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Trial by . . . what?;

Law and the Long War The Future of Justice in the Age of Terror Benjamin Wittes Penguin Press: 306 pp., \$25.95

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Benjamin Wittes is an eternal optimist. In 2006, he wrote a smart little book, "Confirmation Wars," which argued that U.S. Supreme Court nominees should not have to endure lengthy appearances before the Senate Judiciary Committee just so that preening senators can wax loquacious for hour after hour of live television coverage. Don't hold your breath.

Now the Brookings Institution fellow and former editorial writer for the Washington Post is back with "Law and the Long War," a rich and thoughtful volume that calls on Congress to extract the U.S. government from the deepening legal morass created by what he views as the Bush administration's ill-managed "war on terror." Don't hold your breath for this, either.

Since Sept. 11, 2001, the executive branch's aggressive efforts to disable possible Al Qaeda terrorists have moved forward with only limited legislative contributions from Congress. Now the administration's detention of hundreds of alleged Al Qaeda operatives at the U.S. naval base in Guantanamo Bay, Cuba, many of whom have been imprisoned there for more than six years, is generating a landslide of courtroom litigation in which the government is playing a losing hand.

A jerry-built system of "Combatant Status Review Tribunals" and attendant military administrative proceedings was set up by the Pentagon to process the prisoners. But Wittes emphasizes that Congress "never grounded the detentions in law -- meaning that the entire edifice . . . stands on a bed of sand." The shakiness of this structure has become especially apparent in recent weeks: First the high court, in a case titled *Boumediene vs. Bush*, ruled that the Guantanamo detainees have the right to petition for their individual release through habeas corpus actions in federal court. Then a federal appeals court found that Huzaifa Parhat, one of 17 Guantanamo detainees who are Uighur Muslims from western China, did not merit any detention as an "unlawful enemy combatant" whatsoever.

These court rulings amplify what Wittes terms "a certain sloppiness in the military's categorization of and standards for the detainees," the "vast majority" of whom "were not captured by American forces" but were handed over by Afghan or Pakistani forces. As a result, he writes, many of the specific allegations against particular individuals are "vague, weakly sourced, entirely unsourced, or even stated as possibilities or likelihoods, rather than as certainties." And some detainees' denials of involvement with Al Qaeda seem "alarmingly credible, particularly when coupled with especially thin government allegations." (Of the roughly 270 remaining Guantanamo detainees, several dozen may be able to win release through habeas corpus petitions. But those for whom the U.S. government can show evidence of Al Qaeda loyalties will no doubt remain prisoners for years to come.)

The ungainly terminology applied to the detainees reflects how the struggle with Al Qaeda -- now "a confederation of loosely associated groups," as former State Department counselor Curtis A. Bradley notes in the current issue of *Foreign Affairs* -- fails to fit the traditional concept, and legal doctrine, of "war." From the outset of the attack on Afghanistan in 2001, the administration refused to treat Al Qaeda agents and Afghan Taliban as prisoners of war and generally avoided bringing criminal charges that would lead to full-blown trials in federal courts.

Wittes is sympathetic to this legal conundrum, and he readily acknowledges that the fight against terrorism, a conflict that "seems like a permanent state of affairs" and promises "no endpoint for hostilities," cannot usefully be shoehorned into the existing constitutional law of war. "The answers to our questions don't lie in the Constitution," he asserts, but instead "in our own minds and intellects."

What Wittes envisions is neither "the system of wartime detentions that has evolved since September 11" nor "a purer law enforcement approach to locking up the bad guys" after a criminal conviction. Instead, he proposes that Congress create "a carefully crafted administrative detention scheme" whereby detainees' indefinite incarceration would be ratified, or voided, by a special civilian court using a "pared down" approach to "fundamental fairness and due process" rather than the full panoply of rights normally accorded criminal defendants. Exactly what judicial recourse such detainees will have should be "a matter of legislative policy, not a question of constitutional command," he asserts, blithely adding that "the major reason to hold a trial is a kind of legal public relations" aimed at assuaging world opinion.

Underlying Wittes' proposal is both a conviction that terrorism is fundamentally different from traditional crimes, since it "involves horrors on an altogether different scale," and a deep-seated belief that we owe dramatically less judicial protection to nonresident aliens than U.S. citizens are entitled to, even if aliens are held incommunicado in long-term military detention. "No society can afford inviolable principles and inflexible rules concerning those steps on which its ultimate fate or interests depend," he declares. "Ultimate fate" conjures up the familiar argument that no rules should limit the interrogation of a suspect who may have planted a ticking bomb in Times Square, but the phrase "or interests" opens this barn door as wide as the human imagination can roam.

"Law and the Long War" addresses an impressively broad range of questions, but its greatest shortcoming is Wittes' failure to fully and fairly plumb whether U.S. criminal law already offers the best possible solutions to the problems he raises. As Georgetown University law professor David Cole notes in a recent essay in the *New York Review of Books*, Britain has successfully prosecuted all manner of jihadist conspiracy plots through its criminal courts, with numerous groups of defendants sentenced to long prison terms. Cole suggests that the British approach has been informed first and foremost by long and bloody experience -- 1,800 deaths and 20,000 injuries -- with repeated terrorist attacks by the Irish Republican Army in decades past. Today, Britain's multicultural population offers vastly more candidates for terrorist recruiters than does the United States, but at present the only debate there is over the maximum length of detention before a suspect must be formally charged, in stark contrast to the U.S. legal morass that Wittes hopes to resolve.

It may be too late for the comprehensive legislative solution Wittes imagines, especially since he concludes that "it is most unlikely that Congress will suddenly rise from a long slumber and begin energetically writing imaginative new laws." Instead, especially in light of the Supreme Court's latest ruling that detainees must be given access to the federal courts, executive excess and congressional passivity will now be tempered by appropriate -- though tragically tardy --

judicial review. Wittes rues that prospect, just as he rues how the detainees have "somehow morphed from terrorists into victims." But as the high court majority observed, "the fact that these detainees have been denied meaningful access to a judicial forum for a period of years [renders] these cases exceptional."

Guantanamo, even Wittes acknowledges, "has come to symbolize injustice and arbitrary detention." Perhaps in time the federal courts will write a palatable end to this otherwise ignominious chapter of American history.