

# **Terror and the Law**

## **The Limits of Judicial Reasoning in the Post-9/11 World**

By Curtis A. Bradley

From *Foreign Affairs*, July/August 2008

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*Law and the Long War: The Future of Justice in the Age of Terror*. Benjamin Wittes. Penguin Press, 2008, 277 pp. 25.95

Summary: Benjamin Wittes' *Law and the Long War* is required reading for anyone interested in the legal challenges posed by the war on terror.

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Lawyers and courts have become a central part of the Bush administration's "war on terror." The Justice Department's so-called torture memos and other legal documents have triggered extensive debates. The federal courts have entertained numerous habeas corpus challenges from detainees at the Guantánamo Bay detention center, as well as lawsuits on issues ranging from the electronic surveillance of U.S. citizens to the rendition of terrorist suspects to foreign countries. The Supreme Court has already issued three significant decisions concerning the war on terror, and by the time this review is published, it is expected to have issued a fourth.

Yet many fundamental legal questions remain unanswered. Who qualifies as an "enemy combatant" in this conflict? How must this classification be made? How long can such combatants be detained by the U.S. military without trial? These issues remain unresolved partly because the war on terror has been regulated not by Congress but by interactions between the executive branch and the courts, and the courts have tended to decide issues in an ad hoc and case-specific manner. Such an approach can be sensible, especially in the face of fluid circumstances. But as the war on terror becomes a more permanent state of affairs, it is becoming increasingly inadequate.

In an important new book, *Law and the Long War*, Benjamin Wittes, a fellow and the research director in public law at the Brookings Institution, critiques what he calls the "legal architecture" of the war on terror. He finds fault with many players: with the Bush administration, for its "consistent -- sometimes mindless" fixation on executive power and its repeated unwillingness to seek support from Congress; with Congress, for not asserting itself; with the administration's critics, for attempting to deny the White House the flexibility it legitimately needs to fight the war on terror; and with the Supreme Court, for using ongoing legal disputes "to carve itself a seat at the table in foreign and military policy matters over which it has [had], for good reasons, a historically limited role." Wittes' purpose, he explains, is to "shake somewhat the certainty" of both the executive-power enthusiasts and the administration's critics alike. He also seeks to move the debate beyond formal arguments about what is and what is not allowed under existing law toward consideration of a new legal regime that would provide the government with needed flexibility while protecting individual liberties.

With these goals in mind, Wittes offers general strategies for legislative reform on issues such as surveillance, detention, interrogation, rendition, and prosecution. Some of these strategies, such as the call to establish an administrative detention scheme that would be supervised by the courts and would involve periodic assessments of suspects' dangerousness, resemble proposals that have been floated recently. Others, such as requiring the CIA to disclose its interrogation techniques (and deviate from them only with express authorization from the president and with notification to Congress), are more novel. With all of these proposals, Wittes expresses the view that "only Congress can ultimately write the law of this long war."

In his critique as well as in his proposals for reform, Wittes engages with arguments from both the left and the right in a remarkably detached and fair-minded way. Unlike many commentators, he seems genuinely interested in moving past partisan politics and finding workable solutions. The result is a cogent and generally persuasive analysis. The book does, however, have some minor shortcomings: in particular, Wittes' criticism of the Supreme Court seems overstated, and his methodology is not always consistent.

## A MISSED METAPHOR

Critics of the Bush administration have argued from the start of the war on terror that it is a war only in a metaphorical sense, much like the "war on drugs" or the "war on poverty." This charge is unfair, and Wittes rightly disputes it. Al Qaeda is not a mere criminal organization; it is a military organization with the express purpose of fighting the United States. Even before the attacks of September 11, 2001, the United States was using military force against al Qaeda: in 1998, for example, President Bill Clinton ordered cruise-missile strikes after the U.S. embassies in Kenya and Tanzania were bombed. A week after 9/11, Congress gave the president broad authorization to use military force, implicitly targeting both the Taliban and al Qaeda. Within a month, the United States was engaged in a major and widely supported military campaign against both organizations in Afghanistan. The war metaphor for the battle against Islamist terrorism developed then, Wittes notes, because "in the short term, no remotely viable alternative to it existed."

But, as Wittes also explains, the war model is an imperfect fit for terrorism. In a traditional conflict, enemy troops typically wear uniforms and are affiliated with a state, which can compel them to fight. Thus, in such cases, it is both relatively easy to identify combatants and reasonable to treat them as dangerous. In addition, if they are captured, their home state can bring their detention to an end -- for example, by surrendering or entering into an armistice agreement.

