade Center bombing in 1993, and the Manila air plot in 1995); Indictment of Usama Bin Ladin, *United States v. Usama Bin Laden*, 98 Cr. (S.D.N.Y. Nov. 4, 1998) (indictment does not list traditional case number).

- Some of these same governments feel they know the problem well, yet they have not actually been attacked or threatened on the scale suffered by the United States. And, while they still assess the risk as being more ordinary, they also lack the capabilities to join very effectively in more forceful or distasteful measures. So they turn such necessities into virtue.

And the problem is our fault too. It is tempting for some local governments to let the Americans do the distasteful things that protect their people too. Then these free riders can criticize and distance themselves as they wish. But it is unwise for America to play along with that game. When Americans design processes that are exclusively American—"our show"—because we do not want foreign intrusion, we contradict our argument that this is a global struggle waged in common with others, and we encourage free riders.

To build an appropriate coalition, at home and abroad, a leading government needs to do four things:

- (1) Accept the need for a real partnership where the other side gets to have some say and offer a process for policy cooperation—not just tactical help on the case du jour.
- (2) Get out and make the policy case—not just a legal argument—for why a fundamentally different approach is needed.
- (3) Develop an interpretation of the new approach that, with work, can plausibly be sustained in the partner's politics. In other words, if they are receptive to the basic policy argument, develop a design for implementing it that they can defend.
- (4) If they want to help, identify tasks that they can do, with or without help, that commit them to the common enterprise.

Despite many, many bilateral relationships and contacts—usually to solve a tactical problem of the moment—the U.S. government did not begin such a systematic effort to build a coalition for this armed conflict against Islamist terrorism until 2005. Legal policy development is part of such an effort because, in running a multinational enterprise, policymakers need to ask

their lawyers to develop a legal foundation that can work in foreign markets.

The obvious counterargument, of course, is that the prospective partners will offer aid so limpid and legal policies so unrealistic that it is worse than useless to lash up with them. To this the answers are also apparent:

- Set the right terms for given partners.
- It will help that you made your policy case and sought a coalition, even if you fail. And the effort will be remembered if the prospective partner changes their views—reevaluating the risk of attack or if other circumstances change.
- Sliding into habits of growing noncooperation and alienation is not just a problem of world opinion. It will eventually interfere—and interfere very concretely—with the conduct of worldwide operations.

So far I have focused on the nature of the conflict itself. And, as President Bush says, it *is* a war. This is not a metaphorical point. Though the expression “armed conflict” is technically more precise, the United States is engaged in a war against al Qaeda, its affiliates, and allies in at least four ways.

- A war in Afghanistan. This partly involves an enemy that is a transnational enemy, not simply a participant in an internal Afghan conflict.¹⁴
- A war in Iraq. The war going on in Iraq is mainly internal. But it also has a transnational quality because transnational combatants and transnational organizations are combatants in that war. That fight, layered on the various internal struggles, is another reason why U.S. operations should be governed under international law and policies for armed conflict.

14. See Joseph P. “Dutch” Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 32 (2004) (explaining how the Taliban helps and supports foreign al Qaeda terrorists’ entry into Afghanistan).

- Occasional operations to target terrorists in effectively ungoverned areas of the world where there is complete state failure or effective state failure. If terrorist organizations are actively planning violent attacks against Americans in places that are effectively ungoverned, the United States then has to have some kind of way of dealing with those organizations, which are at war with the United States.
- Advising and partnering with local governments in their military and paramilitary operations against Islamist terrorist organizations.

“War” is not a misnomer. But it is insufficient. The struggle includes armed conflict but it is *more* than an armed conflict. It is not *just* a war.

Armed conflict is one aspect, and not even the most important aspect, of a wider struggle to defeat violent Islamist extremism and help moderate Arab and Muslim governments adapt peacefully to the modern world. And using “war” as the umbrella label signals to people that the U.S. government doesn’t “get” that fact. (Although I believe President Bush actually does get it.)

IV. A LEGAL POLICY PERSPECTIVE: QUESTIONING CAPTIVES

The most important policy choices are guidelines on the circumstances for killing people; guidelines on how and when to transfer captives to different jurisdictions; guidelines on how to question captives; and guidelines on whether and how to detain them—and for how long. In all these matters the guidelines extend to cover the character of cooperation with local partners who may help us with all these tasks.

