

**Hearing of the Senate Foreign Relations Committee
on “Extraordinary Rendition, Extraterritorial Detention, and Treatment of
Detainees”
July 26, 2007
Statement of Philip Zelikow
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Chairman Biden, Senator Lugar, and members of the committee members: Thank you for the opportunity to offer my views in your consideration of this subject.

We are now nearly six years into a greatly intensified, global struggle against violent Islamist extremism. In several ways we are involved in armed conflicts. But, though we are at war, this struggle is much more than a war. And the American military will not be the main shield of our republic.

I have had unusual opportunities to consider these issues from several perspectives, as a lawyer, investigator, and policymaker.

-- As a civil rights lawyer in Texas more than 25 years ago, I represented Vietnamese shrimpers being attacked by domestic terrorists, the Knights of the Ku Klux Klan. Based on our successful experience, my colleague in that case – an Alabama lawyer named Morris Dees – and I later offered advice to Congress after the bombing in Oklahoma City.

-- In the 1990s, while teaching at Harvard, I prepared a set of case studies, after fieldwork in Belfast and London, on policing in Northern Ireland.

-- In 1997-1998, along with John Deutch and Ash Carter, I co-authored a study of how to counter a coming danger that we called “catastrophic terrorism.”

-- During the last six years I was a member of the President’s Foreign Intelligence Advisory Board, directed the Markle Foundation’s bipartisan work on national security in the information age, served as the Executive Director of the 9/11 Commission, and in 2005-2006 – as Counselor of the State Department – was a deputy to the Secretary for terrorism, homeland security, and intelligence policy.

So I’ve tried to understand these problems from several different angles. And I am here today as a private individual, not as a representative of the administration.

There is a pattern in how our country tends to react to the trauma of surprising reversals or attack. In 1917-18, 1940-42, or 1950-52, the United States mobilized everything that was to hand, followed by a vast outpouring of spending and energy, trying whatever it could, making many mistakes, but also getting some things right.

These past episodes have always been followed by a period when we catch our collective breath, reflect a little on what we have been doing, and decide how or whether to make lasting changes in the way we protect our country. We are in such a period today. That means a good, healthy national debate.

I have contributed to the public debate about how to treat captives. Rather than repeat those remarks, they are attached as an annex to this statement. As readers will see, I agree with many of the premises of this hearing. Our ideals do matter.

Today I want to focus more directly on some of the policy ideas under consideration by the committee, especially concerning renditions and make four basic points:

1. Renditions are an indispensable instrument of policy in order to protect the United States.
2. Concerns about renditions have less to do with the practice itself, than with arguments about how the captives may be treated at their point of arrival. If that is the concern, then confront it directly and substantively.
3. The practice of renditions has already changed from what it was in 2002 and 2003. It is continuing to evolve, along with many other facets of American policy. So be careful not to overreact now to the way you think people may have overreacted then.
4. The particular proposed remedy of banning participation in renditions except if approved by a FISA court could create lasting risks that outweigh the original concern.

Renditions are vital

There are many situations when formal extradition or deportation of terrorist suspects is not a viable option. The practice of rendition itself has repeatedly been upheld in cases both in the United States and in Europe. ^[1]

Take the case of a Yemeni, living in Malaysia. Let us say that the U.S. has gained signals intelligence indicating that this Yemeni national is involved in planning to attack some nearby American target, perhaps having taken detailed photographs of the American embassies in Singapore and Bangkok – but taking care not to violate local, Malaysian law.

- The activities and protection of a citizen of a foreign country living in a third country is firstly, the responsibility of the country of residence – in this case, Malaysia.
- Secondly, his activities and protection is the responsibility of the country of which

he has the good or bad fortune to be a citizen – in this case, Yemen.

The United States must protect Americans and act honorably in their name. Therefore, if it knows that the person is involved in potential terrorist activity against America, U.S. officials cannot let this slide. Since Malaysia has a responsible, sovereign government, the U.S. would work with Malaysian officials. If those authorities are persuaded that the U.S. concerns deserve action, they may help.

But Malaysia's ability to act is bounded by its laws, its politics, and its lack of access to some U.S. intelligence information. Formal extradition may not be available. Indeed, most countries do not have established bilateral extradition treaties with each other.

The dilemmas for the United States may thus be real and immediate. Do nothing? Take the person into American custody even if the case is not indictable in federal court?

The Malaysian authorities also may feel uneasy about the situation. So all concerned may decide that it is time for this Yemeni citizen to go home. And the Yemeni government, of course, is entitled to know why. It may even be asked to help contain the risk of this person going back to his terrorist work.

