

2009

Review of Law and the Long War by Benjamin Wittes and Assessing Damage, Urging Action by the Eminent Jurists Panel on Terrorism, Counter-Terrorism, and Human Rights

Mark R. Shulman

Pace Law School, mshulman@law.pace.edu

Follow this and additional works at: <http://digitalcommons.pace.edu/lawfaculty>



Part of the [International Law Commons](#)

Recommended Citation

Mark R. Shulman, Review of Law and the Long War by Benjamin Wittes and Assessing Damage, Urging Action by the Eminent Jurists Panel on Terrorism, Counter-Terrorism, and Human Rights, 103 Am. J. Int'l L. 808 (2009).

This Book Review is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

from the overall luster of the book. The quality of Blum's scholarship is very high.

In sum, *Islands of Agreement* is a very useful contribution to the literature on conflict management and resolution. Blum has provided a helpful conceptual framework for thinking about the different types of agreements that develop between long-term rivals. She argues persuasively that the benefits of islands of agreement generally outweigh the costs and that most islands do not unduly prolong conflict by making it more tolerable. Her three case studies not only support her argument, but also are engaging political-historical essays in their own right. It would be interesting to read Blum's thoughts on the efficacy of "islands" in other contexts—especially the broader Arab-Israeli conflict, which one might hope to be the topic of a future book. For now, *Islands of Agreement* is good reading for anyone interested in the geology of peacemaking.

GEOFFREY R. WATSON

The Catholic University of America

Law and the Long War: The Future of Justice in the Age of Terror. By Benjamin Wittes. New York: Penguin Press, 2008. Pp. 305. Index. \$25.95.

Assessing Damage, Urging Action. By the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights. Geneva: International Commission of Jurists, 2009. Pp. 199. At <http://ejp.icj.org/IMG/EJP-Report.pdf>.

Two timely and powerful works effectively frame the legal and political debates about contemporary counterterrorism strategy, particularly in the United States. Read together, they also raise the most essential questions about the nature of the threats to peace and security. Benjamin Wittes has written the energetic and thought-provoking *Law and the Long War*. And a panel of Eminent Jurists of the International Commission of Jurists (Panel) has produced a substantial and hard-hitting report that assesses the damage done in the conduct of the so-called war on terror. Like

and a massive flow of civilians from south Lebanon to the north, Hezbollah was still able to fire Katyusha rockets into its northern territory." Should there be an "after" before "a massive flow"?

Wittes, the Panel focuses on the suitability of the legal architecture for responding to the threats posed by transnational terrorist networks. While Wittes argues that the Bush administration's policies failed mostly for domestic political reasons, the Panel concludes that they were bound to fail, based as they were on a misguided belief that the scale and scope of the terrorist threat was unprecedented and demanded significant deviations from the rule-of-law system upon which states have long relied for their security. For the Panel, the conduct of a "war on terror" itself constitutes one of the gravest threats ever posed to the international legal system.

Although not trained as a lawyer, Wittes is a longtime observer of the U.S. legal system who has written an important and insightful study of the "war on terror." A senior fellow at the Brookings Institution and formerly an editorial writer for the *Washington Post*, Wittes writes widely on controversial legal affairs. In previous books he proposed eliminating live confirmation hearings for federal judges and praised the conduct of Kenneth Starr's investigation of President Bill Clinton. In *Law and the Long War*, Wittes has turned his lively intellect to analyze the ways that the United States should investigate, detain, interrogate, and try accused terrorists in the "Age of Terror." Finding the efforts to date deficient, Wittes proposes a new "kind of constitution for the war on terrorism" (p. 145). In framing his argument, Wittes embraces the Bush administration's characterizations about the revolutionary nature and scope of the terrorist threat, while rejecting some of its means for addressing that threat.

Wittes stakes out a position as a serious "consequentialist." Because it underlies his methodology, the philosophy of this "consequentialist" approach calls out for a more explicit definition. I take it to mean that the merits of actions should be evaluated in light of, or at least not without regard to, their immediate consequences. In its robust form, this approach reads like a variation of Hobbes's philosophy that the ends of national security justify virtually any means that are reasonably tailored to the necessity. In its watered-down form, it may mean merely that policies should not be formulated, nor actions taken (or foresworn),

without regard to the gravity of their consequences. Bright lines leave policymakers insufficient space in which to maneuver.

