NATIONAL AFFAIRS

Legalism in Wartime

Gabriel Schoenfeld

Ever since the September 11th attacks plunged America into a global conflict against radical Islamist terror groups — not to mention ground wars in Iraq and Afghanistan — we have learned a great deal about how our country organizes for and wages war. Among the most striking lessons we have learned is that lawyers and judges now play starring roles both in making national-security policy and in overseeing military operations. The result is that, when it comes to the American government's efforts to provide for the common defense, a far-reaching legalism has taken hold.

Once deferential to the executive branch on matters of national security, federal judges now intervene in the formulation and application of a broad range of defense policies — from the interrogation, detention, and ultimate disposition of enemy combatants, to the search for terror cells by means of electronic surveillance, to security screening at airports and border checkpoints, to the operation of Predator drones. Meanwhile, within the national-security bureaucracies of the executive branch itself, military and intelligence policies have become the purview of an expanding cadre of attorneys.

Outside of these bureaucracies, the media, scholars, and civil-liberties groups cheer on the new legalism; through publicity campaigns and lawsuits, they press for ever more restrictive legal controls over America's pursuit of its security aims. The workings of international law and the actions of foreign courts further tie the hands of the executive, and place more influence into those of outside lawyers.

A constantly changing balance of power among the three branches of our government is as old as the Constitution itself; it is part of the genius

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of the American system. And yet significant intrusion by lawyers and courts into the conduct of national security and warfare is not something the framers of the Constitution even remotely envisioned. Under the arrangement they established, the political branches were to hold the reins in wartime. The president was to make treaties and direct the military as commander in chief, and his freedom of action was to be hemmed in by the powers granted to Congress to appropriate funds, ratify treaties, give its advice and consent regarding appointments, and declare war. The only significant foreign-policy power granted to the Supreme Court was the authority to interpret treaties. The executive, wrote Alexander Hamilton in Federalist No. 78, "holds the sword of the community." The legislature, for its part, "commands the purse," while the judiciary "has no influence over either the sword or the purse."

For most of our history, Hamilton's view prevailed. Thus in 1951, in his classic study *The Supreme Court and the Commander in Chief*, political scientist Clinton Rossiter could still observe that the Court "has refused to speak about the powers of the President as commander in chief in any but the most guarded terms. It has been respectful, complimentary, on occasion properly awed, but it has never embarked on one of those expansive flights of dicta into which it has been so often tempted by other great constitutional questions."

So how did a legalistic approach to war come to predominate today? Over the course of the past few decades, several changes — at times incremental and imperceptible, at other times sweeping and dramatic — have increasingly empowered the judicial branch, at the expense of Congress and the president, on matters of national security. This process has surely had some positive consequences — granting greater legitimacy to both strategic and tactical decisions in wartime, and ensuring that the rule of law is not suspended, even in great crises. But it also has hazardous implications — for our nation's ability to defend itself, and for the integrity and proper functioning of our constitutional system.

PRECURSORS TO LEGALISM

Over the course of the 20th century, judicial encroachment into national-security policy was made possible by two important forces: the civil-liberties movement that took shape after World War I, and a new, more internationalist understanding of war crimes and the laws of war in the wake of World War II.

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During the First World War, the administration of President Woodrow Wilson imposed repressive measures to stifle dissent — including restrictions on speech by anti-war activists, censorship of mail, and mass arrests of immigrants suspected of disloyalty or anarchy. Wilson's crackdown gave rise to a civil-liberties movement, including, most notably, the National Civil Liberties Bureau, which in 1920 changed its name to the American Civil Liberties Union. In the following decades, this movement pursued two sometimes contradictory objectives: the expansion of the sphere of personal freedom in American life, and the advancement of a "progressive" political agenda.

