ADDRESS

CODES OF CONDUCT FOR A TWILIGHT WAR

Philip Zelikow

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Philip Zelikow is the Associate Dean leading the Graduate School of Arts and Sciences and White Burkett Miller Professor of History at the University of Virginia.
I. INTRODUCTION

The United States has been waging a worldwide armed conflict against a loose-knit, nonstate transnational organization, called al Qaeda, and its declared allies and cobelligerents. This war has gone on for more than ten years and it is not done yet.

Our country has reacted before to collective traumas, startling changes in its global circumstances. In periods like 1917–1918, 1940–1942, or 1950–1952, the U.S. government mobilized everything that was at hand, a vast outpouring of spending and energy. Officials tried to do almost everything they could think of, improvising frantically. Such shocks to mass beliefs, when tens of millions of people try to make sense of what is happening, quickly and predictably lead to coarse, accessible explanatory narratives.

These past episodes have always been followed by a period when the American people and their representatives catch their collective breath. They can reflect a little on what they have been doing, refine or revise their beliefs about it, and make more deliberate decisions about how they should try to protect their country. For the United States, after the fresh preoccupation with a war in Iraq, this transition period began a few years after 9/11, aided a bit by the formal public reflections of the 9/11 Commission.¹

The transition had been slow and confused. Partly this is because the nature of the conflict—what I have called a Twilight War—has itself been so shadowy and chimerical. Now public attention is drawn more to concerns at home after another shock (an economic one), after the death of Osama bin Laden, after another set of formal public reflections on the occasion of the tenth anniversary of the attacks, and with almost all U.S. forces leaving Iraq and U.S. forces starting to draw down in Afghanistan. Though halting and inchoate, the sense of transition is now palpable.

This Article reflects on the codes of conduct the United States has devised, and has improvised, during the last ten years of the Twilight War. As the polemics have subsided and policies are regularized for the long haul, I will focus only on two major issues—codes for interrogating enemy captives and the code for defining the enemy.

The interrogation code is worth a good deal of attention for three reasons that go beyond the relatively small number of people interrogated in the special Central Intelligence Agency (CIA) program during the four years of its principal operations, 2002–2006. First, in counterterrorism the questioning of captives is a central form of intelligence collection, in a realm of policy where the quality of intelligence is the most important determinant of tactical success. Second, although only a small number of people were interrogated under the code approved for the special CIA program, the leadership of the U.S. government deliberately chose what code it should adopt. It thereby revealed much about the general quality of its thoughts and processes. Therefore, both in the United States and in some other parts of the world, these choices have colored almost all other attitudes toward the post-9/11 legal regime, including the predisposition to trust—or distrust—many other choices. And, third, the code of conduct adopted for the CIA program had a significant, indirect effect on the codes of conduct, or absence of them, used in larger-scale military programs, foreseeably producing massive public scandals that led to reforms in military practices during 2004.

The code of conduct for defining the enemy has moved to the forefront of debate during the past few years. The issue is important in its own right, of course. But it is especially significant because, as the core al Qaeda organization responsible for the 9/11 attacks breaks down, the definition of the enemy will define the future scope and duration of the war, this Twilight War.

We read and view tales of warfare in part because it is in our nature to want to study or savor the human qualities that come to the surface in such times. We should also use this period of reflection to understand what this Twilight War can teach us about ourselves.

I have had unusual opportunities to consider these issues, as a lawyer, investigator, and policymaker. As a civil rights lawyer in Texas more than thirty years ago, I represented Vietnamese shrimpers being attacked by domestic terrorists, the Knights of the Ku Klux Klan. Based on our successful experience, one of my colleagues in that case—an Alabama lawyer named Morris Dees—and I later got involved in the national debate after a pair of right-wing terrorists blew up a federal building in Oklahoma City seventeen years ago.\(^2\) Returning to graduate school in the

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early 1980s, I studied British imperial policing in 1930s Palestine and other examples of how democracies reconciled their values with terrible challenges of public order. In the 1990s, while teaching at Harvard, I prepared a set of case studies on counterterrorism in Northern Ireland based on fieldwork in Belfast and London. In 1997–1998, along with former CIA Director John Deutch and current Deputy Defense Secretary Ash Carter, I co-authored a study of how to counter a coming danger that back then we called “catastrophic terrorism.”

During the last ten years of conflict, from 2001 to 2003 I was a member of the President’s Foreign Intelligence Advisory Board; in 2002 directed the Markle Foundation’s bipartisan work on national security in the information age; in 2003 and 2004 was the Executive Director of the 9/11 Commission; and from 2005 to 2007 served as Counselor of the State Department, working for Secretary Rice as her deputy for terrorism, homeland security, and intelligence policy and on other miscellaneous policy topics, including the war in Iraq. Now I have been appointed again to part-time volunteer work on the President’s Intelligence Advisory Board (the “Foreign” adjective was dropped from its name in 2008), this time serving President Obama. None of the material in this Article draws on any currently classified information to which I had access in any of these positions.

I approach these issues as problems of policy informed by some knowledge of the law—not the other way around. A sense of history is also helpful. The problems of how to treat irregular enemy soldiers, or question high-value enemy captives, were not new.

The “legalrealists” observed long ago that governments do not make legal choices in classrooms and often not even in courts. Therefore, “legal history could not simply chronicle the emergence and development of [new] legal doctrines, nor treat them largely as intellectual insights divorced from the actual world in which they occurred.” The story of these codes of


5. See 9/11 COMMISSION REPORT, supra note 1, at xiii; MARKLE FOUND., PROTECTING AMERICA’S FREEDOM IN THE INFORMATION AGE (2002).

conduct during the war on al Qaeda is best understood as a story from the actual world of policy development.

One of the most important insights to take away from this historical episode was that the advocates for the radically new codes of conduct framed the issue as a legal question—substantively and bureaucratically. That was partly a matter of clever procedural design by the entrepreneurs. Treating the issue as one of law, not policy, they reinforced and exploited a binary division between the world of policy judgment and the world of legal analysis. If it does nothing else, this episode should reveal the dangers implicit in this habit of thought.  

Where there should have been detailed papers of policy analysis, there were detailed papers of legal analysis. Instead of framing the question around what “should” be done, carefully inventorying prior U.S. and foreign experience in detention practices and interrogations and analyzing all the pros and cons, the issue was debated as one of what “can” be done.

The “can”–“can’t” binary argument was then set in an especially murky area of the law. Neither side could claim a clear black-letter-law answer and the client had a preference. Then this binary choice was decided in secret by a handful of government lawyers, few of whom had any experience with these issues, and who had to take the necessity of extreme measures as a given. These lawyers then became secular priests, granting absolution to the supplicant policymakers.

II. SETTING THE SCENE

A. The Great Fear

For those who did not live through the 9/11 attacks or were not otherwise close to the attacks or the victims, it is difficult now to conjure up the atmosphere of those times, especially as it affected the state of mind of those charged with leading the nation. A phrase of acknowledgment that this was a scary time is not adequate. Without a real effort to recover the mindset of that time, it is impossible to really prepare to deal with such


8. Adapted Material from Philip Zelikow, “U.S. Strategic Planning in 2001–02,” in In Uncertain Times: American Foreign Policy after the Berlin Wall and 9/11, edited by Melvyn P. Leffler and Jeffrey W. Legro. Copyright © 2011 by Cornell University. Used by permission of the publisher, Cornell University Press. The original text has been updated and minor edits have been made to preserve consistency and to conform with Bluebook citation and with Houston Law Review conventions.
issues under the kind of stressful circumstances that produce them.

Intellectually, America’s leaders in 2001 all understood the possibility of a catastrophic attack. It was a scenario; there were plans. But none of America’s leaders had actually experienced anything close to this during their lifetimes. Bush noted in a diary that 9/11 was “the Pearl Harbor of the 21st Century.” Even Pearl Harbor, which these leaders only knew as history, had not killed so many or struck so directly at the very capitals of the nation, politically, culturally, and economically. That this could be done not by a giant fleet but by a group of lightly trained fanatics, less than a platoon in strength, forced everyone in a position of responsibility to rethink their notions of risk. And they had to rethink what had to be done to control that risk.

For the leaders of the U.S. government, the experience was not abstract. George W. Bush, Dick Cheney, Condoleezza Rice, Andrew Card, Donald Rumsfeld, George Tenet, and other officials visited the physical sites of the attacks. The sensory experience of those vast, ugly ruins was overwhelming. Trying to describe it later, Bush struggled—he depicted it as both “very, very, very eerie” and “a nightmare, a living nightmare.” He and the others spent hours in burn units, in morgues, talking to survivors, and trying to share some of the anguish of the families of those who had not survived.

The alarms did not stop and they too were not abstract. On the night of 9/11, Bush and his wife were pulled out of bed by a Secret Service agent saying, “They’re coming! . . . We’re under attack.” It turned out to be a false alarm. Cheney had already been evacuated to Camp David, the first of many nights he would spend away from Washington so that either he or Bush would survive a possible attack. Cheney’s aides looked out of their helicopter that night, saw the lights illuminating the Pentagon and recalled thinking, “The headquarters of the U.S. military is still smoking, and we’re flying over on our way to hide the Vice President. My God, we’re evacuating the Vice President from Washington, D.C. because we’ve been attacked.” Cold War doomsday contingencies long part of their training now seemed

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10. ROBERT DRAPER, DEAD CERTAIN 147 (2007) (internal quotation marks omitted).
12. DRAPER, supra note 10, at 145 (internal quotation marks omitted).
real. In early October, reports of deadly anthrax attacks rocked the nation; government offices were evacuated. These turned out to be real, not false alarms. (Years would pass before suspicion centered on a deranged government scientist who, facing indictment, took his life.) Days after the anthrax attacks, Cheney’s daughter was told that her house with her children in it had tested positive for anthrax. This turned out to be a false alarm.\(^\text{13}\)

Later in October 2001, about two weeks after the then-unsolved anthrax attack in Washington, Cheney visited the “pile” in New York. While there, taking that in, Cheney got the news that a White House biodetector indicated he and others in a particular area of the White House had apparently been exposed to an extremely lethal toxin. He might soon be dead. Rice was receiving the same grim news that she too had apparently been exposed. The next day the indicator turned out to have been a false positive.\(^\text{14}\)

Also very personal was the sense of responsibility these people felt for stopping the next attack. As bad as the 9/11 attack had been, it was excruciating to imagine what America would be like if something like it happened again. Bush began every day with up to an hour or more of nerve-jangling morning terror threat briefings, walking through the “threat matrix.” This daily routine went on for years after 9/11. Tenet and FBI Director Robert Mueller, or their stand-ins, would come to the White House every morning to go through all the alarms and reported plots around the world, answering the President’s questions about what was being done about each. Doubts about whether to pass along warnings and rumors were now resolved in favor of telling the President, who became a daily action officer for them all.\(^\text{15}\)

For them and many others, “war” was not a metaphor or a conflict being handled by distant generals and armies. It was

\(^{13}\) See Stephen F. Hayes, Cheney 358 (2007). See the personal sense of responsibility Tenet describes in George Tenet with Bill Harlow, At the Center of the Storm: My Years at the CIA 171–74 (2007).

\(^{14}\) I heard about this episode from some of those involved. For recent public discussions of it, see Dick Cheney with Liz Cheney, In My Time 341–43 (2011) and Condoleezza Rice, No Higher Honor 101–03 (2011), referring to a period of “unspeakable pressure” and also describing a serious scare of a radiological or nuclear attack against Washington in October 2001.

\(^{15}\) See Elisabeth Bumiller, Condoleezza Rice 167–69 (2007) (depicting how the leaders of all the major departments, like the CIA and FBI, would report directly to the President each morning). See Rice’s comments on Cheney’s near-obsessive attention to the mass of intelligence reports and biological defense in Hayes, supra note 13, at 356, 358.
real; the threats could come directly into their homes or other American homes; the judgment calls that might save lives were theirs to make. Anyone walking into the offices of the CIA’s operations directorate could not miss a poster hung with a photograph of New York City’s former Twin Towers. On it was the sentence: “Today’s date is September 10, 2001.” To one senior CIA analyst, “Every single day [intelligence] was the discipline around which [the Bush Administration] started their day... [T]hey were in fear. In fairness to them, people do not understand how goddamn dangerous we thought it was. The absence of solid information on additional threats was terrifying.”

The pressure on Bush and his senior advisers was so direct because so much of the response had to be invented and improvised. The institutions did not yet have routines for handling these problems. Just in the domestic response the issues were enormous, including huge compensation funds and federally-guaranteed insurance structures. Emergency legislation had to be prepared and moved through Congress; programs were developed that would spend tens of billions of dollars.