To establish this position, Wittes treads a narrow, sometimes winding path between positions taken by the Bush administration and those of human rights advocates, civil libertarians, and the detainees' lawyers. For instance, because it might have prevented the outrageously effective attacks of 9/11, warrantless wiretapping of U.S. persons is both necessary and ethically defensible: the "government should have relatively easy access to telecommunications and other data, the mining of which has an essential role to play in combating terrorism and other transnational threats" (p. 224). We simply need Congress to provide enabling legislation that includes a few safeguards to ensure that the information is not abused. Wittes may well be correct about the need for access, but he provides little evidence in support of his position. As this reviewer sees the situation, the intelligence community had access to information sufficient to thwart the 9/11 attacks, and to the extent its members believed that they were unable to share or use that information, laws have been revised. Wittes rests his argument on a "thought experiment[:] ask yourself whether a year after the next horrific attack, anyone will still be arguing against [a warrantless wiretapping program]," and he sees the Foreign Intelligence Surveillance Act of 1978 as "represent[ing] an approach that captured the zeitgeist of its moment—but it is a moment in which many Americans no longer live" (p. 228).

This thought experiment embodies my principal concern about the book. It postulates a threat of unprecedented scope and scale, one capable of completely overwhelming the existing security apparatus and society's own capacity for resilience. Working from the assumption that his characterization of the threat is accurate, Wittes identifies significant gaps in the government's legal authority to collect potentially useful information, and he proposes remedies and protective measures that appear entirely sensible. But is his axiom correct? Does the terrorist threat necessitate a revolution in the nation's constitutional order?

Among the consequences of counterterrorism policy that Wittes seems not to contemplate are

the secondary effects of U.S. policy and practices upon the rest of the world. While accepting that a successful response to Al Qaeda requires a "long war" and a new body of law, Wittes fails to address the unintended consequences of these innovations. His new architecture would create a civil system of preventive detention that suspends the presumption of innocence and much due process. In his view, opposition to this measure is "almost certainly delusional" (p. 158). He would eliminate judicial review of government actions that affect aliens abroad, accept the moral costs of extraordinary renditions, and legitimate torture itself. He explains that we are building "a constitution for the war on terrorism" (p. 145). This structure would stand separate from ordinary law and the law of war to "avoid seepage of legal doctrines devised for terrorism into domains that already have coherent bodies of law of their own" (p. 146). Wittes expands on this hopeful distinction: "we don't want the nastiness we may sometimes tolerate in interrogations in this conflict to become acceptable treatment for American service members caught by foreign nations under the laws of war" (pp. 146–47). If only nonmilitary intelligence operatives torture, then the Geneva Conventions continue to protect soldiers. In short, Wittes shares with prominent members of the Bush administration an inability or unwillingness to account for the unintended, but inevitable, consequences of establishing a regime that employs "nastiness."

As others have noted, and contrary to the overall thrust of Wittes's argument, America's influence and consequently its interests are dramatically undermined by the widely held perception that it acts unilaterally, imperiously, or just hypocritically. Instead of acting in ways that would isolate Al Qaeda, the United States' disregard for international law and institutions has drawn recruits, sympathizers, and funds for the extremist groups. Moreover, unilateralism undermines the universality of hard-won rule-of-law norms that contribute so significantly to the fragile process of civilization. Wittes overlooks the distinct possibility that the long war—or even a clash of civilizations—might become a self-fulfilling prophecy. As the Panel notes, these adverse consequences

have taken a considerable toll on human rights and on other critical objectives and interests around the world.

In some ways, *Law and the Long War* has already been overtaken by events. One good illustration concerns the election of Barack Obama, who ran on a platform of change and a promise to close Guantánamo. Obama dropped the phrases “unlawful enemy combatants” and “war on terror,” and started to bring terrorist suspects to trial in federal district court.¹ These changes have surely altered the terms of the debate within America and the world, though they have not therefore mooted the purpose and point of *Law and the Long War*. The fight against terrorism may yet prove to be a long one, and Wittes’s conceptualization, policy concerns, and strategic choices may yet prove to be an essential part of the fight. But if these issues prove to be mostly the products of the faulty understanding and missteps of the Bush administration, then the book’s utility will be short-lived. Only time will tell.