These are all large subjects. I’ll focus on just one, which is the most important: how we question captives.

Beliefs in how the United States questions captives colors discussion of every other aspect of the conduct of operations. For example, the controversy over transferring captives—the quite defensible policy of renditions—is fired by beliefs about how these people will be questioned when they arrive at their destination.

The administration has disclosed that, in 2002, the United States began making a series of important decisions about how it would question captives. In essence, the United States made careful, deliberate choices to place extreme physical pressure on captives, with accompanying psychological effects. The limits of those practices were set at the limits of federal criminal prohibitions. The international legal strictures were interpreted so that they would not add any constraints beyond the chosen reading of American law. In other words, the policy guidelines devolved into legal guidelines, which were to do everything you can, so long as it is not punishable as a crime under American law.¹⁵

Technically able lawyers worked hard on how they could then construe the limits of vague, untested laws. They were operating so close to the frontiers of our law that, within only a couple of years, the Department of Justice eventually felt obliged to offer a second legal opinion, rewriting their original views of the subject.¹⁶ The policy results are imaginable and will someday become more fully known.

My point, though, is not to debate the delineation of the legal frontier. That focus obscures the core of the issue. The core of the issue, for legal policy, is this: What is moral—not, what is legal? What is cost beneficial?

A. *The moral question*

The moral question is subjective, of course. It is closely related to another question: What standard of civilized behavior should the United States exemplify in a fight to preserve civilization against barbarism?

My own view is that the cool, carefully considered, methodical, prolonged, and repeated subjection of captives to physical torment, and the accompanying psychological terror, is

15. See generally YOO, *supra* note 11; JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007).

16. GOLDSMITH, *supra* note 15, at 164–65. See generally Memorandum from Daniel Levin, Acting Assistant Attorney Gen., to James B. Comey, Deputy Attorney Gen. (Dec. 30, 2004), available at <http://hei.unige.ch/~clapham/hrdoc/docs/dagmemo.pdf> (superseding the memorandum of Aug. 1, 2002 and defining new limits for the term “torture”).

immoral. I offer no opinion as to whether such conduct is a federal crime; merely that it is immoral.

My moral standards are entitled to no special regard. My argument is not that others should adopt my morality. It is that the responsible policy officials should explicitly, thoughtfully, employ moral reasoning of their own. And, further, my argument is that the substitution of detailed legal formulations for detailed moral ones is a deflection of responsibility. Such deflections, often unconscious, are too common in our modern age.

The quick moral justification is that a greater good is being served—saving more lives. Three initial cautions are in order, before turning to this argument on its merits.

- In most moral lexicons, there is some absolute core of behavior that is improper, whatever the policy gain.
- For that conduct which is morally problematical, but justifiable by necessity, the burden of proof may be high. Consider that the enemies we are fighting have used, even celebrated, the most barbaric and nihilistic tactics of violence ever employed by any terrorist organization in history. To the civilized world, this gives our nation moral ground about as high as one could have. The policy case would need to be compelling indeed to persuade our officials that they should slide and stumble their way down into the valley.
- These dilemmas are not new in American history. There is a long history of experience with questioning captives, both in law enforcement and in several recent American wars. In World War II, for example, the United States had a special program for high value captives;¹⁷ the British had a comparable program. The threats were very great; the fate of thousands of lives could hang in the balance in many ways and on many issues (from antisubmarine warfare to A-bomb research to campaign plans, etc.). There was much trickery and deception. But,

17. *See, e.g.*, JOHN PATRICK FINNEGAN, *MILITARY INTELLIGENCE* 62 (Center of Military History, 1998) (noting that joint prisoner-of-war interrogation centers were set up at Fort Hunt, Virginia, and Byron Hot Springs, California to process high ranking prisoners).

as far as I know, neither government found it necessary to use methods analogous to those our government has more recently chosen.

Some of these periods, like World War II, were hard and degrading. The moral climate was not quaint. Horrifying methods were authorized to win the war. But men like Henry Stimson or George Marshall—or Winston Churchill—did not rely on lawyers to tell them what was right and wrong. It is difficult to imagine such men recommending analogous interrogation techniques for President Roosevelt, much less doing the clever work of developing and designing them.