B. The Policy Entrepreneurs: OVP and CIA

In the formative period for policymaking in what was then known as the “Global War on Terror”—soon turned by an acronym-hungry Defense Department into the GWOT, or “gee-watt”—the Office of the Vice President (OVP) and the CIA played especially central roles. Though not unprecedented, it is uncommon for these two institutions to be so central in a time of

16. Officials described the poster to me.
17. Tenet with Harlow, supra note 13, at 342; see also Bumiller, supra note 15, at 167–69 (2007) (“In retrospect, Rice came to believe that these frantic, emotional weeks affected the psyche of Bush and his inner circle in ways that anyone outside could scarcely appreciate.”). Leaving aside his interpretive conclusions, a good portrait of the post-9/11 routine as seen from the nerve center of the new war in Langley is vividly recovered in Ron Suskind, The One Percent Doctrine 116, 141 (2006). See Tenet with Harlow, supra note 13, at 229–57, 259–80, for a description of the kinds of alarms the CIA was following.
war and crisis, and both of them have a somewhat oblique relationship to the regular organizations and processes for national security policymaking. The particular characters in these institutions during the formative period, between the autumn of 2001 and the summer of 2002, also turned out to be consequential.

When a country mobilizes in an emergency, it grabs what is on the shelf and goes. Only after the initial burst of activity, after a nation pauses to catch its breath, do leaders have the luxury to contemplate what they are learning and can even develop genuinely new institutions. So the agency with lead responsibility for addressing al Qaeda before 9/11, the CIA, became the agency in charge of the fight after 9/11. Empowered to lead a global campaign against the organization, CIA leaders and the White House quickly revised and strengthened draft authorities that principals had reviewed before the attacks (“Annex A” to the pre-9/11 National Security Council (NSC) decision package). The CIA would get its first-ever guided missile program, using drone aircraft, all supplied by the Air Force.

From the start of the Administration, Cheney had made the intelligence establishment one of his particular responsibilities. That job took off after 9/11. For security reasons, so that the President and Vice President could not be killed by a single strike, Cheney was frequently out of Washington. These constant travels may have limited his role in the Administration; for instance, it may have reduced his prior centrality in the legislative management duties usually associated with the White House Chief of Staff. But with respect to the War on Terror, his travels probably concentrated his attention on that topic, as he honed in on issues of intelligence and preparedness.

Cheney had another unique advantage for the President. These terrorism and homeland security issues were both foreign and domestic; they included the FBI as well as the

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20. See Hayes, supra note 13, at 3 (“I think the way that the vice president has had his biggest impact in many ways is just the intellectual contribution to the conceptualization of the war on terror.”) (internal quotation marks omitted) (quoting Condoleezza Rice); Zelikow, supra note 7, at 91–92 (explaining how the CIA was faced with novel problems during the War on Terror and developed new organizational capacities in response “with little substantive policy analysis or interagency consideration”).

21. See 9/11 Commission Report, supra note 1, at 126–27, 332 (illustrating the CIA’s role in addressing al Qaeda before and after 9/11).

22. See id. at 210, 214, 333–34.

23. See id. at 210–12 (documenting the introduction of Predator drones as a mechanism for attack on bin Laden).
The scope of Rice’s responsibilities did not extend easily to domestic agencies and work inside the United States. So the 9/11 challenge, spotlighting the foreign–domestic character of the problem, also put Cheney in the foreground. He could look after Justice and FBI, as well as CIA and the new White House Homeland Security office that he had helped sponsor.

Finally, the basic institution for oversight of the CIA in the Executive Branch is the White House. As CIA’s policy activities took off in 2001–2002, it needed constant attention. In other words, when CIA Director Tenet became the de facto combatant commander of the new war, Cheney became Tenet’s de facto secretary of defense. The two men would later grow apart, but during this period they worked very closely together.

Cheney and his staff were also well placed to address the many legal issues and problems of Department of Defense (DOD)–CIA cooperation that soon began to arise on a day-to-day basis. As before 9/11, Cheney did not regard himself, an elected constitutional officer, as just one more cog in the NSC machinery. On topics when he felt the president was looking to him for urgent and highly secret solutions, Cheney would sometimes go above or around that process, also bypassing Rice.

By late 2001, the Bush Administration was settling into a war routine. Mornings would begin with Bush and his top advisers going over the latest threat reports and discussing what was being done. Intelligence and law enforcement officials around the world joined with, cajoled, or paid off scores of foreign counterparts to cough up leads or take some action.

The drumbeat of rumor and worry never stopped. But with it came the intoxicating sense of resolve and mission that wartime can bring to officialdom. There were so many decisions, large and small, and few precedents to rely on in making them. Constantly improvising and inventing amid uncertainty and dilemmas, officials consciously steeled themselves to just make the call, take the chance. This coping mechanism became a habit of thought. And the approach also seemed to be paying off in the security of the nation, in the President’s political standing, and the Administration’s own growing self-confidence that it was up to the task.

Afghanistan appeared to be a remarkable success. President Bush’s popularity was sky high. Exemplifying and capturing the moment, the White House admitted America’s leading celebrity photographer to shoot a spread showing the war leaders at work, unsmiling and resolved, for the magazine *Vanity Fair*. Bush has
his hands on his hips, showing off his Texas belt buckle, the image of confident determination.\textsuperscript{24}

It was quite a combination, the wartime atmosphere of decisiveness and initial successes against such an evanescent and potentially catastrophic threat. It was a peculiar compound of anxiety mixed with hubris. A stimulant to action, the atmosphere also loosened inhibitions about experiments with new ideas.

In this environment, the OVP and the CIA were the key entrepreneurs in setting codes of conduct for the War on Terror. They developed ideas. They mapped the bureaucratic choreography for turning ideas into action.

At that time the key captains for Cheney and Tenet on counterterrorism policy were David Addington for Cheney and Cofer Black for Tenet. In the spring of 2002, Black left the CIA.\textsuperscript{25} Black was replaced at CIA by his deputy, Jose Rodriguez.

A good deal is known about the character and style of Cheney and Tenet. Pairing those portraits with some understanding of Addington and Black can go a long way to understanding some of the key choices in 2001–2002. Addington was an experienced national security lawyer. He probably had more experience than all his counterparts in the Bush Administration put together—and he knew it.\textsuperscript{26} He had reached some definite views about presidential power.\textsuperscript{27} Close to his boss, blunt, and forceful, Addington brought to his job an ascetic, Jesuitical sense of mission and competence.

Black’s role has received far less notice, though it was probably at least as important as Addington’s.\textsuperscript{28} Black has made

\textsuperscript{24} The photographs by Annie Leibovitz were taken in December 2001 and were published in the \textit{Vanity Fair} issue of February 2002.

\textsuperscript{25} \textsc{Jane Mayer}, \textit{The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals} 180–81 (2008). Black first moved to the State Department, becoming its counterterrorism coordinator for the remainder of Bush’s first term. He then left government for the private sector, to work for the paramilitary contractor then called Blackwater. \textit{Id.} He is currently also listed as a foreign policy adviser to the Mitt Romney campaign. Press Release, Romney for President, Inc., Mitt Romney Announces Foreign Policy and National Security Advisory Team (Oct. 6, 2011), http://www.mittromney.com/news/press/2011/10/mitt-romney-announces-foreign-policy-and-national-security-advisory-team.

\textsuperscript{26} See \textsc{Mayer}, \textit{supra} note 25, at 62–64 (providing an example of Addington’s influence over the proposed executive orders submitted to President Bush).

\textsuperscript{27} See \textit{id.} at 60–61, 64 (indicating that Addington expressed strong opinions about the strength of the President’s power as compared with other branches of the government). \textsc{Mayer} has a detailed portrait of Addington, adapted from an earlier profile she published in the \textit{New Yorker. Id.} at 48–64. For another detailed, first-hand portrait of Addington, see \textsc{Goldsmith}, \textit{supra} note 7, at 22–23, 27–28, 76–90.

\textsuperscript{28} As for Black, Suskind has him in his usual mode, “all pirate’s smile and bluster.” \textsc{Suskind}, \textit{supra} note 17, at 50–51. \textsc{Suskind} sensed that Black was a principal
various public appearances, including his 2004 public testimony at a hearing of the 9/11 Commission. A few minutes of observation and anyone can see that he is an unusual actor, mixing his experience (especially in Africa, notably in Sudan) with a deliberate theatricality, expertly parlaying the Directorate of Operations mystique. Rather than offsetting Tenet’s passionate impulsiveness, Black ran with it. His deputy and replacement, Jose Rodriguez, had a background mainly in Latin American liaison work. His forthcoming self-portrait is set to be titled, *Hard Measures.*

Bush set the overall tone. If Clinton had been a quintessential law school product, brilliantly teasing out every question embedded in a problem, Bush reflected the business school training of his generation. There were problem sets and action choices. The challenge, as he saw it, was to cut through the murk and find the bottom line. This common instinct was probably part of what had long drawn Bush to Cheney.

Bush saw the war as a historic, even a providential, calling. He had come to office to tackle big ideas, not to play “small ball.” Before 9/11 those interests found their expression in the domestic issues Bush felt he understood best. “After 9/11,” his lead speechwriter recalled, the President “defined his personal mission in terms of the War on Terror. In interviews, or the State of the Union addresses, it was clear that his emotional intensity would rise on international issues, and fall on domestic ones.”

After 9/11 the overall mandate had a warlike clarity. The U.S. government should do everything within its lawful power to lower the risk of another major attack. At the time, Michael Hayden, an Air Force general then running one of the largest units in the intelligence community, the National Security Agency, would illustrate this mindset by drawing a circle. Inside

entrepreneur in the development of the CIA interrogation program. See *id.* at 51–53 (summarizing a discussion between Black and a lead CIA WMD expert, Rolf Mowatt-Larssen, that is presented as having occurred in late October or early November 2001).

29. For the general atmosphere, especially at CIA, see, for example, Mayer, supra note 25, at 115, noting the growing concern over what to do with suspected terrorists being held, and Suskind, supra note 17, at 55–56, 99–101, analyzing the CIA’s thought process and the uncertainty with which they were faced. Suskind got to know some of the top CIA officials at work in this period, including Tenet. Tenet “thinks out loud, thinks it as he talks it, searches forward in verbal leaps and lunges. He did it, time and again, with Bush.” Suskind, supra note 17, at 50. This “thought-talk, raw and transparent,” stimulated a mix of wariness and bemusement for Cheney. Id. Rice, Suskind writes, hated it. “Tenet was the cannon-baller, always soaking her.” Id. at 51.

30. Michael J. Gerson, *Heroic Conservatism* 8 (2007) (internal quotation marks omitted); Draper, supra note 10, at xii (relating Bush's political philosophy).

the circle is the sum of everything that is technically possible, relevant, and lawful. Think of the circle as a table. Everything the United States can do that might be possible, relevant, and everything the government’s lawyers say it is allowed to do should be on that table. The President could not face the country—could not face himself—if there was another catastrophe and he thought he had left something on the table, something potentially useful that he could have done but had not.32

During the last weeks of 2001 and first weeks of 2002, helped along by the usual drill to prepare the President’s budget and his State of the Union message, the Administration began settling on a concrete agenda for 2002. This agenda had several “lines of action,” a phrase then much in use. They would ramp up the offensive effort against al Qaeda. On defense, they would build new institutions for homeland security. Thinking globally, they would elaborate a positive alternative vision to address deprivation and disease. And they would somehow grip and resolve the long-standing problem of Saddam Hussein’s Iraq, with its uncertain weapons of mass destruction (WMD) holdings and believed connections to terror groups.

The intensification of counterterror work mainly coursed through the institutions for intelligence and defense. In these particular months, for this particular line of action, Cheney was Bush’s key agent. Bush even told the Senate’s Intelligence Committee Chairman that “the vice president should be your point of contact . . . . [He] has the portfolio for intelligence activities.”33 The President had already expanded CIA authorities. The CIA and DOD institutions received blank checks to expand and invent global operations to identify and track suspects, either for handling by foreign friends or to be targeted by U.S. missiles, agents, or soldiers.

32. See BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY 141–42 (2008) (identifying an early version of the diagram used with Bush and Cheney). A career Air Force officer, Hayden would later become the deputy director of national intelligence—after this new position was created—and then the director of the CIA. He has used this illustration over the years in varying forms. The illustration relies on sound input for drawing the contours of what is lawful and what is useful. The illustration also assumes that other lawmakers in the legislature or the courts will agree on the contours. A president who walks out to what he thinks is the apparent edge of the table takes risks if these lawmakers do not agree or the legal advice is unsound. By 2008, carrying some political scars, Hayden added into his diagram another set of limiting contours, demarcating what was “[p]olitically sustainable.” See id. at 148–49, 181–82.