The case of *Boumediene v. Bush*² provides another good illustration of events outpacing the analysis in *Law and the Long War*. Lakhdar Boumediene was a Guantánamo Bay detainee who argued that Congress lacked the capacity to deny his constitutional right to habeas corpus. Wittes’s book went to press after the Supreme Court heard oral arguments but before it issued its decision recognizing Boumediene’s constitutional right and rejecting some of Wittes’s arguments about the rights of security detainees and the role of courts in determining those rights. Nevertheless, as a long-time and well-informed court watcher, Wittes offers some trenchant observations about the separation of powers in the formation of national security policy. He clearly explains the limitations of policymaking by judges. Typically, they have no expertise in intelligence, national security, military affairs, or policymaking. They generally cannot choose the cases that come before them or when. Their access to information is, as a practical

matter, limited to what the parties present. And traditional judicial canons force judges to narrow their decisions in ways that may treat parties fairly but create ill-considered systems.³ Because of these constraints, Wittes would keep these cases out of the courts. Although he recognizes some of the failures of the Bush administration, as well as the constitutional problems inherent in its efforts to formulate policy insulated from the other branches, Wittes blames Congress for failing to step in to establish more legitimate and effective policies. He claims that

in the war on terrorism, Congress has done very nearly the opposite of countering the executive’s rather considerable ambitions. It has run from its own powers on questions on which its assertion of rightful authority would be helpful, and it has sloughed off the difficult choices onto the two branches less capable than itself of designing new systems for novel problems. (P. 11)

Notwithstanding Wittes’s suggestion that it was not assertive enough, in reality Congress has been remarkably active over the past eight years (albeit largely in line with the legislative agenda of the Bush administration). Within the first few years following 9/11, it issued the sweeping Authorization for the Use of Military Force and took the unprecedented step of pre-authorizing war against Iraq. In order to detain and interrogate those in U.S. custody, Congress curtailed the due process protections of immigrants and passed the Detainee Treatment Act and then the Military Commissions Act, delegating to the president virtually every constitutionally permissible power (and then some, it has been argued). In order to permit gathering intelligence from people not in custody, it revised the Foreign Intelligence

¹ Mark R. Shulman, *The “War on Terror” Is Over—Now What? Restoring the Four Freedoms as a Foundation for Peace and Security*, 3 J. NAT’L SEC. L. & POL’Y 263 (2009).

² 128 S.Ct. 2229 (2008).

³ Owen Fiss, *The Perils of Minimalism*, THEORETICAL INQUIRIES IN L., no. 2, 2008, Art. 13 (2008) (showing “how minimalism has led to legislative enactments that deprive the prisoners of basic rights and that, as a practical matter, compromise the capacity of the Supreme Court ever to adequately address the [detainees’] claims.”); Stephen I. Vladeck, *The Long War, The Federal Courts, and the Necessity/Legality Paradox* 43 U. RICH. L. REV. (2009) (review essay of *Law and the Long War*, taking a critical view of Wittes’s narrative of the role of the courts in shaping U.S. counterterrorism policies).

Surveillance Act of 1978, gave amnesty to telecommunications companies that had complied with extralegal orders to provide information, and passed the USA PATRIOT Act that tore down barriers to intelligence sharing among agencies. It has also passed numerous laws to tackle terrorist financing and authorized in excess of a trillion dollars to make America safe. From this record, one might well conclude not that Congress has been shirking its duties, but that it is responding as it sees fit and in accordance with the requirements of the Constitution and the democratic process. Moreover, and as Wittes acknowledges, had President Bush escaped the constraints imposed by his unitary executive theory, he might well have requested and received even more tools from Congress.

When Wittes complains about congressional inactivity or judicial hyperactivity, his actual complaint, though not stated in these terms, is that our eighteenth-century Constitution is unfit for meeting the terrorist threat. That Constitution has survived, however, for over two centuries, during which the nation has faced an astonishing range of threats. Arguably, the Civil War posed the greatest threat to the Union. Thirteen states seceded. The war killed more Americans than all other wars combined. In the face of this truly unprecedented threat to the nation's security, the Supreme Court concluded the 1866 case of *Ex parte Milligan* as follows:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.⁴

⁴ 71 U.S. (4 Wall) 2, 120–21.

Significantly, the Civil War experience gave the nation no reason to trim back civil rights. Congress used the occasion, instead, to expand them by passing the Thirteenth, Fourteenth, and Fifteenth Amendments.