B. Analyzing Cost Effectiveness

Good intelligence can be gained by physically tormenting captives. Some critics argue that physical coercion is always worthless and elicits garbage. This goes too far. Various experiences have shown that these methods can have value in breaking captives and in doing it more quickly.

But the issue of how to obtain intelligence from questioning captives is a first-class intelligence collection problem. In every sense, it deserves the same professional attention that the United States devotes to its most important and powerful collection systems—like those we use for signals and imagery.

A revealing study of the state of scientific knowledge on ways to elicit information from captives, euphemistically termed “educing,” was recently prepared by a panel of the Intelligence Science Board.¹⁸ The Israelis and the British have considerable recent experience with all the pros and cons, much of it a process of painful trial and error.¹⁹ My own 1994 case study of “Policing

18. Robert A. Fein, *Introduction* to EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART 1, 1–2 (Russell Swenson, ed., Center for Strategic Intelligence Research, National Defense Intelligence College 2006) (2006), available at <http://www.fas.org/irp/dni/educing.pdf>.

19. Ariel Neuman & Daniel Salinas-Serrano, *Custodial Interrogations: What We Know, What We Do, and What We Can Learn from Law Enforcement Experiences*, in EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART 141, 204, 220–23 (Russell Swenson, ed., Center for Strategic Intelligence Research, National Defense Intelligence College 2006), available at <http://fas.org/irp/dni/educing.pdf>; Fein, *supra* note 18, at 11–12.

Northern Ireland” is available from the case program at Harvard University’s Kennedy School of Government.²⁰ There are many other sources.²¹

It is not evident that those who developed such methods, mainly at the CIA, drew on the available evidence and applied adequate professional analysis to consider it.²² From the evidence available in the unclassified literature, in 2002 the CIA had little organizational capability or experience in the interrogation of hostile captives.²³ The FBI and other law

20. Philip Zelikow, *Policing Northern Ireland (A): A Question of Primacy*, KENNEDY SCHOOL OF GOV’T CASE PROGRAM C16-93-1229.0 (1993), available at <http://www.ksgcase.harvard.edu/casetitle.asp?caseNo=1229.0>; Philip Zelikow, *Policing Northern Ireland (B): A Question of Balance*, KENNEDY SCHOOL OF GOV’T CASE PROGRAM C16-93-1230 (1993), available at <http://www.ksgcase.harvard.edu/casetitle.asp?caseNo=1230.0>.

21. See Miriam Gur-Arye, *Introduction to Symposium on the Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity: Excerpts of the Report*, 23 ISR. L. REV. 141, 141, 175 (1989) (discussing the Landau Report, which sanctioned certain methods of torture used by Israel). *But see* HCJ 5100/94 Pub. Comm. Against Torture in *Isr. v. Gov’t of Isr.* [1999] IsrSC 53(4)817 (holding by the Israeli high court that the General Security Service does not have the authority to utilize moderate force in interrogations).

22. See Jane Mayer, *The Black Sites*, NEW YORKER, Aug. 13, 2007, http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer?currentPage=1 (citing supporters of the CIA interrogation techniques questioning the reliability of those techniques); Katherine Eban, *The War on Terror: Rorschach and Awe*, VANITY FAIR, July 17, 2007, <http://www.vanityfair.com/politics/features/2007/07/torture200707> (describing the inexperience of the psychologists who were in charge of developing the CIA interrogation techniques and calling the tactics a “voodoo science”); see also Scott Shane & Mark Mazzetti, *Advisers Fault Harsh Methods in Interrogation*, N.Y. TIMES, May 30, 2007, at A1 (describing the CIA techniques as based on Cold War Soviet Union interrogation tactics, and the “reverse engineer[ing]” used to implement them for post-9/11 use by American interrogators).

23. See DEP’T OF DEFENSE, OFFICE OF THE INSPECTOR GENERAL, REPORT NO. 06-INTEL-10, REVIEW OF DOD-DIRECTED INVESTIGATIONS OF DETAINEE ABUSE (2006), available at <http://www.dodig.osd.mil/foia/DetaineeAbuse.html> (describing the CIA’s inability to organize detainees and interrogation protocols, causing an inability to account for detainee abuse); see also Eban, *supra* note 22 (discussing the CIA’s “famously little experience” in interrogating detainees or in obtaining time sensitive information from hostile captives).

enforcement agencies had much more relevant experience.²⁴ The Department of Defense had some.²⁵

Everyone knows the scenario of the imminent terrorist operation that can be averted with desperately tough methods. But the “ticking time bomb” scenario is mainly the invention of scriptwriters. Intelligence is usually more of a patiently assembled mosaic, where many pieces are usually missing, and leads are pursued to find more pieces. And even broken captives can reveal much, while hiding a little.