33. GELLMAN, supra note 32, at 153 (internal quotation marks omitted) (quoting former Senator Bob Graham, who recounted Bush’s remarks).
Rumsfeld was close to Cheney, ready to play a supporting role. He would not push back against an idea just because it seemed radical. Bush knew Rumsfeld was a strong-willed curmudgeon and liked him all the better for it. “Rumsfeld would later tell his lieutenants,” Robert Draper observed, “that if you wanted the president’s support for an initiative, it was always best to frame it as a ‘Big New Thing.’ Colin Powell never came into the Oval Office with Big New Things. He was captivated by process, by the ongoing rather than by the transformative.”

The retro Rumsfeld came off as the free-thinking maverick; the media celebrity Powell as the Establishment.

In October 2001, President Bush secretly authorized broad surveillance of U.S. communications in order to identify communications with foreigners that might relate to terrorist activity. Those suspect communications with foreigners could then be monitored. None of this would require a court warrant; the program bypassed the existing statutory structure for such surveillance.

In November 2001, the President publicly authorized the Defense Department to take custody of captives suspected of being involved in anti-American terrorism and set up military commissions to try them. Cheney and Addington directly ran the process to develop this November 2001 decision. The decision document, a military order that Rumsfeld supported, was brought directly to President Bush, blindsiding NSC adviser Rice and the policy process she managed. In her memoir Rice acknowledges that her own legal adviser, John Bellinger, was capable, “[b]ut in terms of bureaucratic warfare, he was no match for David Addington.” The NSC staff and sometimes even the White House Counsel had difficulty managing the policy process. In January 2002 the first of what would be hundreds of detainees started arriving at the old U.S. base at Guantánamo Bay in Cuba.

34. Draper, supra note 10, at 283.
35. Cheney with Cheney, supra note 14, at 349–50; see also Gellman, supra note 32, at 139–43 (explaining the creation of the surveillance program).
37. Rice, supra note 14, at 104.
III. HOW TO QUESTION ENEMY CAPTIVES?

A. The Entrepreneurs and the February 2002 Decision on Legal Standards

To understand the development of the codes of conduct for interrogation of captured al Qaeda suspects, it is essential to trace the process with some care. Much is known about the outputs of the policy process, little about how it actually happened. Available information on this aspect is still very fragmentary.

The interrogation policies are highly controversial among legal commentators. They are also extremely unusual from a bureaucratic perspective. After all, large organizations tend to do what they already know how to do and have trained to do. The CIA had no particular experience in conducting interrogations of captives. Within the U.S. government, almost all this experience was in the law enforcement community, some in the military.

For the CIA to get this responsibility, then devise a program with no precedent in institutional or U.S. history, and implement it with vast high-level effort to persuade cooperating countries, mobilize the people and resources, and implement it in extreme secrecy—this was a remarkable, nonlinear innovation. It was an extraordinary bureaucratic feat that necessarily would have consumed a great deal of George Tenet’s time and energy, and the time and energy of top Agency and other officials.

How was such a program conjured out of organizational thin air? The usual narrative starts with the March 2002 capture in Pakistan of an al Qaeda suspect named Abu Zubaydah. Extraordinary interrogation methods are then presented as a reaction to this extraordinary opportunity and frustration that Zubaydah appeared to be withholding key information from his captors. After discussion during the spring and early summer, the procedures are approved in July 2002 if the lawyers will say it is OK, which they soon do. In his recent memoir, for example, Cheney presents the policy development in just this way.39

In fact, the critical formative period for the interrogation program appears to have occurred months earlier, in the winter of 2001–2002, well before Zubaydah or any other high-value suspects were captured. For instance, by December 2001 the CIA was already interested in reverse-engineering methods heretofore used only to train Americans to resist enemy torture—the Survival, Evasion, Resistance, and Escape (SERE) program

39. CHENEY WITH CHENEY, supra note 14, at 357–58.
operated by the Defense Department and also used in training for the CIA’s Directorate of Operations. The Defense Department’s General Counsel—prompted by people outside of DOD—was already formally requesting assistance from the relevant DOD program by January 2002. When Abu Zubaydah was captured in March 2002, the prototype concept for more coercive interrogation had already been developed. The contractors to try it out were already lined up.

From the point of view of the entrepreneurs, this was smart planning very much in tune with the prevailing Washington atmosphere of enabled, heroic improvisation. People like Cheney, Tenet, Addington, Black, and Rodriguez would have seen themselves as men with guts enough to look ahead and see what would have to be done to protect the country, applying exceptional methods to a handful of dangerous killers. They knew they would encounter people of more cautious temperament. They were used to that. But, though they had not foreseen this particular eventuality, Cheney and Addington had handpicked a few key national security lawyers at Justice and Defense as men who could be relied on to follow a broad understanding of presidential power, above all in times of crisis.


41. See Hearing on SERE, supra note 40, at 2.

42. See S. Comm. on Armed Servs., 110th Cong., Inquiry into the Treatment of Detainees in U.S. Custody 8–10 (Comm. Print 2008) [hereinafter 2008 Armed Services Committee Print] (describing the intense SERE-based training program conducted on March 8, 2002).

43. See Gellman, supra note 32, at 162–80 (describing the Bush Administration’s decisions leading to the development of an aggressive interrogation program that the CIA agreed to undertake because of its belief that it was the only program that would work); Mayer, supra note 25, at 139–42 (discussing the “special CIA interrogation squad [that] had been training in ‘enhanced’ techniques” for interrogations of high-value targets such as Zubayda).

44. For a description of this “War Council” of hand-picked lawyers within the Administration, a coterie that excluded and alienated then-Attorney General John Ashcroft, see Goldsmith, supra note 7, at 22–23. For a sense of the group’s self-image, “Yoo frequently told me stories about Addington slaying the legal wimps in the administration . . . .” Id. at 27.
So, for the first time in American history, leaders of the U.S. government carefully devised ways and means to torment enemy captives.45

The first key decision, worked up at the end of 2001 and beginning of 2002, was the decision to abandon adherence to Common Article 3 of the four Geneva Conventions on Armed Conflict,46 initially adopted in 1949 with strong U.S. sponsorship.47 Notice the timing. At the same time as the choices about the governing standards were being prepared for decision by President Bush, the interrogation program was apparently also being conceived and designed by a few people at the CIA and the OVP. The two processes were kept in separate compartments, handled on a different timetable, and neither appears to have been reviewed in a normal NSC policymaking process. But the entrepreneurs would have understood the relation between these two streams of planning.

First to come up for presidential decision was the issue of legal standards and the Geneva Conventions. It came to a head in January 2002.48 The evidence is not clear on just who drove the process. As a working hypothesis, assume that the “show-runner” in this case was OVP. Rice had threatened to resign after the end-run military commissions order of November 2001.49 So this time the sponsors ran the issue through a more regular interagency process, yet not a policy process. They chose a lawyer’s process, run by the White House Counsel, Alberto Gonzales, rather than the usual NSC process run by Rice.

45. See Stephanie Carvin, Prisoners of America's Wars: From the Early Republic to Guantanamo 154 (2010) (referring to the United States' new interrogation program as a “new paradigm” (internal quotation marks omitted)).

46. See Memorandum from George W. Bush, President, to the Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees para. 2 (Feb. 7, 2002) [hereinafter Bush Memorandum], available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf (adopting the Office of Legal Counsel’s recommendation and concluding that the Geneva Convention does not apply to the conflict with al Qaeda); Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep’t of Def., Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees 5–9 (Jan. 22, 2002) [hereinafter January 2002 Bybee Memorandum], available at http://www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf (advising the President that Common Article 3 did not apply to the detention or trial of al Qaeda members).


48. See generally January 2002 Bybee Memorandum, supra note 46, at 1–2 (outlining comprehensive recommendations regarding the Geneva Convention made to President Bush).

49. Rice, supra note 14, at 104–06.
In this legal process, there is no evidence, at least not yet, that most of the principals realized that these decisions might lay the groundwork for tormenting enemy captives during interrogation. It seemed to be a matter of general standards for armed conflict.

I agree with the government’s view at the time, and today, that the conflict against the worldwide organization, al Qaeda, was properly conducted under the law of armed conflict. Even before 9/11 the problem had grown far beyond one where reliance on U.S. criminal law, with extraditions or renditions, was adequate or appropriate.50

So when Justice presented the view that, of course, al Qaeda captives did not qualify for full POW status under the relevant Geneva Convention, that was not a particularly controversial conclusion. Disagreements focused on whether the Taliban would be covered. Justice said no.51 President Bush, and apparently all his other advisers, were preparing to accept this conclusion when Secretary of State Powell intervened and got a full NSC airing of this disagreement. He essentially won the argument, so that the war in Afghanistan would be covered by Geneva and Taliban captives would receive protection.52

To recover some sense of at least some of what the President’s circle thought he had done, note the prepared opening lead his spokesman, Ari Fleischer, used in announcing that February 2002 decision in the press room:

Today President Bush affirms our enduring commitment to the important principles of the Geneva Convention. Consistent with American values and the principles of the Geneva Convention, the United States has treated and will continue to treat all Taliban and al Qaeda detainees in [Guantánamo] Bay humanely and consistent with the principles of the Geneva Convention.

The only other point Fleischer explained about al Qaeda was that its members were not entitled to full prisoner of war (POW) status.53

The actual decision document (then still classified) was not consistent with Fleischer’s statement. I do not believe Fleischer’s prepared statement was deliberately designed to dissemble. Instead I presume, at least until more evidence surfaces, that he was only

50. See generally Zelikow, supra note 7, at 90–100 (detailing the legal methods enlisted by government lawyers to transition from a criminal law-based paradigm to an armed conflict-based paradigm).


52. Id. at 370–71.

53. Id.
putting an upbeat gloss on what he and the people who had helped him prepare this statement actually thought had happened.

Yet to the entrepreneurs already working on novel interrogation ideas, and to some of the very few government lawyers involved in the secret deliberations, the most interesting issue in setting codes of conduct for a war against al Qaeda was not the high-profile argument about the Taliban. It was the issue of whether to apply Common Article 3. The issue sounds highly technical. It is no “technicality.”

It is called “Common” Article 3 because the same Article was placed in all four of the Geneva Conventions on the Law of Armed Conflict that had been sponsored by the United States in the aftermath of World War II. In 1949 the concern was to ensure that minimum standards would also apply to situations of internal conflict, such as resistance to occupying forces. So the language referred to “conflict[s] not of an international character” in which, nonetheless, “cruel treatment” was prohibited, as were “outrages upon personal dignity, in particular, humiliating and degrading treatment.” Such a standard is often referred to, using shorthand, as the “CID” standard (“cruel, inhuman, degrading”). The Article was plainly meant as the minimum standard, the floor, if formal protections were not available.

By the 1970s, Common Article 3 was regarded by all civilized nations, very much including the United States, as establishing a peremptory norm to be obeyed in any kind of armed conflict, as a matter of customary international law. For instance, the federal war crimes statute, which made it a felony under U.S. domestic law to commit a war crime, punishable by up to life imprisonment, stated that any intentional violation of Common Article 3 was, per se, a war crime and a felony under the law.


56. Third Geneva Convention, Common art. 3, supra note 47.


The Department of Justice’s Office of Legal Counsel’s January 2002 opinion found that al Qaeda (and Taliban) prisoners were not protected by Common Article 3. Most of the opinion is devoted to the simpler argument that so occupied the attention of the principals at the time, making the relatively easy argument that the formal Geneva protections do not apply.

For the few people authorized or able to read the whole opinion at the time, at the end they would have found the further argument stripping away the floor, the Common Article 3 floor. The argument came in two seemingly plausible parts. First, the opinion argued that the original language of the Article applied only to conflicts “not of an international character.” So the formal treaty article did not apply.

Second, the opinion explained that Common Article 3 could not be applied just because it was a principle of customary international law, because customary international law could not be part of domestic federal law. The opinion did not call attention to the U.S. government’s longstanding commitment to abide by this particular norm. Nor did the opinion quarrel with the fact that Common Article 3 was part of the international law governing armed conflict. It only held that such a customary norm for substantive conduct was not part of federal law and thus it did not necessarily bind the Executive. At the time this nuanced position was a plausible position among some legal scholars, a faction who had been reacting to what they saw as proliferating claims for international law during the 1990s. Jack Goldsmith, later to become such a vocal dissenter from Bush Administration policy, was originally recruited into the Administration because of his prominence among this group of skeptically conservative professors.