The tension between these objectives frequently flared in the movement's early years. From the 1930s through the 1950s, the presence of American communists (and communist fellow-travelers) in the leading councils of the ACLU led to bitter divisions within the organization. Of these controversial figures, Corliss Lamont — who avidly defended the Soviet Union during Stalin's most repressive phases — was pre-eminent; serving on the ACLU's board of directors for 22 years, he was a precursor of the radical civil-liberties lawyers of recent decades.

As with today's civil-liberties activists, when those early ACLU radicals saw their progressive aims in conflict with the preservation of liberty, liberty was often the loser. Indeed, figures like Lamont were among the most avid *supporters* of President Franklin Roosevelt's decision to intern 150,000 Japanese-Americans after Pearl Harbor. Seizing upon every available avenue to advance any policy that might aid the American war effort — and thereby the Soviet war effort — Lamont in fact called ACLU attempts to challenge the internment policy obstructionist, declaring that his own organization's actions were tantamount to lending aid and comfort to the enemy. (It is worth noting that Lamont remains a revered figure in some quarters; Columbia University's law school has an endowed "Corliss Lamont Civil Liberties Chair.")

In the latter half of the 20th century, however, and particularly during and after the Vietnam War, civil-liberties activists moved deep into the national-security domain, striving to use the courts to restrain the executive. This was not an entirely novel set of tactics, but now it dovetailed with the increasing activism of the Warren Court and the entire judiciary. A major landmark in this process was the 1973 case *Holtzman v. Schlesinger*. The case involved the controversial bombing of parts of Cambodia, undertaken by the Nixon administration in an

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effort to cut off shipments of arms to North Vietnam and to pressure the Hanoi regime. In June 1973, the Congress voted to cut off funding to operations involving Cambodian territory beginning in August of that year. But in July, before the funding ban took effect, New York congresswoman Elizabeth Holtzman (represented by ACLU attorneys) filed suit in federal court arguing that continued bombing was not authorized by Congress and was therefore unconstitutional. A federal judge agreed with Holtzman and ordered a halt to the bombing, but the administration quickly appealed the decision to the U.S. Court of Appeals for the Second Circuit, which stayed the lower court's injunction. Holtzman appealed to the Supreme Court, which was out of session; Justice Thurgood Marshall denied her appeal. But Holtzman then made use of a provision that allowed her to turn to another justice for redress. The ACLU accordingly sent one of its lawyers across the country to the remote holiday redoubt of Justice William Douglas in Goose Prairie, Washington, and Douglas vacated the stay.

Here was a watershed moment. In effect, the judicial branch of government was now directing the application of American air power in real time. The Nixon administration immediately asked Chief Justice Warren Burger to convene the Court and reconsider Douglas's stay. Conferring by telephone that day, the full Supreme Court overruled Douglas (with all eight of his colleagues siding against him) and rapidly moved to free the administration's hands. Air operations over Cambodia never halted, but the ACLU had certainly advanced its cause. Indeed, the organization may have lost the legal battle but won the war; the ACLU counts *Holtzman* among its "most important U.S. Supreme Court victories." In unprecedented fashion, it had inserted, according to the Second Circuit Court of Appeals, "a bluntly political and not a judicial question" into the machinery of the courts, and successfully maneuvered it to the system's apex. Along the way, the organization had achieved a parallel goal: generating a blaze of publicity for the anti-war cause.

The civil-liberties movement's campaign to make war a judicial matter received a powerful boost from the broader elevation of judicial forms in the international arena in the aftermath of World War II. The Nuremberg trials — called by the victorious allies in 1945 to prosecute those most responsible for the horrors of Nazi Germany — placed international courts in an exalted position, with the authority to prosecute and punish war crimes. The trials gave moral and juridical force to the

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notion that the individual and his rights, rather than the state, are the locus of international jurisprudence.