When we turn to *Assessing Damage, Urging Action*, it is immediately apparent that the Eminent Jurists see the world in a much different way than Wittes. Much like the Radical Republicans who dominated Congress in the 1860s, the Panel sees the recognition of human dignity as the key to security, progress, and prosperity. Chaired by former South African Chief Justice Arthur Chaskalson, who had in 1963 served on Nelson Mandela's defense team, the Panel included diverse judges, lawyers, and academics with first-class credentials in human rights and humanitarian affairs: Georges Abi-Saab (Egypt), Robert Goldman (United States), Hina Jilani (Pakistan), Viti Muntarbhorn (Thailand), Mary Robinson (Ireland), Stefan Trechsel (Switzerland), and Raúl Zaffaroni (Argentina). Other than Robinson, who served with distinction as president of Ireland, none appears to have significant military or executive experience. The International Commission of Jurists secretariat staff supported the Panel, which launched its global study in 2005. Panel members and staff convened public and private hearings on every continent, collecting first-hand information on experiences with counterterrorism campaigns over the past forty years. They met publicly with leaders of the bench and bar, human rights activists, academics, and other members of the public. Privately, they met with a wide swath of government officials. While the particular focus was the ongoing campaigns against Al Qaeda and its affiliates, the Panel took in a great deal of information about earlier counterterrorism campaigns around the world. Culling through many thousands of pages of notes and records (many posted now on the commission's Web site), the staff drafted while Panel members commented and edited. Notwithstanding this cumbersome process, the resulting report offers a pellucid assault on the concept and strategy of the so-called war on terror. Steeped in the historical record and unafraid of veering into political issues, the Panel

takes as its basic tenet that “any implied dichotomy between securing people’s rights and people’s security is wrong. Upholding human rights is not a matter of being ‘soft’ on terrorism” (p. 16). The report concludes: “It is time for change” (p. 25).

The Panel’s conclusions are readily summarized. While flatly rejecting the concept of a “war on terror,” they acknowledge that terrorism poses serious threats and that states must strive to counter it. But since 9/11, states have demonstrated a worrying propensity to discard hard-won legal institutions that had previously done much to ensure security. By deviating from ordinary criminal law and undermining international law, these states are acting in gravely counterproductive ways. They fail to employ the most powerful tools for addressing terrorist threats, and they undermine their own legitimacy—in effect, feeding the discontent that nourishes terrorism. Moreover, the historical record reveals a trend that consolidating power in the executive leads to abuses having nothing to do with the counterterrorism agenda.

The Panel rejects the notion that states need new legal paradigms or tools in order to counter the threat of transnational terrorist networks. Most of the “change” that the Panel intends to effect is, as one might therefore expect, a return to the pre-9/11 norms of international and domestic law. In short, the rule of law remains the most effective counterterrorism tool; derogations from it produce seriously adverse consequences. They undermine the overall effectiveness of the rule-of-law system and feed cycles of hatred and violence.

Although written without reference to *Law and the Long War*, the Panel’s report frequently seems like an effort to refute the premises upon which Wittes wrote and the policies that he seeks to promote. The Panel focuses on the cyclical dynamics of violence and brutality. In contrast, Wittes implies that the consequences of violence can be wholly beneficial and fully contained. His book opens with a chilling story intended to shock the reader out of his smug “nonconsequentialism.” In the months following the close of World War II, British soldiers searched in vain for Rudolf Höss, the one-time commandant of Auschwitz. In due course, they located his wife, who refused to pro-

vide information about his location. To compel her to give up her husband, the British threatened to render their son to the Soviet Union. Forced to choose between the lives of her husband and her son, Frau Höss capitulated. Her husband was quickly captured, and after serving as a witness at Nuremberg, he was tried by the Polish government and hanged on gallows specially constructed on the ground of the former concentration camp that he had commanded.