Yet, if anyone had wanted to counter these two arguments against the applicability of Common Article 3, it would not have been hard. A rebuttal would not have needed to rely solely on a theological argument about the binding character of customary international law.

Three other replies were available at the time:

1. As it was then drafted, the federal war crimes statute referred to “conduct . . . which constitutes” a

60. Id. at 5–11.
61. Id. at 6–9 (quoting Common Article 3).
62. Id. at 32–37.
63. See GOLDSMITH, supra note 7, at 21, 59–60.
violation of Common Article 3. That language could easily be construed as bypassing the issue of the treaty’s jurisdictional scope because it was incorporating into the statute the treaty’s substantive description of the prohibited conduct.

2. What was meant by a conflict of “an international character?” One could argue, as the Office of Legal Counsel (OLC) did, that this was a geographic description. But one could also argue that the term was political and functional, synonymous with an allusion to conflicts of an interstate character. Because the Geneva Conventions generally apply to conflicts between nations (i.e., those that are international), Common Article 3 was clearly meant to cover conflicts between nations and non-nations—nonstate groups such as resistance movements. Whatever it was, al Qaeda plainly was not a nation. So a conflict between it and a nation was not international. This reading comes much closer to all the evidence surrounding the purpose of Common Article 3.

3. The U.S. had informally recognized a treaty to abide by “peremptory norm[s] of general international law.” Thus the power of certain customary norms that reached this level was itself provided for by an authoritative treaty, putting aside the relevance of the argument over less influential aspects of customary international law.

I am not arguing that any reasonable OLC should have adopted these arguments at the time, though I do believe that. Suppose one thinks this is a close call, one way or the other. Consider the problem as a policymaker should. The OLC opinion was quite risky.

If understood, the counterarguments at least had some heft. Should a federal court side with any one of them, then any official who authorized violation of the substantive code of conduct embodied by Common Article 3 could be accused of war crimes under federal as well as international law. That is a lot of exposure.

I have not yet seen evidence that, in early 2002, any senior policymaker understood quite how thin was the legal ice on

which they had been advised they could skate. It may seem odd to us now, knowing what would happen later, that when Bush made his decision on legal standards in February 2002, I believe he and his advisers, like Powell, Rice, and perhaps even Rice’s then-deputy, Stephen Hadley (a veteran lawyer) may even have felt that they had actually decided not to adopt the hard-line views advocated by Cheney and the Justice Department. Instead they may have thought that Powell and his legal adviser had won their argument to get Geneva status for the Taliban.

The Common Article 3 decision was the key one, however. After all, if there was no Common Article 3, what minimum standard of treatment would take its place?

To the unwitting, emollient language was offered. Even though Common Article 3 was held inapplicable, the presidential decision document stated that, “[a]s a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.” 68 Careful readers might note that this decision had no effect on the CIA, since it was not part of the armed forces. They might also have noted that the classified decision document stated expressly that Geneva principles need not be followed if there was “military necessity” not to do so. 69

The few people who were already aware of the work on new interrogation methods by January and February 2002 would have fully grasped the significance of these carve-outs. With Common Article 3 gone, no restriction on the CIA, and any principles subject to military necessity, what were the governing standards—if any?

The answer was bound to be blurry. For al Qaeda suspects the standard, in effect, became: No torture, and no murder. And torture would be quite narrowly defined.

B. The Decision on Interrogation Procedures in the Summer of 2002

But so far it seemed only that lawyers had made a legal judgment about applicable legal standards. Weeks later, when Zubaydah was captured and the CIA decided to implement their new program, again little formal policy process seemed needed.

Cheney and/or Tenet argued to President Bush, perhaps in April 2002, that Zubaydah was withholding vital information and

68. Bush Memorandum, supra note 46, para. 3.
69. Id.
that they had a proposed interrogation program to get it. Rice has provided the most detailed account of what followed that is available so far, though still brief. In this account, Bush heard the proposal directly and asked two questions: Was the proposed program legal? Was it necessary?

Rice states that someone, presumably Bush, told Cheney, Rice, Hadley, and Attorney General John Ashcroft to meet with Tenet that afternoon. Tenet said the program was necessary. It could be monitored for safety by CIA doctors. It would be like the SERE program that was used in training many Americans. Rice asked that Powell and Rumsfeld also be briefed.70

Despite CIA pressure to make the decision quickly, the process of answering Bush’s questions appears to have gone on for about three months.71 The CIA’s strong affirmation of necessity appears to have come fairly quickly. Delay apparently came when Rice asked Ashcroft personally to vet the decision on legality.72 He seems to have affirmed legality in July; Rice told CIA they could proceed.73

Consider, then, the position of President Bush. Tenet, backed by the Vice President, stated—in the most compartmented and secret discussion possible—that, in the Agency’s expert judgment, the program was necessary.74

The applicable legal standards had already been decided, months earlier. With the “cruel, inhuman, or degrading treatment” (CID) standard codified in Common Article 3 tossed out, the only remaining relevant standard was the federal anti-torture statute,75 construed in the narrowest conceivable way.

The OLC wrote up its opinion authorizing the procedures. The opinion, authored by Jay Bybee and John Yoo, carefully canvasses both European and Israeli precedents.76 It finds a two-level standard in which torture is narrowly defined, by contrast

70. RICE, supra note 14, at 116–17.
71. Id. at 116–18.
72. Id. at 117–18.
73. Id. at 118; Sen. John D. Rockefeller IV, Chairman, Select Comm. on Intelligence, Release of Declassified Narrative Describing the Department of Justice Office of Legal Counsel’s Opinions on the CIA’s Detention and Interrogation Program (Apr. 22, 2009), in THE TORTURE MEMOS 275, 279 (David Cole ed., 2009).
74. RICE, supra note 14, at 117.
to the much broader CID standard that would have applied under Common Article 3.\(^{77}\) Since Common Article 3 had been put aside, Yoo did not need to do a CID compliance analysis. So he used this contrast between CID and “torture” to show that the proposed procedures did not amount to “torture,” at least as proscribed by federal law.\(^{78}\) For good measure he threw in language saying that, even if this was torture, the President could override the statutory prohibition under his Commander-in-Chief powers.\(^{79}\)

The Attorney General had simply assumed that the program was uniquely necessary to produce vital intelligence. It was not Ashcroft’s place, in a formal sense, to weigh wider benefits against costs.

No evidence has surfaced on how Powell reacted to the proposal. Rumsfeld later told a biographer that he had been swept along too quickly by the post-9/11 rapids. “All of a sudden, it was just all happening, and the general counsel’s office in the Pentagon had the lead . . . .” Rumsfeld added:

> It never registered in my mind in this particular instance—it did in almost every other case—that these issues ought to be in a policy development or management posture. Looking back at it now, I have a feeling that was a mistake. In retrospect, it would have been better to take all of those issues and put them in the hands of policy or management.\(^{80}\)

In other words, the President was told that an al Qaeda leader with knowledge of possible plots was in our hands, that this was the only way to find out what he knew, and that the proposed program was legal. The President approved it.

None of the policy or moral issues connected with these choices appear to have been analyzed in any noticeable way, including the background and merits of the SERE training analogy. The SERE program was reportedly reverse-engineered and then sold to policymakers as being no more than “what we do to our own trainees.”\(^{81}\) Some people who ran the program, who became CIA contractors, had not actually engaged in actual interrogations or intelligence collection. They had some theories

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\(^{77}\) *Id.* at 75, 80, 99. On the narrowness of the torture definition, see Goldsmith, *supra* note 7, at 144–62.


\(^{79}\) *Id.* at 80, 85–86.


\(^{81}\) See Mayer, *supra* note 25, at 157–58 (describing the SERE program’s use for training American soldiers to resist torture).
about psychology.\textsuperscript{82} And some CIA operatives would have heard from Arab or Israeli friends about methods that worked for them. So, in effect, a few CIA officials cast about for Americans with proven experience in tormenting people without permanently injuring them. And they knew where to find a few of them.

Rice could have argued for a more substantial policy analysis. She does not reflect on her process choices in her memoir. The issue was already framed by the questions Bush had posed.

What is not evident to those outside of the government is the procedural stance of Tenet and Cheney’s interrogation proposal. This appears to have been presented to Bush as a decision about intelligence collection methods—if a momentous one. No new covert-action presidential finding was sought or needed, and perhaps not even a new Memorandum of Notification under the existing finding.\textsuperscript{83}

Intelligence collection methods are not usually subjected to a policy analysis. CIA operators do not usually write up such proposals in this way. That CIA was the proponent for this policy means there might well have been no written analysis of it at all, any inventory of knowledge set down for careful review. At least that is my working hypothesis as a historian until more evidence emerges.

The CIA’s analysts are among the finest in the government, with a strong body of best practices—not always followed, but definitely part of the institution. The CIA’s operators, in contrast, almost never write detailed policy analyses, especially of their own operational proposals for intelligence collection or covert action. Partly it is because of secrecy habits, partly it is because of an organizational subculture that idealizes the operator, a field guy, contrasted to paper-pushing desk warriors. And partly it is because the CIA has a reigning myth, which Tenet constantly repeated and appears to have sincerely believed, that the CIA “does not do policy,” even though at this time Tenet was the principal combatant commander in America’s war, doing policy all the time.

A further bureaucratic factor in this extraordinary decision is that the tough, gritty world of “the field” worked its way into

\textsuperscript{82} Id. at 157, 161–62.

\textsuperscript{83} See RISEN, supra note 36, at 26–27 (explaining how the CIA avoided the need for an additional finding by categorizing their interrogation tactics as “intelligence collection”); WOODWARD, supra note 11, at 76–78, 101 (describing the original Bush finding and Memorandum of Notification authorizing lethal covert action against al Qaeda as a modification to a memorandum signed by President Ronald Reagan).
the consciousness of the nation’s leaders to a degree rarely seen before, or since. A large cultural divide shadowed these judgments, a divide between the world of secretive, bearded operators in the field coming from their 3 a.m. meetings at safe houses, and the world of Washington policymakers in their wood-paneled suites. As the policymakers sense this divide, they often and naturally become more deferential—especially in a time of seemingly endless alarms.

What policymakers can sometimes miss, though, is that the world of the field has many “countries” and cultures of its own. Veteran field operators often disagree about what the government should do, and did in this case. For instance, two detailed memoirs are now available from former interrogators—a former FBI agent and a former CIA operative. Both are deeply hostile to the CIA program, so their views represent only a part of the spectrum of views about interrogation methods. But they certainly illustrate the range of attitudes among experts in the field—including an intriguing range of views within the ranks of the CIA itself, an organization with many mini-cultures and factions. 84

Policymakers were rarely aware of these arguments. For top policymakers, people like Tenet, Black, and Rodriguez represented to them the world of the men and women in the field. They were its face.

Uneasy, FBI Director Robert Mueller pulled his people, whose numbers included some of the most experienced interrogators and most seasoned experts on al Qaeda—out of any involvement with the CIA program, even when they had not already been shut out of it. I do not know whether Mueller ever discussed his qualms, or the views of some of his veteran agents, with Bush or Rice.

The leaders of the CIA believed and told the government’s leaders that their program would be uniquely effective in getting vital information from high-value captives. “Uniquely” is the key word. After all, other kinds of interrogation programs were well known to experts in law enforcement and the U.S. Armed Forces. 85 The Director of the CIA, the de facto combatant

84. See Glenn L. Carle, The Interrogator (2011) (relating the experience of a CIA case officer for one of the al Qaeda high-value detainees during the second half of 2002); Ali H. Soufan with Daniel Freedman, The Black Banners: The Inside Story of 9/11 and the War Against Al-Qaeda 373–435 (2011) (outlining what a very experienced FBI interrogator, one of the premier experts on al Qaeda anywhere in the U.S. government, observed at both Guantánamo and in the interrogation of Abu Zubaydah as the new rules, or absence of them, and the new CIA program were all put in place during 2002).

85. See Mayer, supra note 25, at 155 (providing an example of the FBI’s traditional “rapport-building” techniques initially used to interrogate Zubayda (internal quotation marks omitted); Richard A. Leo, Inside the Interrogation Room, 86 J. Crim. L.
commander in an ongoing fight, apparently emphasized that there were no good alternatives to adoption of this proposal.

So when CIA made its assertions about the unique necessity of its proposed intelligence collection program, it would have been bureaucratically odd if they had done a written policy analysis for it. And it would have been bureaucratically odd if anyone sought to interpose themselves and write it for them.

So my straw hypothesis pictures the confident policy entrepreneurs offering the President a tough call. And this President waited for “tough” decisions the way a batter waits on pitched balls.