The formation of the United Nations in 1945, moreover, committed the United States to a set of international norms that intruded upon the internal affairs of nations. And through the International Court of Justice, the U.N. charter created an institution that could, theoretically at least, enforce them. Any gap was soon filled by the rise of the doctrine of "universal jurisdiction," under which some nations asserted the right to prosecute individuals for alleged crimes committed outside of their own borders. The spread of this doctrine has led to the proliferation of extradition requests against foreign officials for crimes, real and alleged, in foreign civil conflicts. To cite one prominent example, in 1997, Spanish judge Baltasar Garzón used universal jurisdiction to pursue former Chilean dictator Augusto Pinochet. Some American officials — most notably former secretary of state Henry Kissinger — are among those who have subsequently been targeted under the same legal regime. More recently, Israeli officials have faced similar attempts at prosecution for war crimes allegedly committed in the 2006 war in the Gaza Strip.

Over time, multilateral agreements have also given rise to a body of customary international law that has assumed an increasingly prominent role in our domestic legal order. Lawyers inside our government often try to conform to these international standards when formulating policy, and lawyers outside our government appeal to these standards when litigating against American national-security decisions. For instance, while it is generally accepted that customary international law establishes standards for the treatment of captured combatants, there is sharp disagreement about precisely what those standards require and how and to whom they should be applied. The American prison in Guantánamo Bay, Cuba, is on one hand decried as a gross violation of international norms — the "Gulag of our times," in the words of Amnesty International — and yet on the other hand defended by its architects as punctiliously in accord with customary international law.

Many in our legal elite view the increasing reach of customary international law with approval. In the academic legal community especially, an influential school of thought maintains that customary international law exists on the same plane as treaties negotiated by the president and ratified by the Senate. In effect, they argue, the decisions of our representative government should be supplanted by mechanisms that bind

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our freedom of action without our consent. Indeed, there is nothing "inherently undemocratic about judges applying norms of customary law that were made outside the United States," writes Harold Koh — former dean of Yale Law School, a leading exponent of the transnational legal movement, and, as it happens, the top legal advisor at the Department of State.

The development of the civil-liberties movement, the Nuremberg trials, and post-war international covenants form a kind of backdrop to this story. But in the foreground stands the legacy of the Nixon years. The crisis of Watergate had an enduring impact on attitudes toward the dangers of presidential power. And these misgivings were fueled by allegations of CIA wrongdoing in the 1960s and '70s, including charges (brought to light in public inquiries) that the agency had spied on Americans involved in the anti-war movement and had plotted assassination attempts against foreign leaders.

Moreover, the grinding southeast Asian war into which the United States had seemed ineluctably to slide provoked Congress into substantially altering the balance of power among the branches of government, strengthening the position of Congress relative to that of the president. The most significant product of this effort was the War Powers Resolution of 1973 — passed in the teeth of a presidential veto — which, among other provisions, stipulated that an American president could send soldiers into action abroad only with authorization from Congress. The resolution raised the prospect of a collision between the two political branches of government, which threatened to invite the courts to intervene — and so to further widen the crack opened in *Holtzman*.

Beginning in the 1980s, members of Congress walked into this breach by filing a succession of lawsuits challenging presidential administrations for alleged infringement of the resolution's terms. These suits went after the Reagan administration for sending military advisors to El Salvador in 1981, then for its decision to invade Grenada in 1983, and then for U.S. military and intelligence operations in Nicaragua in the late '80s. Lawsuits were also brought against the administration of President George H. W. Bush for its intervention in the Persian Gulf in 1990, and against the Clinton administration for America's involvement in Kosovo in the late 1990s. To date, the courts have turned aside such suits, dismissing them as non-justiciable political matters. But given the increasing self-assurance with which the judiciary has entered the

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national-security arena, a new dynamic — one that strongly favors the courts over our government's political branches — may be in the offing.