Since even many Yemenis cannot reliably predict what will happen to them in government custody, especially over time, it will be even harder for Americans and Malaysians to make a reliable guess. Yet, to the Yemeni resident in Malaysia the United States government owes the obligations it owes to any of the billions of human beings in the world, such as the duty not to send anyone, knowingly, off to be tortured.

Dilemmas like these involve an intricate weighing of circumstances and risks: the risk to America; the risk to the person if he is sent to Yemen; appraisals of opportunities to gather further intelligence about the person's plans or associates; U.S. assessments of and relationships with both Malaysia and Yemen, and so on.

Get at the heart of the problem

The practice of renditions itself is not the main concern. So-called "extraordinary renditions" appear to be focused not on renditions to trial. Instead the concern is with renditions for purposes of interrogation outside the normal legal system, with the expectation that the detainee will be tortured or subjected to other cruel or inhuman treatment.

So, is the real concern with renditions that the captive will be detained at Guantanamo as an enemy combatant, or questioned inhumanely by U.S. officials? Then the Congress could again take on the policy issue of how or whether it wants executive officials to detain and question captives under the international law of armed conflict. Nor is it really an answer to just set up new rights of habeas access to the federal courts.^[2]

Or, is the real concern that Yemen or some other country will mistreat its own citizens if

they are involuntarily repatriated? This then becomes part of a larger set of issues, about the responsibility of the U.S. for how other countries treat their citizens, on their territory.

The U.S. has moral and legal responsibility if it has arranged or participated in the involuntary repatriation of a person back to his home country. Therefore, as Secretary Rice explained publicly in December 2005: “In conducting such renditions, it is the policy of the United States, and I presume of any other democracies who use this procedure, to comply with its laws and comply with its treaty obligations, including those under the Convention Against Torture. ... The United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured.”

Again, however, the various obligations must be considered together, including the obligation to protect the people of the United States. If Guantanamo is closed down with no replacement under the law of armed conflict, if practically all the home countries of captives are regarded as inhumane destinations for a terrorist suspect, then the default mode for everyone involved – the path of least resistance – will be to do nothing.

Use oversight ... practices may be changing

Most, if not all, of the principal allegations of abuse of rendition are several years old, and appear to date from the period of initial mobilization after the 9/11 attacks.

Therefore, to avoid the possibility of overreacting to practices that may already have changed, or be changing, Congress might use its oversight powers to review specific cases. Make a diagnosis. See if lessons have been learned. The Congress will also find that some of the accountable senior officials have changed and it can judge whether the current officeholders are worthy of public trust.

I was recently impressed by the British parliament’s own investigation of its government’s involvement in renditions. This was an oversight report of the Intelligence and Security Committee, which in turn elicited an appropriate government response. Although the investigators sheltered themselves a bit too cozily from the hard dilemmas I have outlined above, they did display sensible professionalism in sifting myth from fact, and there is quite a bit of myth surrounding allegations about ‘extraordinary rendition.’¹³¹

Beginning in 2005, the U.S. government began comprehensively reviewing a number of aspects of its treatment of persons captured in the struggle against violent Islamist extremism. This review occurred for many reasons. One was that increasing international concern is not just a problem of public opinion; such concern creates concrete obstacles to effective international operations.

The Congress and the Supreme Court also played important parts in these reevaluations. Culminating in President Bush’s statement of September 2006 the administration made a number of moves, which are recounted in more detail in the remarks I have appended to

this statement.

Some of you may be satisfied with the administration's progress so far; some not. My main point is this: These issues can and should now be handled in a genuine partnership of shared powers between the President and Congress. That partnership also extends to foreign governments.

In 2004 the 9/11 Commission bluntly recommended that the U.S. turn "a national strategy into a coalition strategy," adding that "coalition warfare also requires coalition policies on what to do with enemy captives."^[4] That is one reason why, to make an armed conflict approach sustainable, the Commission was the first major public report to endorse adoption of Geneva Convention Common Article 3 as a common foundation.

In September 2006 President Bush pledged that the administration would "work with the international community to construct a common foundation to defend our nation and protect our freedoms." The administration, and the State Department specifically, has been working hard to develop a coalition approach. As a result of meetings in many countries over the last year and a half, there is growing recognition of how difficult the challenge is and of the need for creative, practical solutions to sustain the rule of law in what some European officials concede is the "grey area" between established procedures and approaches that fall outside of recognized legal principles.^[5]

I have noted that the draft legislation also includes a requirement that all questioning conducted by intelligence officials would conform with the requirements of the Army Field Manual. As you can tell from my earlier remarks on this subject, I sympathize strongly with the concern about interrogation practices. But I believe that members may have underestimated the significance of the President's recent Executive Order.