It is much more difficult, however, to identify members of the enemy forces in the conflict with al Qaeda. The organization's chain of command is often unclear, and many individuals involved with the group neither wear uniforms nor are citizens of a state officially at war with the United States. This increases the likelihood that harmless civilians will be incorrectly identified as enemies -- a problem that has only been heightened in recent years as al Qaeda has morphed into a confederation of loosely associated groups. Formal membership in al Qaeda is also an inadequate proxy for dangerousness. The members of such a decentralized organization are likely to commit to it and to the hostilities it wages in varying degrees. Moreover, terrorist suspects are likely to be detained longer than traditional combatants, and perhaps significantly so, since they have no state to represent them and help bring the conflict to an end.

Ironically, as Wittes notes, although the war model was helpful to the executive branch early on, it may have unduly constrained the White House as the war on terror progressed. The template forced the executive branch to justify its policies by reference to "enemy combatants," "war crimes," and "the theater of war" -- categories that do not readily apply to a global struggle against a nonstate terrorist organization or advance the full range of goals that the executive branch wished to pursue. For example, a war model envisions that hostilities will eventually end, at which time enemy prisoners will be released, but in the conflict with al Qaeda, there may be a need to detain particularly dangerous operatives indefinitely. Meanwhile, as Wittes observes, "the farther into the conflict America waded and the less military the day-to-day operation of the conflict came to appear, the harder it became to sustain public support for [the administration's] activities."

## THE RULES OF LAW

The descriptive inadequacy of the war model creates problems for regulating the war on terror through law. By its nature, legal reasoning tends to be backward-looking: it focuses on the Constitution and existing statutes, judicial precedents, and historical practices rather than on designing a new framework. Lawyers and judges are now debating, for example, whether the war on terror is controlled by a Supreme Court decision from the Civil War era or another one from World War II, even though neither addresses the unique features of the current conflict.

There is nothing inherently wrong with this sort of reasoning. It is what lawyers and judges are trained to do, and it is useful in many settings. The past can sometimes provide important guidance about what works and what does not and about a nation's collective values. Furthermore, the approach is properly designed to limit the ability of administration lawyers and unelected federal judges to make fundamental policy choices. But it is not the ideal way to regulate a long-term security situation that raises difficult and novel issues. Courts tend to hide the functional considerations that influence their decisions, and as they strain to interpret statutes or precedents in ways that accommodate their preexisting preferences, they can undermine the rule of law.

Another problem is that there is little existing law that is directly applicable to the war on terror. None of the Supreme Court's war-powers decisions from earlier conflicts addresses this one's unique features. This is the

reason why in its 2004 decision in *Hamdi v. Rumsfeld*, the Supreme Court declined to rule on the most difficult legal questions, such as how to define who, other than fighters on the battlefield in Afghanistan, qualifies as an enemy combatant and how long these enemy combatants can be detained. International law also provides only limited guidance. The Geneva Conventions are surely some of the most important post-World War II treaties, but they are ill suited to regulate the war on terror because they are primarily focused on conflicts fought by organized state armies. It would be an overstatement to say that there is no law at all to guide efforts to combat terrorism, but as Wittes observes, much of what is available are "underdeveloped strands of law intended for other purposes, interacting in peculiar and often perverse ways."

Perhaps as a result, the current approach has tended to work in a piecemeal fashion. As Wittes persuasively explains, because the government's various tactics in the war on terror are interconnected, the government can adapt to a judicial ruling about one of them by altering its practices with respect to another. For instance, if the courts make it too difficult for the administration to resort to military trials, the government might start holding suspects without trial for a longer period. Increased judicial oversight of the treatment of detainees at Guantánamo may cause the military to rely more heavily on detention centers in, say, Afghanistan. This substitution effect -- a problem in other areas of judicial decision-making as well -- can make it difficult to develop a coherent and effective regulatory regime.

## JUDICIAL UNRESTRAINT

One of the few instances in which Wittes' analysis misses the mark is his treatment of the Supreme Court. Wittes is highly critical of the Court for playing too active a role in regulating the war on terror. He acknowledges that the Court has not yet imposed significant limitations on the government's ability to fight terrorism, but he finds "doctrinal seeds of a far more aggressive judicial posture" and warns of a "major expansion of judicial power over foreign policy and warfare."