the war on terror

The rise of radical Islamic terrorism over the past two decades has brought the issue of judicial encroachment into war-making to a head. For better or worse, after the first bombing of the World Trade Center in 1993, the United States treated terrorism primarily as a criminal-justice and law-enforcement matter; al-Qaeda was treated not as a network of belligerents, but regarded rather as a criminal conspiracy. The Justice Department and the courts were thus brought into the action and became the primary players in America's pursuit of its terrorist enemies. The 1995 trial of Egyptian cleric Omar Abdel-Rahman, often called "the blind sheikh" — arrested for his involvement in the Trade Center bombing, a conspiracy to blow up New York City landmarks, and a plot to kill Egyptian leader Hosni Mubarak — was a milestone in this process. Rahman and nine co-defendants were convicted in a New York federal court of 48 out of 50 charges, including seditious conspiracy. The *New York Times* applauded the verdict in an editorial, explaining that our constitutional democracy, in protecting itself from terrorism, "has the added burden of responding in accordance with law and principle, balancing considerations of security and justice."

The *Times*, of course, was perfectly correct. But left unresolved was the question of where the balance between security and justice should be struck. After September 11, 2001, the law-enforcement approach to terrorism was, at least superficially, dispensed with in favor of military action abroad. President George W. Bush told the nation that the attacks were not crimes but acts of war against America — and that their perpetrators, as well as those states and organizations that had abetted them, would be treated accordingly. But because our homeland was a central theater of operations (as it had not been since the Civil War), the domestic legal apparatus took on a prominent role in America's response. Trials of terrorists in civilian courts — like those of shoe-bomber Richard Reid in 2002 and of would-be September 11th hijacker Zacarias Moussaoui in 2006 — thus continued, even as the Bush administration pledged that a "war on terrorism" should supplant the criminal-justice approach.

But of all the developments of the post-September 11th era, the one that has pushed courts into the military arena most is the detention of accused al-Qaeda terrorists. The long-term — indeed, the potentially

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indefinite — incarceration of detainees at Guantánamo, coupled with revelations about the harsh techniques used in interrogating them, as well as the spectacle of the Abu Ghraib prison in Iraq, generated intense concern here and abroad. The Bush administration's continued insistence that its freedom to conduct the war on terror was unfettered, as well as its failure to seek support for key policies from even a Republican-controlled Congress, created an angry backlash — channeled, in many cases, through the courts. Habeas corpus cases began making their way through the judicial system, leading to landmark Supreme Court decisions that represented extraordinary intrusions by the judiciary into the realm of national-security policymaking.

For instance, in a 5-3 ruling in the 2006 case *Hamdan v. Rumsfeld*, the Court knocked down the military commissions erected by the Bush administration to try captured enemy combatants held at Guantánamo Bay, ruling that these tribunals lacked congressional authorization. At the request of the Bush administration, Congress responded swiftly with the Military Commissions Act of 2006, designed to put the commissions on sound legislative footing. And yet in 2008 the Court again stepped in, ruling 5-4 in *Boumediene v. Bush* that the military commissions established by Congress, too, failed to sufficiently protect the rights of detainees. The Court thus placed itself above both the executive *and* the legislature in one of the most militarily and politically sensitive aspects of counterterrorism. "Henceforth, as today's opinion makes unnervingly clear," wrote Justice Scalia acidly in his dissent, "how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails."

As the courts have begun to play a far more aggressive role in determining war policy, a parallel shift has taken place within the American bar. It is a basic principle of American justice that everyone deserves a zealous defense; few contest the idea that even hardened terrorists should be entitled to counsel, whether they are tried in civilian courts or before military commissions. Even so, members of what has been dubbed the "Guantánamo bar" — the 500 or so lawyers (many of them from top-drawer firms, leading law schools, and civil-liberties organizations) who are representing terrorist defendants — have often gone far beyond providing competent counsel in court.

Some of the attorneys have launched public-relations campaigns to "humanize" their clients in the eyes of the American people, hoping

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to generate political opposition to their clients' continued incarceration. For example, in 2007, the book *Poems From Guantánamo: The Detainees Speak* was published by Marc Falkoff — an attorney who represented several detainees who contributed "poetry" to the volume.