The administration cites examples of people who have been caught or operations that may have been stopped.²⁶ It would be useful to have a professional, objective analysis of such successes in order to determine and illustrate the contributions of various forms of intelligence.

In such an analysis, the elementary question would not be: Did you get information that proved useful? Instead it would be: Did you get information that could have been usefully gained only from these methods?

- This question is especially apt because the United States has been employing other sets of methods, under different rules, against extremely dangerous and hardened captives in places like Iraq.²⁷ So there are many fruitful bases for comparison and learning.

24. Compare Eban, *supra* note 22 (showing the lack of CIA experience in interrogation), with Amanda Phillips, *Virtual Interrogation Software*, LAW ENF. TECH., Aug. 15, 2007, [http://www.officer.com/print/Law-Enforcement-Technology/Virtual-interrogation-software-fine-tunes-skills-on-or-off-duty/1\\$37939](http://www.officer.com/print/Law-Enforcement-Technology/Virtual-interrogation-software-fine-tunes-skills-on-or-off-duty/1$37939) (showing the FBI's dedication to new interrogation training advances).

25. 151 Cong. Rec. S1314, 1317 (daily ed. Feb. 14, 2005) (statement of Sen. Levin (D.-Mich.)).

26. See, e.g., News Release, White House, Fact Sheet: Bringing Terrorists to Justice (Sept. 6, 2006), <http://www.whitehouse.gov/news/releases/2006/09/20060906-2.html> (listing examples of intelligence obtained from detainees concerning other al Qaeda plots and the location of other operatives).

27. See Mark Bowden, *The Ploy*, ATLANTIC, May 2007, <http://www.theatlantic.com/doc/prem/200705/tracking-zarqawi> (describing how members of Delta Force's Task Force 145 broke Abu Musab al-Zarqawi's without using torture techniques).

- It is also apt because—contrary to much public understanding—a special intelligence program can actually derive its main added value from the readiness to devote a great deal of individualized time and expert attention to a high value captive—not from coercing him.²⁸

No institution would benefit more from such an objective appraisal than the CIA itself. A reputation for relying on physical coercion can have some benefits, of course. But, over the longrun, it might be better for the institution if CIA was regarded as special for its willingness to apply patient, labor intensive expertise, rather than a (largely false) reputation of having the opposite preference.

Finally, once the gain from coercive techniques is better and more professionally understood, there is still the next step in the policy analysis, of balancing these gains against the moral stain and the political cost of relying, or appearing to rely, on physical torment.

All these suggestions can be criticized as a time consuming, academic effort for which there was no time during the threatening days of 2002 and beyond. Yet, if the problem had been properly framed, the analytical effort suggested here could have been done quite rapidly, in days or weeks. And there were months and years to deepen understanding. To get some perspective, also reflect a moment on the effort private firms will devote to the analysis of far less consequential matters, from acquiring a company to building a refinery.

My hypothesis is that the problem was not properly framed, and that lawyerly interpretation was often substituted for thorough policy analysis at the critical and formative subcabinet and expert level. The result produced a situation in which cabinet principals, and the President, were not well served—even if at the time they thought they were getting what they

28. Steven M. Kleinman, *KUBARK Counterintelligence Interrogation Review: Observations of an Interrogator—Lessons Learned and Avenues for Further Research*, in *EDUCING INFORMATION* 95, 106 (Russell Swenson ed., 2006), <http://www.fas.org/irp/dni/educing.pdf>.

wanted in those very anxious days. In time, perhaps, more information will allow a firmer judgment on whether my hypothesis is correct.

V. THE TRANSITION OF THE AMERICAN APPROACH DURING 2006

This process of transition was spurred on by congressional action, especially the role of John McCain and by the Supreme Court's decision last year.²⁹ But the transition was already well underway in 2005, and all the main options had been fully developed before the Supreme Court ruled.