For Wittes, the suffering that Frau Höss experienced during this interrogation was outweighed by the benefit that society received through the capture of her husband. For this reviewer, the Höss incident raises a number of other considerations, including: how to weigh the value of information; the definition of cruel, inhumane, and degrading treatment; the roles of noncombatants; and the mechanics of transitional justice. It also brings into sharp focus the contrast between technical expediency and due process, between capturing a heinous criminal and abiding by the standards of civilization. In the long run, is civilization better off allowing some mass murderers to escape, recognizing that such is the price of maintaining a robust system of the rule of law? From Wittes’s perspective, what matters is that Höss served as a valuable witness at Nuremberg and was then executed; Frau Höss’s ordeal—as engineered and carried out by British military personnel—was no more than the collateral effect of a process that achieved a worthy objective. Wittes writes that he thanks God that the British soldiers had been willing to subject Frau Höss to this ordeal (p. 3). His gratitude glosses over the kind of effects that trouble the Panel. What happened to Frau Höss, the British soldiers, their families, and their communities? What effect did this kind of action have on the development of a postwar system of justice? What signals did it send (and continue to send through his retelling) about who we are and who we should be? Moreover, by focusing attention on one event in which the desired outcome was achieved (the capture and execution of the villain), are we missing one or possibly many stories about other wives who were mistreated in vain, either because they would not reveal their husbands’ whereabouts or because they had been telling the

truth all along? What about the documented incidents of innocent people being tortured to death or of torture actually hindering the gathering of intelligence? Wittes does not address these kinds of questions. Instead, he encourages the reader to wonder whether there might be other instances when a measure of brutality would make the world a much better place.

The Panel, unlike Wittes, addresses these kinds of questions by examining the systemic effects of counterterrorism regimes from recent history, focusing mainly on the experiences of Northern Ireland, Argentina, and Peru. The Panel observes that Great Britain's efforts to suppress political extremism in Northern Ireland succeeded only when it suspended its own role in perpetuating the cycle of violence. London abandoned "failed detention policies" that had driven hundreds of young men into forming a highly efficient insurgency force, and it abandoned the special purpose Diplock Courts and restored a legal system with all the protections of due process and substantive criminal law. This course correction enabled London to halt processes that were corrupting the British rule of law and to start an authentic peace process for Northern Ireland. During the late twentieth century, states across South America and South Asia had to learn similar, equally painful lessons. Many had themselves been feeding terror through their own brutal policies.

Eight years after 9/11, the legal framework for responding to the threat of transnational terrorism remains hotly contested. With their contending visions, these two works—Wittes's *Law and the Long War* and the Panel's *Assessing Damage, Urging Action*—outline the terms of this vital debate. Both are thoroughly researched, thoughtfully reasoned, and fearlessly argued. And as of this writing, it is unclear which vision will prevail.

MARK R. SHULMAN
Pace University School of Law

Targeted Killing in International Law. By Nils Melzer. Oxford, New York: Oxford University Press, 2008. Pp. liv, 468. Index. \$130, £65, cloth; \$60, £29.99, paper.

Few international law topics evoke such a visceral response as "targeted killings." The attention

paid them is somewhat curious since attacks must actually be "targeted" if they are to comply with the international humanitarian law (IHL). Article 51.4 of Additional Protocol I of 1977¹ expressly provides that "indiscriminate attacks are prohibited," explaining that they include those "which are not directed at a military objective . . . and consequently . . . are of a nature to strike military objectives and civilians or civilian objects without distinction." The United States, *inter alia*, is not a party to Additional Protocol I. However, the *Customary International Humanitarian Law* study of the International Committee of the Red Cross (ICRC) correctly asserts in Rules 11 and 12 that an analogous prohibition exists in customary law for both international and noninternational armed conflicts.² Human rights norms, binding in certain circumstances of armed conflict and generally applicable in the absence thereof, are equally demanding. There is no question that an attack that is *not* targeted violates international law.

The crux of the matter is, instead, who it is that is targeted and in what circumstances. During armed conflict, the rules are, at least textually, straightforward. Article 48 of Additional Protocol I, which applies in international armed conflict, requires belligerents to "at all times distinguish between the civilian population and combatants . . . and accordingly . . . direct their operations only against military objectives." This broad restatement of the customary law principle of distinction is operationalized in Article 51: "The civilian population as such, as well as individual civilians, shall not be the object of attack." However, the Protocol cautions that civilians lose this protection from attack "for such time as they take a direct part in hostilities." Common Article 3 to the four 1949 Geneva Conventions similarly forbids, in "conflicts not of an international character," acts of "violence to life and person" directed at "persons taking no active part in hostilities"—a

¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 UNTS 3, *reprinted in* 16 ILM 1391 (1977).

² 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 37–43 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).