Another stratagem has been to demand access to classified materials in discovery proceedings, tying both the courts and our intelligence agencies in knots. This tactic was certainly deployed in *Hamdan*, when defense counsel sought access to high-value detainees who may have had knowledge of the conditions surrounding Salim Hamdan's interrogation after his capture in Afghanistan. The aim of such efforts is, of course, "graymail" — pressing the government to choose between disclosing vital secrets and continuing with its case.

However novel such practices may be with respect to enemy prisoners during wartime, they are not illegal; finding ways to hinder prosecution is, after all, what good lawyers do. But some members of the Guantánamo bar have clearly overstepped proper bounds. In 2008, the ACLU — together with the National Association of Criminal Defense Lawyers — initiated the John Adams Project, purportedly intended to assist military counsel defending prisoners held at Guantánamo. Researchers for the project tracked down and photographed CIA officers living in the Washington, D.C., area, including some with covert status. Those photographs were then brought to Guantánamo and surreptitiously given to prisoners, evidently as part of an effort to identify CIA officers who had been involved in "enhanced interrogations" or had served in CIA "black sites" overseas. These activities, presumably meant to prepare the way for lawsuits against individual CIA officers, may have also violated a number of laws, including the Intelligence Identities Protection Act. Indeed, last year, both *Newsweek* and the *Washington Times* reported that a federal grand jury was investigating the matter.

One attorney who certainly violated the law was Lynne Stewart, who represented "blind sheikh" Omar Abdel-Rahman. While her client was serving a life sentence in federal prison, Stewart was ostensibly helping him to argue for improved conditions; in truth, she helped him convey instructions to his Egypt-based terrorist organization, al-Gama'a al-Islamiyya, to commit acts of violence. In 2005, Stewart herself was convicted on charges of providing material support to terrorism; last year, following a lengthy appeals process, her original sentence — 28 months — was increased to ten years. Stewart is a fringe figure, but

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not without her supporters in the mainstream legal world: David Cole, a professor of law at Georgetown University and a leading intellectual light in the Guantánamo bar, said Stewart was the victim of "classic McCarthy-era tactics: fearmongering and guilt by association." A portion of Stewart's legal defense fund was underwritten by the Open Society Institute, the foundation funded by the billionaire George Soros.

Stewart's story, and the sympathy and support she has garnered, exemplify the new intensity with which some in America's legal elite defend terrorists bent on America's destruction. In this sense, her case is a marker of a profoundly altered legal culture — one that is, in turn, reflected in sweeping changes of a different sort to the national-security apparatus itself.

THE LAWYERS' WAR

In recent decades, a quiet revolution has taken place within America's military and civilian defense agencies. Lawyers have penetrated every crevice of our national-security machinery (there are more than 10,000 attorneys in the Defense Department alone), and they determine the conduct of war to a degree without any precedent.

What does this new legalism look like in practice? Consider that, in 1914, the War Department — fulfilling America's obligations under the Hague treaty — published its *Rules of Land Warfare*, which contained 139 pages of text. Today, many editions later, the Pentagon is poised to issue yet another update of its Law of War Manual, which will exceed 1,100 single-spaced typewritten pages, with more than 3,000 footnotes.

In World War II, the United States and her allies obliterated entire German and Japanese cities in bombing campaigns intended to break the wills of civilian populations; the laws of war, at least those concerning air power, were cast by the wayside. Today, we have moved far in the other direction. Dropping a single munition on a target often requires approval up and down the chain of command to ensure that the attack conforms to "the laws of targeting." The American military strives to adhere stringently to international law that demands that lethal attacks meet the requirements of humanity, necessity, proportionality, and distinction, ensuring that an appropriate level of force is applied against legitimate targets. But amid the fog of war, judgment about such matters can be difficult. Hence, the lawyers are brought in.