Meanwhile the President’s advisers who could have been more skeptical, like Rice, her deputy, Stephen Hadley, Powell, and his deputy, Richard Armitage, perhaps felt a bit uneasy, but not equipped with the analysis to launch a countering salvo. Hence legal judgments, with no policy analysis, converged with intelligence collection judgments, again a process usually including no policy analysis.

What might such a policy analysis have yielded in, say, a week of hard work? A fair understanding should focus only on what it could reasonably have been considered in 2002, before there was any experience in the use of these methods on Zubaydah or others.

It turns out there is quite a bit of empirical and historical information available about interrogation experience in this country, in its past wars, and in the experiences of other democracies facing terrifying threats. These experiences are highly instructive. They show the damage that these programs can do to the counterterror effort, the process of trial and error as alternatives emerged, and the proven effectiveness of some of these alternatives.\textsuperscript{86}

America has had extensive experience with interrogation of high-value detainees, especially in World War II when special facilities were created for this purpose.\textsuperscript{87} Pained by the brutality


\textsuperscript{87} \textsc{Paul J. Springer, America’s Captives: Treatment of POWs from the Revolutionary War to the War on Terror} 150 (2010).
of that war, Army Chief of Staff George Marshall explained to Congress during 1948 how he tried to work through some of the tougher calls.\textsuperscript{88}

Though Marshall was talking about bombing, it is worth noticing Marshall’s thought process in approaching such moral issues. The government had done things, he said, that had been “very, very terrible.” He testified that:

We reached the point, in the last war, where we were so infuriated over the practices of the Japanese and of the Germans that the American people were willing to go through with it. I thought it was vital that they should; but it was a terrible thing to have to use that type of power. If you are confronted with the use of that type of power in the beginning of the war you are also confronted with a very certain reaction of the American people. They have to be driven very hard before they will agree to such a drastic use of force.\textsuperscript{89}

In World War II, in the treatment of high-value captives, the United States chose not to do terrible things. It instead treated the high-value detainees humanely, even though thousands of lives were potentially at stake in the midst of a total war for national survival.\textsuperscript{90}

During the Vietnam War, the Army had struggled to adapt to the conditions of irregular warfare. The results were a few notorious cases of abuses and killings.\textsuperscript{91} Burned by this experience, the military—led by the Army—worked hard from 1970 onward to intensify training in the laws of war and eliminate such practices.

The SERE program had been devised as a counter to detested programs, like those that had been used by China and North Korea. But these methods had not so much been used to gather intelligence as to break or brainwash prisoners, to get them to confess publicly to imaginary germ warfare and the like.

\textsuperscript{88.} Universal Military Training: Hearings Before the S. Comm. on Armed Servs., 80th Cong. 21–22 (1948) (statement of Hon. George C. Marshall, Secretary of State).

\textsuperscript{89.} Id. at 21.

\textsuperscript{90.} See, e.g., SPRINGER, supra note 87, at 150–52 (discussing World War II interrogation practices and noting favorable treatment of captives held in Allied Powers’ POW camps); Scott Shane & Mark Mazzetti, Advisers Fault Harsh Methods in Interrogation, N.Y. TIMES, May 30, 2007, at A1 (comparing the harsh interrogation methods used after 9/11 to the noncoercive interrogation methods used during World War II).

\textsuperscript{91.} SPRINGER, supra note 87, at 180–81, 185–87 (discussing the U.S. Army’s advisory role in treatment of POWs during the Vietnam conflict and noting allegations of torture and executions); see CARVIN, supra note 45, at 103–04 (referencing the author’s “My Lai massacre story,” which led to widespread outrage).
These had not been programs regarded as having gathered good intelligence. 92

Among the more recent cases in democracies, the French in the Algerian war, the British in Northern Ireland, and the Israeli battle against Palestinian terrorism have all illustrated that coercive methods can sometimes break captives more quickly and extract information from them. But with rare exceptions, the supposed time element—the ticking time bomb argument—is more media scenario than reality. Proponents of the extreme interrogations point to information gained, uniquely, they say. 93 Opponents say it is inferior to more patient, less coercive methods. 94 It is possible to find respectable experts, even including directors of the Israeli Shin Bet intelligence service, on both sides of the argument. 95

I think it goes too far to say that coercive methods can never get anything uniquely valuable. And a government analysis in 2002 might not have said so. What such an analysis could have provided is a tentative net assessment. What is also needed, from a moral perspective—necessarily subjective—is also some clear notion of which methods are subject to a balancing test, and which methods so belie the humanity of the user as to be unconditionally improper.

In considering a net assessment, any serious analysis would have acknowledged significant intelligence costs from tormenting prisoners, in getting bad information and reducing the possibility of cooperative assistance. There is also little disagreement about the price an institution must pay to administer such techniques to people—not least the degree of high-level attention involved in creating, staffing, and protecting such interrogation centers and figuring out what to do with the people who have been broken by them.

92. Scott Shane, China Inspired Interrogations at Guantánamo, N.Y. TIMES, July 2, 2008, at A1 (noting SERE was developed in response to techniques designed to obtain false confession, not to provide valuable intelligence).


94. See, e.g., Bell, supra note 93, at 352–57 (discussing the lack of evidence supporting the effectiveness of extreme interrogation techniques); Philip N.S. Rumney, Is Coercive Interrogation of Terrorist Suspects Effective? A Response to Bagaric and Clarke, 40 U.S.F. L. REV. 479, 492–96 (2006) (suggesting that information learned from coercive interrogations is unreliable and inaccurate).

95. The Israeli case can provide striking anecdotes for every position in the debate. For the position of former Shin Bet directors, like Avi Dichter and Carmi Gillon, and the Israeli court actions, see Daniel Byman, A High Price: The Triumphs and Failures of Israeli Counterterrorism 297–306 (2011). Israeli interrogators have coped with the restrictions on their methods.
In the French, British, and Israeli cases, the costs of using such tactics became prohibitive. By 1999 extreme coercive methods had been banned even in Israel by that country’s Supreme Court. The purpose of a policy analysis would have been, at a minimum, to canvass the relevant U.S. experience or the lessons from French, British, and Israeli experience and come up with some sense of a net assessment over time. All of this, and a careful analysis of the oft-used SERE analogy, could and should have been presented to President Bush and all of his top advisers during the three months that passed before he made his decision. Bush or Rice should have insisted on this.

C. Reconsidering Application of the CID Standard in 2005

The CIA program went forward. Military interrogation standards also entered a kind of limbo, for fear that the military should not adopt higher standards that would seem to belie the Justice Department’s professed minimalist view. This created a particular challenge. The military was rushing many new soldiers, inexperienced in interrogation, through six-week training courses and into the field. As more and more young people had to apply sketchy standards under stressful conditions, any seasoned manager would be able to foresee the results. The U.S. Army, in particular, had seen this movie before, during the Vietnam War.

Problematic practices at Guantánamo began growing in late 2002 and into 2003. The standardless environment infected the military, especially the Army, and with the invasion of Iraq, the infection spread. Then came all the improvisations accompanying the detention of thousands of captives in Iraq. These would culminate in the chaotic practices at the Abu Ghraib prison, always shadowed by information and rumors about what the “intelligence” people were doing.


99. Id. (noting confusion as to interrogation standards and suggesting harsh interrogation tactics spread from the Guantánamo Bay detention facility to Iraq and Afghanistan).

100. See Shane & Mazzetti, supra note 90.

101. See Philip Gourevitch & Errol Morris, Standard Operating Procedure
In 2003, while serving as Executive Director of the 9/11 Commission, some of my staff colleagues and I became concerned because the CIA was unwilling to disclose information about the conduct of the interrogations of key detainees and would not allow access to the detainees or the interrogators. We did not know anything about the substance of the CIA interrogation program, only the intelligence reports being produced from it.

The Commission’s concerns deepened as reports in 2004 indicated that detainees might have been abused. Therefore, in its July 2004 report, the Commission formally recommended that the United States “engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists” drawing “upon Article 3 of the Geneva Conventions on the law of armed conflict,” an article “specifically designed for those cases in which the usual laws of war did not apply.” In its recommendation, the 9/11 Commission noted that these “minimum standards are generally accepted throughout the world as customary international law.”

Although the Bush Administration accepted most of the Commission’s recommendations, this was one of the few the Administration did not accept. That refusal plainly signaled that the Administration was reserving the right to inflict treatment that might violate the CID standard expressed in slightly varying terms, not only in Common Article 3 but also in other treaties like the Convention Against Torture, which had been signed and ratified by the United States. The CID standard is also found in a Protocol to the Geneva Conventions that had been accepted by most countries and by the United States during the Reagan Administration.

53–55 (2008) (stating that five different versions of interrogation instructions were posted at Abu Ghraib prison in the course of a month and noting the pressures to produce intelligence from the prison population).

102. After the 2007 disclosure that the CIA had destroyed videotapes of interrogations, the Commission’s efforts to learn more about the circumstances surrounding interrogations were summarized in a report that I prepared with our former deputy general counsel, Steve Dunne. That unclassified report has been made public. See Memorandum from Philip Zelikow to Tom Kean and Lee Hamilton, Interrogations and Recordings: Relevant 9/11 Commission Requests and CIA Responses 1, 3–7 (Dec. 13, 2007), available at http://graphics8.nytimes.com/packages/pdf/national/20071222-INTEL-MEMO.pdf.

103. 9/11 COMMISSION REPORT, supra note 1, at 380.


105. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4,
the 9/11 Commission’s recommendation on this point was therefore both revealing and troubling.

As 2004 turned to 2005, the controversy about the treatment of captives intensified. There were the revelations of detainee abuse in military facilities in Iraq and reports of alleged murders.\textsuperscript{106} There were reports of past abuses at the Guantánamo facility.\textsuperscript{107} There were growing rumors and reports about other sites run by the CIA.\textsuperscript{108} I later learned that, in 2004, the CIA Inspector General (IG), John Helgerson, had prepared a secret report that was plainly skeptical and worried about the Agency’s treatment of captives. I was acquainted with Helgerson and respected his judgment; I also later talked to CIA officials who worked on this study. An important critique, the IG report was also another reminder about the outstanding professionalism that can always be found in the Agency’s ranks. In the Justice Department, a fresh group of lawyers had secretly begun questioning the constricted way the anti-torture statute was being interpreted and were also conscious of the significance of international practices and standards.\textsuperscript{109}

The August 2002 OLC opinion leaked.\textsuperscript{110} Its language seemed extreme, so an opinion was drafted to take its place, prepared by these new lawyers, led by Dan Levin. The new opinion, issued in December 2004, still did not analyze whether the program complied with a CID standard.\textsuperscript{111} It was just a reevaluation of

\textsuperscript{adopted June 8, 1977, 1125 U.N.T.S 609; see Derek Jinks, September 11 and the Laws of War, 28 YALE J. INT’L L. 1, 14 & n.75 (2003) (stating the United States has not ratified the Protocol).}


\textsuperscript{107. See Neil A. Lewis & Eric Schmitt, Inquiry Finds Abuses at Guantánamo Bay, N.Y. TIMES, May 1, 2005, at N35 (discussing investigations into detainee abuse at the Guantánamo Bay detention facility).}


\textsuperscript{109. For the Helgerson report, see OFFICE OF INSPECTOR GENERAL, CENT. INTELLIGENCE AGENCY, SPECIAL REVIEW: COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001—OCTOBER 2003) (2004), available at http://graphics8.nytimes.com/packages/pdf/politics/20090825-DETAIN/2004CIAIG.pdf. But see JACK GOLDSMITH, POWER AND CONSTRAINT 104, 278 n.74 (2012). On the revision of the OLC opinion interpreting the federal anti-torture statute, see GOLDSMITH, supra note 7, at 39–42, 142–46, 159, 164. Among the more important of these lawyers were James Comey, Daniel Levin, and Jack Goldsmith. All of these men had gotten their jobs because of their reputations as excellent, conservative scholars and government lawyers.}

\textsuperscript{110. GOLDSMITH, supra note 7, at 157.}

compliance with the federal law banning torture. The commander-in-chief issue had gone away because President Bush said he would not approve torture anyway. The opinion looked at the procedures and said they were not torture under the law.

At the beginning of 2005, Alberto Gonzales became the new Attorney General. He brought in a new team of lawyers, with Steven Bradbury becoming the acting head of the OLC. Bradbury led the articulation of a new set of OLC opinions. These covered new ground. Although the Administration and Justice still argued that a CID standard did not apply to the problem, one of the new opinions—secretly issued at the end of May 2005—said that even if CID applied, the CIA program would not violate it. The main argument was jurisdictional, that the standard would not apply to captives held outside of the United States, but the opinion also had a substantive analysis.