The U.S. government has made a comprehensive adjustment in its approach to the conduct of the armed conflict and associated operations against violent Islamist extremist groups such as al Qaeda.

The public debate is still dominated by lawyers, arguing over the details of the legislation passed last year. But it is important to recognize all of the elements of the policy change embedded in and surrounding President Bush's more narrowly focused September 2006 address.³⁰ I'll list just nine of the elements in this new paradigm.

1. The decision that we need a sustainable policy for the long haul built on partnership: domestically with the Congress; internationally with allies and partners.
2. A new and public Army field manual and DOD directive providing baseline policies for the detention and treatment of captured terrorists.
3. A new approach to military commissions, already underway before the Supreme Court's decision and then informed by it as well.

29. Press Release, John McCain, U.S. Senator, McCain Statement on Detainee Amendments (Oct. 5, 2005) (discussing Sen. McCain's (R.-Ariz.) proposed legislation requiring a uniform standard for military interrogation); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2759–60 (2006) (holding military commissions like Hamdan's to be in violation of the Uniform Code of Military Justice and the Geneva Conventions and requiring more specific authorization from Congress for such commissions).

30. President George W. Bush, Address from the East Room of the White House (Sept. 6, 2006), <http://www.whitehouse.gov/news/releases/2006/09/print/20060906-3.html>.

4. Employing those military commissions for major war criminals and al Qaeda's leaders, not Usama's driver.³¹ These commissions will finally bring the 9/11 conspirators to justice and, I hope, usher in a process where America will be reminded what the struggle is really about.
5. The decision announced in the East Room of the White House that America does intend to close Guantanamo.³² The glide path is necessarily lengthy and difficult, working on problems involving thirty three different countries, many of whom don't want their people back. There are still decisions to be made about how to replace and improve the Guantanamo detention system.
6. The vital decision to disclose and explain a particular CIA interrogation program, implicit in the decision to bring the 9/11 conspirators to justice (and one reason that decision was so difficult for the administration).
7. The decision to transition such a special interrogation program so that it has different capabilities, different goals, and different methods. Guidelines for future treatment of such captives will be developed in consultation with Congress so that the Executive can sustain an important intelligence collection program for the future.
8. Putting the program in a more durable legal framework. Such a framework reiterates America's commitment against torture, but also accepts, as a minimum standard, that America will adhere to common Article III of the Geneva Conventions.³³

31. In *Hamdan*, four of the Supreme Court Justices concluded Hamdan, Usama Bin Ladin's bodyguard and personal driver, had not been charged with an "offense that by . . . the law of war may be tried by military commissions." *Hamdan*, 126 S. Ct. at 2759-61 (quoting 10 U.S.C. § 851 (2000)).

32. President George W. Bush, Address from the East Room of the White House (Sept. 6, 2006), <http://www.whitehouse.gov/news/releases/2006/09/print/20060906-3.html>.

33. Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 31.

— Incidentally, the legislation passed in 2006 did not reinterpret the meaning of the terms in Article III. Congress, and the United States, do not have the authority to reinterpret such international treaty terms unilaterally. The legislation did clarify the relation between those binding treaty provisions and the scope of federal *criminal* liability for violating them, specified in Title 18 of the U.S. Code.³⁴

9. An offer to foreign governments, telling them that the U.S. government has listened to their concerns and challenging them to work with us on what President Bush called “a common foundation to defend our nations and protect our freedoms.”³⁵

The work of now building a more viable coalition, at home and abroad, is well begun. Foreign governments are now quietly wrestling with hard questions they had hitherto avoided, and in turn, posing hard questions to American officials about the scope and character of their policies.

This process is healthy. With this framework, and the predictable policy and political deliberations that are already unfolding, the United States has an excellent opportunity to develop a durable and effective legal policy approach for worldwide operations against Islamist terrorist groups. To keep the pendulum from swinging too hard back and forth, America’s leaders need to strike the right policy balance, avoiding an unconscious slide back toward the magnetic poles of absolutist legal propositions.

34. 18 U.S.C.A. § 2441 (West 2006).

35. President George W. Bush, Address from the East Room of the White House (Sept. 6, 2006), <http://www.whitehouse.gov/news/releases/2006/09/print/20060906-3.html>.