This transformation can be traced back to one of the disasters of Vietnam — the 1968 My Lai massacre, in which a U.S. Army unit under

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the command of Second Lieutenant William Calley killed hundreds of Vietnamese villagers, many of them women and children. In the wake of that atrocity and the ensuing courts martial, in 1974, the Pentagon issued Department of Defense Directive 5100.77, which established a Law of War program and put the Army Judge Advocate General's Corps in charge of carrying it out. A mechanism was now in place up and down the chain of command to ensure that forces scrupulously observed the laws of war, and also that violations of the law were promptly reported, investigated, and remedied. The program continued to grow over the following decades, and by the time of the Gulf War in 1991, it had become a major component of America's war-fighting infrastructure.

In that conflict, JAGs were given a critical role in operational military decision-making, including the planning and execution of the air campaign that opened the war. For example, when the Iraqi air force deliberately parked some of its MiG fighters near one of the great ancient monuments of Mesopotamia, the Ziggurat of Ur — hoping thereby to save the planes from American bombing — it was JAGs who decided, as one post-war analysis records, that "their military value as aircraft was determined to be outweighed by the risk of damage to the historical religious site." Similarly, when U.S. war planners proposed, for psychological purposes, to strike symbols of Saddam Hussein's regime — a massive statue of Saddam in Baghdad, for example, and the victory arch from the Iran-Iraq war — JAGs objected on the grounds that such targets were "cultural objects," protected by international law.

The march of technological progress over the two decades since the Gulf War has further facilitated the integration of the JAG corps into combat operations. Precision-strike capabilities were initially developed to increase military effectiveness, but they also make it possible to wage war under tighter and tighter legal constraints. During World War II, it would have been futile for a B-17 crew dropping dumb bombs on a munitions factory in the center of a German city to ponder the intricacies of the laws of war regarding civilian casualties. Today the "pilot" of an unmanned Predator drone can sit in a base in Kansas with a military lawyer looking over his shoulder and get legal clearance for a missile strike that can blast the home of an al-Qaeda operative in Afghanistan while leaving neighboring houses intact.

A peculiar dynamic has thus taken hold in our defense apparatus. Our capacity for precision encourages the legalists to seek yet more limits, which

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in turn impels the military to develop even more discriminating weapons so as to stay within the narrowing strictures of the laws of war. Precision and legalism thus feed on one another; the result is a stringent regime. As Harold Koh has explained, "procedures and practices for identifying lawful targets are extremely robust," and the key principles of the laws of war "are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law."

THE COSTS OF LEGALISM

Tight control of the battlefield brings undeniable benefits. It works to minimize civilian deaths, an invaluable objective for its own sake, and one essential, in an age of televised war, to ensuring that public opinion (both domestic and international) does not turn against the United States. The new legalism also protects military officers from liability when their decisions in the field (at least those decisions approved in advance by JAGs) go awry. It is for these reasons that many military commanders have come to regard law as one of the "centers of gravity" of war, ranked in importance with intelligence, logistics, morale, and superiority in firepower.

But legalism holds the potential to reduce military effectiveness. We already see this in the ongoing political campaign to restrict drone strikes in Afghanistan because of the risks of collateral damage. Some allege that because the ground-based CIA pilots of the drones are civilians who do not wear uniforms, they themselves are irregular combatants operating in violation of international law. Others, including the International Committee of the Red Cross, insist that terrorists, as civilians, are legitimate targets only at those moments in which they are directly participating in hostilities. "In the past quarter century, various nations, NGOs, academics, international organizations, and others in the 'international community' have been busily weaving a web of international laws and judicial institutions that today threatens [U.S. government] interests," wrote Harvard law professor Jack Goldsmith, formerly of the Pentagon counsel's office, in a 2002 memo to Secretary of Defense Donald Rumsfeld. Goldsmith added: "The issue is especially urgent because of the unusual challenges we face in the war on terrorism."