Rice became Secretary of State. I became Counselor of the Department of State. This should not be confused with the duties of the State Department’s Legal Adviser (Bellinger took this job, moving from his position on the NSC staff). The “Counselor” is an old office at State, a place where the Secretary puts someone who serves as a kind of deputy on miscellaneous issues.

By June 2005, President Bush was open to reconsidering the whole approach to treatment of enemy captives in the War on Terror. I believe, on slender evidence, that Bush had become conflicted about the practices he had authorized and the consequence that were becoming apparent during 2004 and into 2005. Though still hearing and probably believing that the

Levin Memorandum], in THE TORTURE MEMOS, supra note 73, at 128, 129–35 (analyzing the definition of torture under the United Nations Convention Against Torture (CAT) standard rather than the CID standard).

112. See Statement on the United Nations International Day in Support of Victims of Torture 1 PUB. PAPERS 1141, 1141 (June 26, 2004); see also Neil A. Lewis, U.S. Spells Out New Definition Curbing Torture, N.Y. TIMES, Jan. 1, 2005, at A1 (affirming that the new memorandum was solicited “to reiterate the president’s determination that the United States never engage in torture” (internal quotation marks omitted) (quoting Trent Duffy, spokesman for President Bush)).

113. See generally Levin Memorandum, supra note 111, at 130–51 (providing an analysis focused on statutory interpretation and legislative intent).


extreme methods were necessary, he also appears to have been open to options for the future of the Guantánamo facility, for the eventual disposition of detainees held by CIA, and to look at the standards governing the treatment of enemy captives.

Secretary of State Condoleezza Rice was in favor of change. Also supporting change was her Legal Adviser, John Bellinger, who had held the same job for her on the NSC staff.\textsuperscript{116} Bellinger was already deeply concerned about detainee policies and carried scars from earlier bureaucratic battles on the topic.

Subcabinet deputies began meeting regularly in highly sensitive meetings to consider these issues. I represented the Department at these meetings, along with Mr. Bellinger. I was thus “read in” to the details of this particular CIA program for the first time.

But by the time I began engaging in these arguments, in the spring and summer of 2005, another important source of data had emerged. This was the American intelligence and interrogation effort against al Qaeda in Iraq. This was an interagency effort, including experts from the military, from the FBI, and from the CIA. It was organized by the military, particularly the Joint Special Operations Command.

By 2005 the Iraq program against al Qaeda was complying with the CID standard in its interrogation of captives. Without meaning to do so, the U.S. government had thus created a natural, double-blind experiment. It had set up two different kinds of interrogation programs, operating under different guidelines and management, against two wings of al Qaeda—one in Iraq and one outside of Iraq.

The program in Iraq was high-tempo and time-urgent. The general in charge of the more constrained, interagency interrogation program against al Qaeda in Iraq considered it effective. By mid-2005 the government’s leaders, including President Bush, had been told of this positive assessment.\textsuperscript{117} They now had hard evidence that CID-compliant interrogations could work.

Nonetheless, the intelligence community’s position in 2005, and later, remained that a substantial program of intense

\textsuperscript{116} See id. at 289, 291–92, 324.

\textsuperscript{117} I heard this assessment, which expressly accepted the viability of the more constrained legal guidelines, presented to President Bush by the then-head of the Joint Special Operations Command, Stanley McChrystal. I had also visited the interrogation center in Iraq and discussed its operations privately with soldiers and other officials serving there.
physical coercion was uniquely necessary to protect the nation.\textsuperscript{118} The arguments that have appeared in the press are the same arguments, even using some of the same examples, used to defend the program against its few internal critics in 2005 and 2006.

These examples usually cite plots thwarted or terrorists captured. Some of these examples may not be accurate. Others may be exaggerated, or they may mask murky, internal arguments among operatives and analysts about whose source proved out, or which lead was key. Rival claims of credit often accompany successful cases. But getting into a debate about whether the CIA program produced useful intelligence misses the point.

The point is not whether the CIA program produced useful intelligence. Of course it did. Quite a lot. The CIA had exclusive custody of a number of the most important al Qaeda captives in the world, for years. Any good interrogation effort would produce an important flow of information from these captives.

Complicating the story, the CIA did not just rely on physical coercion. A long-term interrogation program was also being employed, mustering a number of experts using growing skill in patiently mining for more information and assimilating it. Indeed, one of the tragedies of this program is that the association with physical coercion detracts attention away from some of the very high quality work the CIA did do for the country, quality work that has continued and become even better during the last five years, after the extreme interrogation program was dismantled.

So the issue is not whether the CIA program of extreme physical coercion produced useful intelligence; it was about its net value when compared to the alternatives.\textsuperscript{119} Earlier I

\textsuperscript{118} MARC A. THIESSEN, COURTING DISASTER 172–73 (2010).

\textsuperscript{119} While in government, I joined in encouraging the Intelligence Science Board, a federal advisory group, and its chairman, Robert Fein, to pursue a professional examination of the empirical data, science, and pseudoscience surrounding the topic of interrogation. The Board ultimately produced a valuable report with papers from a variety of experts.

A representative conclusion, from a veteran interrogator and former director of the Air Force Combat Interrogation Course, was that “the scientific community has never established that coercive interrogation methods are an effective means of obtaining reliable intelligence information.” Steven M. Kleinman, KUBARK Counterintelligence Interrogation Review: Observations of an Interrogator—Lessons Learned and Avenues for Further Research, in INTELLIGENCE SCI. BD., CTR. FOR STRATEGIC INTELLIGENCE RES., EDUCING INFORMATION: INTERROGATION: SCIENCE AND ART 95, 130 (Russell Swenson ed., 2006). The author added that, “[c]laims from some members of the operational community as to the alleged effectiveness of coercive methods in educing meaningful information from resistant sources are, at best, anecdotal in nature and would be, in the author’s view, unlikely to withstand the rigors of sound scientific inquiry.” Id. at 130 n.91.
mentioned the information that could have been gained in early 2002, from studying past cases. By 2005 the United States had experiences with its own interrogation program that it could draw upon. To be weighed against suitably sifted claims of unique value, that program had proven to have serious drawbacks just in the intelligence calculus, such as:

—constraints in getting the optimal team of interrogators, since law enforcement and military experts could not take part;

—whether the program actually produces much of the time-sensitive current intelligence that is one of its unique justifications;

—loss of intelligence from allies who fear becoming complicit in a program they abhor and a whole set of fresh problems with coalition cooperation on intelligence operations;

—poorer reliability of information obtained through torment;

—possible loss of opportunities to turn some captives into more effective and even cooperative informants; and

—problems in devising an endgame for the eventual trial or long-term disposition of the captives.

Finally, the interrogation program was the glue that bound the images of Abu Ghraib and the question of torture to the values the United States was displaying after 9/11. By 2005, both Secretary Rice and I believed that the raging controversy, usually encapsulated in shorthand words like “Abu Ghraib” or “Guantánamo” or “torture,” was hurting the United States’ position in the world more than any other problem in our foreign policy, even more than the war in Iraq.

As Secretary of State, Rice therefore placed a high priority on changing the national approach to the treatment of detainees. Once the President indicated his readiness to hear alternatives, her advisers first attempted to develop a “Big Bang” approach, a presidential initiative that might take on the whole cluster of issues in a single announcement.

To show what such an initiative might look like and how it could be presented, and with help from Mr. Bellinger, I worked with the Deputy Secretary of Defense, Gordon England, on a joint paper, a notional draft of the building blocks of such an initiative. Deputy Secretary England was aided by DOD’s Deputy

120. Rice, supra note 14, at 496–97.
Assistant Secretary for Detainee Affairs, Matt Waxman, and other staff. Our (unclassified) joint paper outlining the elements of a presidential initiative was distributed secretly in June 2005. 121

Secretary of Defense Rumsfeld immediately disavowed the draft initiative. He said the paper did not represent his Department’s views. He designated a different official to be his deputy for these issues. The NSC staff then felt it was more appropriate for the interagency process to address the specific issues incrementally, rather than discuss this broad paper.

At State we then concentrated much of our effort on getting the U.S. government to at least adopt the CID standard in all of its activities. In other words, we sought to reverse the presidential decision of February 2002. As I mentioned earlier, the Administration had always conceded the applicability of the federal anti-torture statute and had repeatedly held that the CIA program did not violate it. The Justice Department’s view was authoritative for the Executive Branch and was immovable. The anti-torture language, as interpreted by Justice, also turned on medical assessments by CIA doctors, assessments we therefore could not challenge. 122

The CID standard also was the standard that had been proposed in 2005 within Congress, a battle led by Senator John McCain and his allies, including Senator Lindsey Graham, for the “McCain Amendment.” 123

As mentioned earlier, the Administration’s position on all these CID arguments had been this: We do not have to measure our conduct against this standard because none of these treaty standards apply. 124 If the standard did apply, the CIA program

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121. A copy of this June 2005 memo was provided to the press more than a year later, apparently from a source in the Defense Department. Tim Golden, Detainee Memo Created Divide in White House, N.Y. TIMES, Oct. 1, 2006, at A1. This draft presidential initiative, Memorandum from Philip Zelikow and Gordon England, Elements of Possible Initiative (June 12, 2005), is now available at http://www.gwu.edu/~nsarchiv/news/20120403/docs/Elements%20of%20possible%20initiative%20document.pdf. After Secretary Rumsfeld repudiated his deputy’s work and discussion of this move was blocked, I worked with Bellinger on another proposal for revised legal standards, circulated the next month. This is also now available. Memorandum from Philip Zelikow and John B. Bellinger III, Detainees—The Need for a Stronger Legal Framework (July 2005), available at http://www.gwu.edu/~nsarchiv/news/20120403/docs/Detainees%20document.pdf.

122. Bradbury Memorandum, supra note 114, at 235.


124. Bush Memorandum, supra note 46, para. 2.
did not violate it.  

State worked to persuade the rest of the government to accept the CID standard. Deputies and principals battled over this and other topics on into the fall of 2005, including the issue of how the Administration should deal with Senator McCain’s proposed amendment. New press reports alleging the existence of CIA “black sites” for interrogations, written by Dana Priest for the Washington Post, fueled further controversy—especially in Europe.

By the end of 2005, these debates finally led to real change. On December 5, as Rice left on a trip to Europe, she formally announced on behalf of the President that the CID standard would govern U.S. conduct by any agency, anywhere in the world. Perhaps coincidentally, in November 2005, CIA officials had ordered the destruction of their existing videotapes of coercive interrogations. On December 30, the McCain Amendment (to a defense appropriations bill) was signed into law, as the Detainee Treatment Act of 2005.

D. Applying the CID Standard in 2006–2007

Thus by early 2006 there was no way for the Administration to avoid the need to reevaluate the CIA program against a CID standard. The work of the NSC deputies intensified.

OLC had held that, even if the CID standard did apply, the full CIA program—including waterboarding—complied with it. This OLC view also meant, in effect, that the McCain Amendment was a nullity. According to Justice, the McCain Amendment would not prohibit the very program and procedures Senator McCain and his supporters thought they had banned.

125. Bradbury Memorandum, supra note 114, at 272–74.

126. See generally THE TORTURE MEMOS, supra note 73, at 152–274 (including three torture memos from May of 2005).

127. Priest, supra note 108; see Mayer, supra note 25, at 320 (noting the “international furor” following Priest’s disclosure of the black sites).


131. For additional background information, see “What Went Wrong: Torture and the Office of Legal Counsel in the Bush Administration”: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary, 111th Cong. 15–16 (2010) (statement of Philip Zelikow, Professor, University of Virginia).
So, with the battle to apply the standard having been won, State then had to fight another battle over how to define its meaning. It was hard to believe that Justice would really maintain that the CIA program did not violate a CID standard. Indeed, someone reading Jay Bybee and John Yoo’s August 2002 opinion with its careful distinguishing of “torture” from the much broader CID standard might easily infer that even Bybee and Yoo would not have tried to defend the program against a CID compliance standard (they would then have had to rely on their presidential commander-in-chief trump card).\footnote{See August 2002 Bybee Memorandum, supra note 76, at 43–44 (explaining that the act of torture requires a specific intent “to cause severe physical or mental pain or suffering”); Letter from John C. Yoo, Deputy Assistant Attorney Gen., to Alberto R. Gonzalez, Counsel for the President 2–3 (Aug. 1, 2002), available at http://www.justice.gov/olc/docs/memo-gonzales-aug1.pdf (advising that it was “crystal clear” that a defendant must have a specific intent to inflict severe pain and suffering to be guilty of torture).}

Yet every Administration lawyer, except those at State, still maintained that the original CIA program was not cruel, inhuman, or degrading treatment. It is worth pondering just how radical the Justice position was.