This criticism seems both misdirected and unsupported. The Supreme Court's intervention in the war on terror has been understandable and restrained: it has stepped in to respond to the executive branch's aggressive claims and Congress' inattention while still limiting the scope of its involvement. The Court has been careful to rest its decisions not on the Constitution but on statutes, which Congress can amend. In fact, some of its decisions have already prompted congressional action -- a desirable outcome, according to Wittes. The Court has also avoided deciding issues not squarely presented to it, again allowing the political process a broad space in which to operate.

Wittes predicts with dismay that the Supreme Court will hold that the Guantánamo detainees have a constitutional right to have a federal court review the validity of their detentions. But much of this part of his critique is based on legal sources that he discounts in other parts of the book. Despite his general view that judicial precedents from prior wars are not very useful in the war on terror, for instance, he complains that an extraterritorial approach to habeas corpus would be inconsistent with the 1950 decision in *Johnson v. Eisentrager*. In any event, the circumstances of that case can be distinguished from those regarding the detentions in the war on terror: it concerned the military trial of German soldiers captured in China at the end of World War II -- detainees who were citizens of an enemy state and had already received a trial. Moreover, given Wittes' focus on the consequences of policies rather than the formal reasoning underlying them, he is hard-pressed to explain why someone held by the U.S. military in the United States should benefit from the full panoply of constitutional rights but someone who is held 90 miles offshore in a facility over which the U.S. government has just as much control should not.

## THE LAW OF CONSEQUENCES

As the issue of extraterritoriality illustrates, Wittes is not always consistent in his methodological approach. He tends to favor a consequentialist method, arguing that the war on terror should be regulated according not to abstract categories but to the specific policies that are most likely to be effective. And he criticizes both ideologues in the Bush administration and civil libertarians for being nonconsequentialist: according to him, the first group stakes out claims of executive power as a matter of principle, and the second tries to restrict the executive's flexibility based on ill-fitting legal rules or absolutist moral claims.

Yet when it comes to the issue of torture, Wittes appears to waver in his approach. He makes clear that he supports the interrogation tactic that the British used in 1946 with the wife of Rudolf Hoess, the commandant of

the Auschwitz concentration camp, in which they threatened to send her sons to a country where they would likely be killed. And he notes, "dig deep enough -- and it often does not take much digging -- and the most categorical opposition to coercive interrogation gives way to consequentialism." There are consequentialist arguments against ever allowing torture, but Wittes does not make them. Instead, he largely avoids the question of torture altogether, ostensibly because the administration does not currently claim it has the authority to use it against terrorist suspects and has reportedly discontinued the practice known as waterboarding. When Wittes does refer to torture, he asserts in passing that it should never be allowed, even in exceptional circumstances, without explaining whether that conclusion is based on consequentialist or nonconsequentialist grounds. Nor does he clarify the notoriously difficult distinction between "coercive interrogation," which he would allow in some circumstances, and "torture," which he would not. Wittes ultimately defends only the limited claim that "it is simply not clear that the optimal level of coercion in intelligence-gathering is zero."

Occasionally, Wittes' commitment to consequentialism also leads him to overlook other important values. This problem is most evident in his chapter on surveillance, much of which is dedicated to explaining how the 1978 Foreign Intelligence Surveillance Act does not adequately allow the government to take advantage of modern technologies. Wittes may be right about this (it is hard to tell given how little is known about the government's current surveillance needs), but he misses the main point, which is that after 9/11 the Bush administration secretly developed a warrantless surveillance program that very likely violated federal law, including criminal law. After the press revealed the program's existence in December 2005, the Justice Department suggested that as commander in chief, the president could simply disregard the 30-year-old statute -- staking out precisely the same type of extreme position on executive power that the administration took with respect to its infamous torture memos. Even if one concludes, like Wittes, that the executive branch had good reason for its surveillance program, this does not excuse its failure to seek authorization for it from Congress, at least not if one believes that transparency and respect for established institutional processes are important parts of the rule of law.

Despite these limitations, *Law and the Long War* deserves to be read widely. It is one of the most balanced and nonpolemic accounts of the legal issues in the war on terror to date, and its suggestions for reform are thoughtful and realistic. Written with enough attention to detail to engage legal experts, it is also accessible to lay readers interested in the general policy issues. Although not all of its themes are novel, it is more comprehensive and more substantive, and clearer and more concise, than many of the other recent treatments of this topic.