That order not only defines the scope of prohibited conduct just as strongly as the draft bill, equating cruel and inhuman treatment to the prohibitions of the Fifth, Eighth, and Fourteenth Amendments; the EO goes beyond the draft legislation. It adds prohibitions that also conform to generally recognized international standards as well. Properly applied, I believe the EO can set interrogation practices on a sustainable path, addressing concerns about some of the practices that have been alleged in the media. But the circumstances of the intelligence community and this program may warrant a bit more flexibility than is needed or wanted in the Army Field Manual.

In other words, though the balance may not satisfy everyone, these policies are on a healthier path. I do support new legislation on Guantanamo. But on rendition and interrogation, I urge the appropriate committees to look hard at what is being done and be sure they believe there is still a systemic problem before legislating a new, systemic solution.

Risks of a cure may outweigh the problem

There are real risks of executive abuse. You have heard about those risks already. So I will say more about the risks on the other side, the risk of hobbling vital action. As an illustration we can use part of the 9/11 plot.

In late 1999 the NSA analyzed communications associated with individuals who later participated in the 9/11 attacks – especially Khalid al Mihdhar and Nawaf al Hazmi.

Intelligence officials correctly concluded these two people were part of an operational cadre. They were tracked to Kuala Lumpur, Malaysia. The U.S. did not know it, but those two were joined there by two other members of the cell involved in an early version of the “planes operation.” Those four men also met with and were aided by a top Southeast Asian operative named Hambali, who set them up at the home of another important terrorist, Yazid Sufaat.

Supposing that it had some of the management practices, tools, and procedures now in place, the U.S. government might have done more than just track Mihdhar and Hazmi to Kuala Lumpur. It might have more fully assimilated what its agencies knew about these two men and prepared rapidly to act on that information.

Officials then would have the following options, with very little time to decide what to do:

-- Leave the two men alone and try to keep tracking them. All these individuals soon began traveling in different directions. The U.S. did not know it, but Mihdhar and Hazmi were going to Bangkok, where the trail might be lost (as it was in January 2000).

-- Ask Malaysian authorities to detain them. Since the U.S. officials had key information about Mihdhar and Hazmi, the U.S. probably needed to participate directly in the detention, questioning, and rapid exploitation of captured materials, perhaps leading them to Hambali, Sufaat, and the others.

-- But the U.S. probably would not have captured hard evidence about the planned “planes operation.” So any further decisions would be based on intelligence about evident planning for some operation, still unclear.

-- Even if the Malaysian security services had obliged with some temporary arrest or detention, the Malaysians might well feel no wish to hold Mihdhar and Hazmi, or any other individuals who might have been detained in this operation. None, besides Sufaat, were Malaysian. They had committed no evident crimes in Malaysia. They were not planning any attacks in Malaysia. Malaysia was then ruled by Prime Minister Mahathir Mohamed, who was not very receptive to U.S. concerns about Islamist extremism and would have had little appetite for any public proceedings, even if the grounds had been firmer. And, anyway, little if any of the key American evidence could be used in a public court.

-- So the U.S. could then either release the men or, under current options, render them into American custody with a possible end destination at Guantanamo, with all that implies.

-- If that option seemed unappealing, the best alternative to indefinite and problematical American custody would be a rendition to send the men back to their home countries. For Mihdhar and Hazmi that would be Saudi Arabia (though Mihdhar also retained strong ties to Yemen).

Under the draft proposed legislation that I have reviewed, called the "National Security with Justice Act of 2007," the U.S. government officials would then face the following hurdles, perhaps with the clock ticking on Malaysian willingness to hold these men for even another hour:

-- overcome a statutory presumption firmly against rendition, or even participating in such a rendition;

-- prepare an application to a federal judge in Washington, DC and first get it reviewed by the Attorney General or his deputy;

-- affirm in writing that each individual is "an international terrorist";

-- pledge that the Saudi government will not subject either man to cruel or inhuman treatment;

-- pledge that the Saudi government will initiate timely legal proceedings against the men that comport with fundamental due process;

-- state in writing why Malaysian courts (or its politics) are not likely to succeed in handling these men adequately (presumably getting State Department clearance for the depiction of Prime Minister Mahathir's government);

-- make sure the federal judge can consult all the State Department and UN reports about Saudi Arabia that the law expressly requires the judge to check;

-- hope that the federal judge will make a positive finding of "substantial likelihood" that Saudi Arabia will not subject either man to cruel or inhuman treatment;

-- promise that the State Department will regularly monitor Saudi treatment of both these men for as many months or years as they may be confined, reporting on their status to the Congress every six months; and

-- persuade his agency heads to assume the risk of the civil suit provided for by law if the rendition violated the above rules, with the litigant entitled to sue for punitive damages and attorney's fees.