The OLC contended correctly that the U.S. position had long been that the subjective terms—like “cruel” or “humane”—should be interpreted in light of the well developed and analogous restrictions found in American constitutional law, specifically in the interpretation of the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.\footnote{Bradbury Memorandum, supra note 114, at 249.} As the OLC observed in a May 30, 2005 legal opinion, the Congress had conditioned its ratification of one of the CID standards, the one found in the Convention Against Torture, on its being interpreted in just this way.\footnote{Id. at 248–49.} Fair enough.

This meant that for the CIA interrogation program to pass a CID standard, it had to pass the standards of the U.S. Constitution as well. Thus the U.S. Department of Justice had to conclude that waterboarding, extensive sleep deprivation, hanging prisoners naked in chains, and the rest was a treatment program that, if employed in any county jail in the United States, would not violate the U.S. Constitution. This was an amazing contention.

Yet at the time the OLC opinion was utterly secret. No one had penned so much as a word to challenge this reasoning or expose President Bush to an alternative view. The White House Counsel, Harriet Miers, certainly did not question it.
To challenge OLC’s interpretation, it was necessary to challenge the Justice Department’s interpretation of U.S. constitutional law. This was not easy from the inside, since OLC is the authoritative interpreter of such law for the Executive Branch of the government. Many years earlier I had worked in this area of American constitutional law. The OLC interpretation of U.S. constitutional law in this area seemed especially strained and indefensible:

1. It relied on a “shocks the conscience” standard in U.S. constitutional case law to judge interrogations but did not seem to present a fair reading of the case law under that standard.\(^{135}\)

2. The OLC analysis also neglected another important line of case law, on conditions of confinement.

3. The OLC analysis also employed a balancing test, weighing the interrogation’s offensiveness against its presumed necessity to defend the nation, when in fact the law employed both a balancing test—for some procedures—as well as absolute prohibitions.\(^{136}\)

I distributed a memo analyzing these legal issues to other deputies at one of our meetings, in February 2006. I later heard the memo was not considered appropriate for further discussion and that copies of my memo were to be collected and destroyed. That particular request, passed along informally, did not seem proper and I ignored it.\(^{137}\)

The broader arguments over the future of the CIA program went on for months. The continued attempt to defend the program at this stage, to argue that such a program met a

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\(^{135}\) See id. at 256 (citing Rochin v. California, 342 U.S. 165, 172 (1952) and Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)).

\(^{136}\) August 2002 Bybee Memorandum, supra note 76, at 39–41.

\(^{137}\) My alternative legal position, written and circulated to other deputies as a draft opinion, was declassified in April 2012. Memorandum from Philip Zelikow, The McCain Amendment and U.S. Obligations Under Article 16 of the Convention Against Torture (Feb. 15, 2006), available at http://www.gwu.edu/~nsarchiv/news/20120403/docs/Zelikow%20Feb%202006.pdf. Though marked as a draft, that meant it was a draft opinion, not an unfinished document. My suggested approach did not mention Common Article 3 as a source of the “CID” standard because, at that point, there was no need to add a direct assault on that 2002 OLC opinion too. As a matter of Administration policy (announced by Rice in December 2005) and statute (the McCain Amendment signed later in December 2005) the CID standard in the Convention Against Torture clearly applied, so I could make the compliance argument just emphasizing that. But as I mentioned earlier in this Essay, the CID compliance issue would instantly have implications for felony criminal exposure under the War Crimes Act if the courts should find that the administration’s 2002 legal position on Common Article 3 was incorrect, which is what the Supreme Court did hold four months later, in June 2006.
CID/Common Article 3 standard, seems to have obliged intelligent and highly educated attorneys to adopt legal positions that were untenable and extreme.

If this is so, an interesting historical question arises about why the lawyers, including the White House Counsel and top lawyers at Justice and the CIA, remained so stubborn even during the first half of 2006. Answers may come more from the realm of social psychology or fear of criminal investigation than from any legal theory. The only defense against criminal prosecution would be that officials acted in good faith reliance on the advice of their government lawyers.

Inside the Bush Administration, intense debate continued in the early months of 2006. Both principals and deputies examined proposals to bring the high-value detainees out of the “black sites” and to Guantánamo where they could be brought to justice (and would give accounts of their treatment to lawyers and the Red Cross); seek legislation that would close Guantánamo; accept fully the application of Common Article 3; and find some way of maintaining a standby CIA program that would comply with legal standards. 138

A new OLC opinion was also being developed in the spring of 2006 to deal with the different circumstances, including the McCain Amendment. We at State were concerned about this development, unless OLC had reconsidered how to interpret the CID standard. We nonetheless believed these issues were moving in an encouraging direction, though the Administration certainly remained divided. Options for action on all the major issues had been developed for a possible presidential decision and had already been discussed repeatedly by the President’s principal advisers.

On June 29, 2006, the U.S. Supreme Court decided Hamdan v. Rumsfeld. 139 That decision held that Geneva Common Article 3 applied to the U.S. government’s treatment of these captives as a matter of law. 140 Immediately, the potential exposure to criminal liability in the federal war crimes act became real.

Internal debate continued on into July, with some of the President’s advisers proposing that Bush seek legislation to overturn the Supreme Court’s decision. 141 Secretary Rice and Vice President Cheney aired out their different views, what Rice

140. Id. at 630–32.
141. RICE, supra note 14, at 500–01.
remembers as “the most intense confrontation of my time in Washington.”

President Bush finally made several decisions. He set the goal of closing the Guantánamo facility. He decided to bring all the high-value detainees out of the “black sites” and move them toward trial. He sought legislation from the Congress that would address these developments (the future Military Commissions Act) and defended the need for some continuing CIA program that would comply with relevant law. President Bush announced these decisions on September 6.

Battles continued within the Bush Administration during 2007, led by Rice and Bellinger, against efforts to rehabilitate the CIA interrogation program. With waterboarding dropped, the White House and the CIA sought to restart the CIA interrogation program. Justice argued early in 2007 that other coercive methods, including extreme sleep deprivation, did not violate Common Article 3 or other codifications of a “CID” standard, such as Article 16 of the Convention Against Torture. To reach this conclusion, Justice used the same tendentious interpretation of American constitutional law that it had proposed a year earlier. By this time I had left government. Bellinger, with Rice’s support, vehemently objected to the Justice Department’s legal view. He did not try, as I had, to quarrel with the Justice Department’s interpretation of American constitutional law. He instead argued at length that the proposed renewal of the CIA program would violate Common Article 3, as it was understood in international law. Justice’s OLC disagreed. Attorney General Gonzales persisted with an executive order to restart the program. Rice refused to agree and effectively blocked a full renewal of the coercive interrogation program for the remainder of the Bush administration.

In January 2009, on his second full day in office, President Obama settled the argument more definitively. He reaffirmed Bush’s 2006 decisions and further tightened the interrogation standards.

142. *Id.* at 502.
143. Remarks on the War on Terror, 2 PUB. PAPERS 1612, 1618 (Sept. 6, 2006).
144. *RICE, supra note 14,* at 503; *OFFICE OF PROF’L RESPONSIBILITY, DEPT OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 156–57, 249–50* (2009), *available at* http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf. The Office of Professional Responsibility concluded that the OLC (Bradbury) view on the CID issues was mistaken but that his errors did not cross the high bar of professional misconduct. The Office did conclude that, in their work for the OLC in 2002, John Yoo and Jay Bybee did commit professional misconduct.
All of the U.S. government’s interrogation programs have now been operating under new legal standards for five years; those operated by the U.S. military for at least six. Those operated by the FBI never changed their standards.\(^{146}\) There has been no evident diminution in the effectiveness of any of these programs as a result.

The point can be made more strongly. For years President Bush had been warned that tighter interrogation standards would fatefuly compromise the struggle against al Qaeda. Consider, then, the empirical evidence on the course of that struggle before and after the standards were changed. In the fight against al Qaeda in Iraq, score a major success for combined intelligence–military operations. After interrogation standards tightened, al Qaeda in Iraq was effectively broken in the years from 2005 to 2008. As for the war against core al Qaeda, based in Pakistan, the struggle went up and down, with core al Qaeda regaining a worrisome degree of strength by 2006 and on into 2008. Since 2008 the struggle against al Qaeda in Pakistan has been going well, culminating in the killing of Osama Bin Laden in 2011 and the subsequent deaths of many other al Qaeda leaders. There is no evident correlation between intelligence success and the availability of extreme interrogation methods.

Obviously the character of interrogation standards is not the critical variable in these stories. Other factors are more important, including policy choices by U.S. and Pakistani authorities. But these are real intelligence success stories, a testament to the determined work of a number of skilled professionals at the CIA and other agencies. With extreme interrogation methods off the table, it is easier to notice the paramount importance of their other skills in achieving these successes.

Looking back on the episode, the U.S. government adopted an unprecedented program of coolly calculated dehumanizing abuse and physical torment to extract information. This was a mistake. The program’s costs—which include the high-level effort expended in order to establish, maintain, and defend the program—appear on the evidence available so far to have well outweighed any unique value the program might have had as a

\(^{146}\) See MAYER, supra note 25, at 202–04 (noting the FBI’s preference for “less coercive” interrogation techniques); THIESSEN, supra note 118, at 341 (describing the FBI’s recommendation of using traditional law enforcement tactics to interrogate terrorists).
method of counterterrorism intelligence collection. The costs extended to damage done to the stature of the United States and to the efficacy of other U.S. policies and operations, including intelligence operations.

Further, the disclosure that the Bush Administration would deliberately make such choices, in secret with the acquiescence of congressional leaders from both parties, shocked a great many people in the United States and in other civilized countries, including almost all interested members of the American and international legal community. That shock and the rippling suspicion that followed has colored all other debate about the Bush Administration’s post-9/11 legal policies and this can be counted as still more collateral damage.

This was a collective failure of American public leadership, in which a number of officials and members of Congress (and staffers) of both parties played a part, endorsing a CIA program of physical coercion without any precedent in U.S. history. Widespread support continued even after the McCain Amendment was passed and even after the Hamdan decision came down. Precisely because this was a collective failure it is all the more important not just to judge it, but to comprehend it.

IV. DEFINING ENEMY SOLDIERS IN A TWILIGHT WAR

A. The Presidential and Congressional Authorizations to Use Military Force

After the 9/11 attacks, President Bush sought and promptly received a congressional Authorization to Use Military Force (AUMF) against all the organizations that had been involved in the attacks. Al Qaeda had already declared war against America, including in a declaration issued early in 1998. The United States then also became involved in large-scale wars in Afghanistan and Iraq. In 2012 the war in Iraq has transitioned fully into a military assistance mission. The U.S. government hopes that it can also move to a posture of military assistance in

147. The brief for the opposing view is assembled by former White House speechwriter Marc Thiessen. See THIESSEN, supra note 118, at 206–11.
149. 9/11 COMMISSION REPORT, supra note 1, at 47–48.
Afghanistan in 2014. But the global conflict against al Qaeda and its allies continues.

Since 9/11 the U.S. government has consistently argued, and the courts have consistently agreed, that the United States is engaged in an armed conflict against al Qaeda and the Taliban. Some scholars have rejected a war framework, arguing that only national criminal law should apply. But this view has not been adopted by any relevant U.S. authority and it will not be endorsed until al Qaeda, the organized nonstate group, has disintegrated.

So the critical issue has been to define the enemies who can be killed or captured as part of this armed conflict. Addressing this problem, the Bush Administration again initially adopted an unsustainable legal standard. Its standard blurred the line between the war standard and the criteria, in U.S. domestic law, for defining the prohibition of material support to any designated terrorist organization. If anyone giving material support to al Qaeda or an associated organization can lawfully be targeted for secret killing or capture, the application of such a standard could be very broad indeed. Any distant fundraiser or money donor, a grandmother at a cookpot: all could be targeted.

The U.S. Supreme Court tried to offer more clarity in 2004, by holding that the AUMF allowed, as part of the law of war, detentions of individuals who were both “part of or supporting forces hostile to the United States or coalition partners” and were “engaged in an armed conflict” against the United States.

B. Overbroad Application of the Definition: The Boumediene Litigation

This standard for detention of enemy combatants was not properly or convincingly applied. The President and the Congress

154. See Hamdi, 542 U.S. at 521 (noting that the Court’s “understanding [of detention authority] is based on longstanding law-of-war principles” and that “[this] understanding may unravel” only based on a change in the conflict’s underlying circumstances); Bellinger & Padmanabhan, supra note 153, at 228–29 (suggesting that combatants could be detained as long as hostilities continue).
set up Combatant Status Review Tribunals (CSRTs) to provide reviews and attempted to prohibit review of these judgments by habeas petitions. The CSRTs did not establish a credible record of review and, in 2008, a distrustful Supreme Court reinstated federal habeas review of such cases in Boumediene v. Bush.\footnote{Boumediene v. Bush, 553 U.S. 723, 733–35 (2008).}

Boumediene involved six petitioners being held in Guantánamo.\footnote{Boumediene v. Bush, 579 F. Supp. 2d 191, 192 (D.D.C. 2008), rev’d sub nom. Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. 2010). It was a very good case to illustrate the overbroad application of the prevailing definition of the targetable enemy.} All were Algerians who had been arrested in Bosnia in 2001 and turned over to the U.S. government.\footnote{Boumediene, 579 F. Supp. 2d at 193–94.} After the Supreme Court made its decision in June 2008, the case was remanded to the district court for habeas review.\footnote{Boumediene, 553 U.S. at 798.}

In the subsequent review later in 2008, I was an expert (volunteering pro bono) authorized by the court, at the request of the petitioners, to review and evaluate the classified information put forward by the government to support the detention. I did not consider any of the petitioners’ exculpatory arguments. Just weighing the government’s information and assuming the sources of the information were credible, my view was that the government’s evidence was insufficient to detain any of the six. Though the specifics are classified and under seal, I made two overarching arguments.\footnote{The publicly available reference is Petitioners’ Public Traverse to the Government’s Return to the Petition for Habeas Corpus, Boumediene, 579 F. Supp. 2d 191 (No. 04-1166 (RJL)).}

First, the court cases tended to be about detention, and that context was deceptive. Viewed only as a question of detention, lawyers might be tempted to see a lower standard of culpability as being relatively harmless. But the basis for detention under the law of war was essentially identical to the basis for targeting and killing enemies in the field.

In Afghanistan and in Iraq, we were making such determinations almost every day. It is a very serious matter, carrying a significant moral and legal burden. The standard for detaining these people in Bosnia would also have been the standard for attacking them with deadly force.

Second, to meet this standard the individuals needed both to be part of an enemy organization with whom we were lawfully at war and be engaged in active hostilities. The government’s evidence did not appear to meet this standard.

\begin{enumerate}
\item See id. at 733.
\item Boumediene, 579 F. Supp. 2d at 193–94.
\item Boumediene, 553 U.S. at 798.
\item The publicly available reference is Petitioners’ Public Traverse to the Government’s Return to the Petition for Habeas Corpus, Boumediene, 579 F. Supp. 2d 191 (No. 04-1166 (RJL)).
\end{enumerate}
The district court subsequently found that the government had failed to meet this standard for five of the six petitioners and ordered them released. The one petitioner still held appealed his case and the D.C. Circuit reversed, ordering his release as well. The D.C. Circuit found that the standard at least required being “functionally part” of al Qaeda and that the evidence about the remaining petitioner, Bensayah, was insufficient to show even that.

The courts thus are at least requiring that the first prong be met, of being “functionally part” of the enemy nonstate organization. However, the courts have not been sufficiently clear in following the law of war to reinforce the second prong of the standard, that the individual must actively be participating in the belligerent, violent activities of the group. In my view this can be a combat support role too, such as training or recruiting.

The International Committee of the Red Cross has also endorsed such a general approach looking for “direct participation in hostilities” as the critical test in the case of people appearing to be civilians who are in fact functioning in the violent work of a nonstate organization at war. Of course the courts could just hold that such a “functional” test goes along with “functionally” being part of the enemy organization. And this analysis could inform decisions on drone missile attacks or captures.

The U.S. government appears to have actually put its policy on a sustainable foundation by adopting just such an approach. Abandoning what he derided as “conclusory labels” like “enemy combatant,” the State Department Legal Adviser, Harold Koh, has stated that “our general approach of looking at ‘functional’ membership in an armed group has been endorsed not only by the federal courts, but also is consistent with the approach taken in the targeting context by the ICRC in its recent study on Direct Participation in Hostilities.”

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163. Bensayah, 610 F.3d at 725–27.
164. For a useful expression of this concern, written before Bensayah was decided, see Bellinger & Padmanabhan, supra note 153, at 218–19.
166. See Jordan J. Paust, Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan, 19 J. TRANSNAT’L L. & POL’Y 237, 271 n.90 (2010) (stating that civilians “directly participate in hostilities” and are thus targetable for even nonobvious hostile actions such as preparing for and returning from operations, supplying ammunition, and loading an airplane with bombs).
Participation in Hostilities.\textsuperscript{167} Attorney General Eric Holder has now settled the issue, recently defining the scope of permissible targets as “combatants, civilians directly participating in hostilities, and military objectives.”\textsuperscript{168} The U.S. government has thus adopted the ICRC standard. This standard is appropriate.

C. Beyond the Original AUMFs?

The AUMF authorizes the use of all necessary and appropriate force against al Qaeda, the Taliban, and associated forces. The term “associated forces” can extend the geographic scope of hostilities well beyond the “hot” Afghanistan theater of operations. The catalogue of which organizations are categorized as “associated forces” is secret. So the full scope of AUMF-related operations is also secret.

The relevant guidance may be written down in documents where the President notifies Congress about the scope of intelligence operations or in orders issued by the Secretary of Defense. Thus the scope of the war also involves difficult and largely subterranean issues between these two secret worlds—sometimes referred to by the insider-shorthand terms, “Title 50” and “Title 10”—each of which have their own procedures for presidential approval and congressional involvement.\textsuperscript{169}

Adding to the potential confusion, the authority in the AUMF overlaps with the President’s constitutional authority as Commander in Chief. Attorney General Holder recently stated it this way: “The Constitution empowers the President to protect the nation from any imminent threat of violent attack.”\textsuperscript{170}

And, at least as a matter of policy, not law, the Obama Administration appears to have accepted an additional standard. A member of the White House national security staff recently explained that not only must the targeted individual or individuals be part of al Qaeda “and its associated forces,” individuals in such other countries must also be found to be “a threat to the United States, whose removal would cause a


\textsuperscript{170} Holder, supra note 168.
significant—even if only temporary—disruption of the plans and capabilities of al-Qa’ida and its associated forces.”

This added “significant disruption” standard may be good policy if intelligence offers the U.S. government the luxury of such refined discrimination. But, as a legal matter, I do not believe the AUMF or the law of armed conflict require this additional standard to justify operations against active participants in the violent work of al Qaeda, which was always a loose-knit worldwide organization and federation of organizations. Al Qaeda was, to translate the name literally, “the base.”

One hypothesis to explain the U.S. government’s current emphasis on these higher self-defense standards is because these are operations that the government believes may be outside of the scope of the original AUMF. They may be operations against organizations that the President does not judge to have been involved in the 9/11 attacks against the United States. In order, then, to go to war against members of these other organizations, the direct self-defense standard has to be met, relying in turn on the President’s Article II authorities as Commander in Chief rather than on a specific congressional authorization for the use of military force.

The U.S. government’s acknowledgment that its forces had targeted and killed a group of individuals in Yemen that included the Yemeni–U.S. dual citizen Anwar al-Aulaqi has stimulated a fresh round of controversy. From what little I know, I believe Aulaqi was correctly targeted for attack for reasons going all the way back to the 9/11 attacks themselves. It is also clear, as the Supreme Court reiterated in 2004, that if U.S. citizens became part of an enemy organization they were targetable as such for killing or capture under the law of war. Press reports indicate that the Obama Administration’s OLC wrote a 2010 legal opinion approving the targeting of Aulaqi on just these grounds.


175. Savage, supra note 173.
Attorney General Holder publicly added another standard to be met if the target is a U.S. citizen. That standard would be the satisfaction of the Fifth Amendment’s due process clause, so that a U.S. citizen is not deprived of life without due process. For the content of the due process, Holder introduced a balancing test in which the tests of being a targetable enemy are already met and (1) the individual himself poses an imminent threat of violent attack against the United States; (2) capture is not feasible; and (3) the operation complies with the law of war.\textsuperscript{176}

I do not agree with the Attorney General’s extension of such constitutional criteria to military or paramilitary operations in the field. First, law-of-war criteria should alone be adequate in such circumstances, if a U.S. citizen has joined the enemy forces—which he would have to have done to be both a member of the enemy organization and a direct participant in hostilities. The introduction of a Fifth Amendment analysis invites all the corollary associations with procedures for review of constitutional determinations.

Second, the precedent is ominous. The relevant judgments, even the killings, may be conducted in secret. If law-of-war criteria are not enough, I’m not sure it is such a good idea to open the door to developing constitutional criteria that might justify other kinds of extrajudicial killings of U.S. citizens by the U.S. government, handled through secret balancing tests. This context may seem benign enough, but the precedent is not.

The U.S. government should publish and explain any overarching policy and legal documents that guide and confine the conduct of deadly operations against its foreign enemies, if any, beyond the scope of the 2001 AUMF. For circumstances in which the AUMF is no longer the guiding framework, then the Executive Branch of the U.S. government has a duty to articulate the scope of its warfare to the Congress and the public.

Such an exercise would open up four issues for healthy debate. First, are we applying a direct self-defense criterion to justify warfare against organizations beyond the scope of the AUMF? If so, what are the confining principles?

Second, if “associated” with al Qaeda, what does that term mean?

Third, are we applying the criterion to organizations or also to individuals? Would the criterion apply to any individual, anywhere in the world, who for any reason declared himself to be at war with the United States and sought to commit an act of violence against Americans? War is not the appropriate tool

\textsuperscript{176} Holder, supra note 168.
against them all. And if al Qaeda eventually does disintegrate, it might help to be able to sense the threshold at which we no longer need to be at war. It would be good to see that there is a point at which we can end what Mark Danner has eloquently critiqued as our “State of Exception.”

Fourth, the United States should reestablish the primacy of the U.S. military in the conduct of its wars. There are various institutional and policy reasons to be sure that the military is a partner in the conduct of essentially military operations. Here I will only emphasize a legal issue, that the U.S. government will find it hard to defend a practice of using civilians to carry out military operations, to kill people, under the law of war. The international law of armed conflict is all too clear on this prohibition.

The U.S. government appears to have slowly adapted in the field to a more blended model that fuses the best capabilities of its military and intelligence organizations to achieve the desired objectives. The well-publicized May 2011 operation into Pakistan to capture or kill Osama bin Laden is one example. Secret military operations are perfectly lawful, if they are otherwise justifiable. As the United States adapts to the conditions of enduring twilight war, then the U.S. government should make sure the way it conducts its operations is defensible for the long haul. Our laws and institutions have not yet adapted to the new world of 21st century twilight wars.

V. CONCLUSION: THE SOCIAL CONTRACT

Secret intelligence and military operations are one of those realms of government activity in which the state entrusts people with exceptional powers for good and ill, powers not easily accommodated in a society founded on limited government, public accountability, and the rule of law. For example, when we give many soldiers and policemen the lawful power to kill and hurt other people, we do this knowing that the public cannot know how these powers will always be used. There is a fundamental social contract formed, of trust.

The contract can be stated in this way:
—We, on the outside, do not know what will go on in every surveillance operation, alley fight, or precinct house. We will grant extraordinary powers to thousands of people we do not know, people who will use these powers in situations we often will not be aware of or understand.

—So we have to be able to trust your organization and its professionals. To earn that trust you must convince outsiders that your organization will try hard to stay within lines the American people do know about, understand, and broadly accept. We need to see that you train people to respect those bright lines, respect them under terrible stress. We expect that abuses will be rare and will be dealt with in a way that retains our trust.

Such a social contract is an essential foundation to granting intelligence agencies and military departments with thousands of employees, conducting many operations around the world, extraordinary powers to intercept communications, break laws in other countries, and even use lethal force to defend the country—all in secret. For a great many Americans, and a great many foreign citizens whose cooperation the U.S. government also needs in order to carry out effective operations, the last ten years strained that necessary social contract.

When the contract is broken, Congress and the courts lose faith in executive assurances of appropriate behavior. They will then respond in many ways. One constant is that they will find ways to limit executive discretion and check on behavior, often to the point of essentially paralyzing programs or flexibility that may genuinely be needed. In other words, once trust breaks down, all sides will lose. Jack Goldsmith has emphasized this point in describing the constraints that now envelop national security policy, much of it provoked by the Bush Administration's counterproductive effort to enlarge untrammeled presidential power. 178

But as trust is restored, a clear-cut framework with effective oversight can complement effective operations. In 2005 and 2006, opponents of change warned that a more constrained environment would handcuff the country. Just the opposite occurred. Good guidance and professionalism rebuilt trust. Operations against al Qaeda intensified in the latter part of the Bush administration and the ops tempo was redoubled under Obama. Successes followed.