Thus a scenario in which, all the problems that the 9/11 Commission identified having been wondrously and happily solved, new hurdles have arisen. Officials hesitate about whether they should strenuously lobby Malaysian officials to detain these individuals at all. Due efforts would be made to keep watching the men before they moved on. And they would move on with their planning and with their actions.

As mentioned earlier, there is a balance of risks involved in calculating how to deal with the problem of renditions, as with so many other aspects of this global struggle.

Congress and the Executive should shoulder, directly, the burden of setting this country's core values and policies for this difficult struggle.

Notes

^[1] See, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655 (1992)(abduction from Mexico, without Mexican permission, of Mexican national involved in torture/murder of a DEA agent); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991)(rendition of Fawaz Yunis, wanted for a 1985 hijacking, lured out of Lebanon onto a yacht and then transported back to the United States). Or, in Europe, *Case of Ocalan v. Turkey*, European Court of Human Rights (May 2005)(Turkish abduction of PKK leader from Kenya), esp. paras 87-90; or *Ramirez v. France*, European Commission of Human Rights (June 1996)(French rendition of "Carlos the Jackal" from Sudan).

^[2] Bills now being proposed would also provide much broader habeas corpus rights for any detainees in Guantanamo. This remedy is not well connected to the fundamental problem. On this point I cannot add much to the observations of Benjamin Wittes, "Punt Return," *The New Republic Online*, July 23, 2007.

^[3] Both the committee report and the government's response can be found at www.cabinetoffice.gov.uk/intelligence <<http://www.cabinetoffice.gov.uk/intelligence>> .

^[4] *The 9/11 Commission Report* (New York: Norton, 2004), p. 379.

^[5] For a description of these efforts and the basic approach, see the testimony of the State Department's Legal Adviser, John Bellinger, to the Helsinki Commission (June 21, 2007).

Annex: “Legal Policy for a Twilight War” (April 2007)

“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.

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. As part of that transition, the United States 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. Bin Ladin was indicted in the Southern District of New York. Naturally, neither the FBI nor the U.S. Marshals service could apprehend him or his principal associates. Therefore the United States 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.

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

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.

Lawyers are not generally trained in legal policy. Even some of the finest lawyers cannot be considered expert in it. Confronted with a novel problem, the habit of thought developed in law schools, and practice, is to spot the legal issue and determine an authoritative, or at least arguable, position on what the law requires. 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,’ 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. 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. 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 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 officials 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 United States 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 brilliant scholar who has recently published an illustrative memoir of these experiences.

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 that have political resonance in the United States and other countries.

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. That level of risk challenges the usual assumptions in fashioning legal policy.

-- It is harder to apprehend suspects. The problem with al-Qaida 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 extradition, is beyond their capacity. The governments involved will often concede their incapacity – in private.

-- Then there are problems in gathering evidence. Some of the pre-9/11 indictments were triumphs of investigation under extremely adverse circumstances. 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.

-- 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 United States 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 counter-argument, 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 non-cooperation 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 war against al Qaeda, its affiliates, and allies in at least four ways.

- A war in Afghanistan. That partly involves an enemy that is a transnational enemy, not simply a participant in an internal Afghan conflict.

-- 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.

-- 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.

Brilliant 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. 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 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; 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, 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. It is unclassified and available on the web at <http://www.fas.org/irp/dni/educing.pdf>. 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. My own 1994 case study of ‘Policing Northern Ireland’ is available from the case program at Harvard University’s Kennedy School of Government. There are many other sources.

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. From the evidence available in the unclassified literature, in 2002 the CIA had little organizational capability or experience in the interrogation of hostile captives. The FBI and other law enforcement agencies had much more relevant experience. The Department of Defense had some.

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. 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. So there are many fruitful bases for comparison and learning.

-- 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.

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 long-run, 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 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. But the transition was already well underway in 2005 and all the main options had been fully developed before the Supreme Court ruled.

The United States 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 the lawyers, arguing over the details of the legislation passed last year. But it is important to recognize all the elements of the policy change embedded in and surrounding President Bush's more narrowly focused September 2006 address. 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.
 4. Employing those military commissions for major war criminals and al Qaeda's leaders, not Osama's driver. 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. The glide path is necessarily lengthy and difficult, working on problems involving 33 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.
- 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 United States Code.

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

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.