Beyond the theoretical dangers, the new legalism — having so thoroughly shaped the mindsets of those who wage our wars — has made

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our own officials balk at defending America in critical moments, sometimes with disastrous consequences. In 1998, the Clinton administration contemplated a plan to capture Osama bin Laden in his encampment in Kandahar, Afghanistan, and transport him to the United States for trial. According to the 9/11 Commission report, Samuel Berger, President Clinton's national security advisor, saw legal problems looming large. He "worried that the hard evidence against bin Laden was skimpy and that there was a danger of snatching him and bringing him to the United States only to see him acquitted," the report noted. At the same time, a high-ranking CIA official expressed fears about violating an executive order against foreign assassinations: According to the commission, the official was worried that "the operation had at least a slight flavor of a plan for an assassination" and "people might get killed." The operation was called off, and people were indeed killed, though not in Kandahar but in New York, Washington, and Pennsylvania.

FIGHTING TO WIN

Chief Justice Charles Evans Hughes once famously argued that "the war power of the Federal Government . . . is a power to wage war successfully." But given the new constraints on our troops and civilian officials, can America now wage war successfully? Do our legal mechanisms, extraordinarily attuned to defending the rights of our enemies, correspond to the very serious challenges we face in defending our own people?

The judiciary is the branch of our government least well equipped to make judgments about matters of war. Lawyers and judges are trained to operate in a process with highly articulated procedural rules by which all must abide. The mechanisms of that process turn at a leisurely pace with careful deliberation and full consideration of all relevant information at every step of the way. National security is nothing like this: It is a chaotic world of unknowns that demands rapid decision-making and specialized knowledge, and in which the enemy plays by no rules but his own.

The conflicting realms of law and war have come to a kind of collision in the administration of Barack Obama. On the one hand, his election has ushered in an era in which the newly assertive courts, the left-leaning lawyers and civil-liberties groups, and the executive branch have seemingly become aligned. Many of those in the upper echelons

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of the Obama administration are products of the same legal culture that stood in bitter opposition to the Bush-era counterterrorism framework. Former members of the Guantánamo bar now hold senior positions in the Department of Justice. The Obama administration came into office pressing for civilian trials in which terrorists captured abroad would enjoy the full set of rights granted American citizens, promising to close the Guantánamo Bay facility, seeking to re-open investigations of CIA interrogators, and disclosing former national-security secrets, as in the case of the "torture memos."

On the other hand, the costs of excessive legalism have become increasingly apparent, including to the Obama administration itself. Under public and congressional pressure, the administration has backtracked from its initial plan to try prominent terrorists — most notably the mastermind of the September 11th attacks, Khalid Sheikh Mohammed — in civilian courts. The administration has also been quietly moving away from its default position of Mirandizing terrorists apprehended on American soil. It has declined to release photos of prisoners under interrogation by the CIA. It has asserted the state-secrets doctrine in court cases — taking the same positions, in fact, as the Bush administration. It has been unable to fulfill its promise to close Guantánamo and has stated, strikingly, that it will retain in custody indefinitely a select group of terrorists who cannot be tried but who are too dangerous to release. It has greatly expanded the use of drone attacks against terrorists in Afghanistan, Pakistan, and Yemen, defended such attacks as being consonant with international law, and even proclaimed the right to target American citizens abroad who engage in terrorism. As a consequence of all these reversals, the Obama administration finds itself under sharp attack from the very civil-liberties groups and newspaper editorial pages that had formerly lauded it.

As President Obama and his advisors are beginning to learn, these ongoing controversies are part of the perpetual struggle to find an equilibrium between life and liberty — a struggle that every liberal democracy faces acutely in wartime. And within our particular democracy, given its constitutional system and separation of powers, the vagaries of formulating national-security policy can be especially difficult. Throughout our history, we were mostly content to have such decisions emerge from the interplay between the legislature and executive. But today, with the enthusiastic approval of our legal, political, and media

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elites, the judiciary is inserting itself into those policy decisions as never before — taking our defense apparatus, and our ability to wage war, into uncharted territory.

This plunge into the unknown comes at a dangerous time. An unspoken assumption of the legalist regime is that we are not presented with an existential danger; whatever threats face us in the struggle against Islamist radicals, this view implies, our national survival is not at risk as it was when we faced the Axis powers in World War II or the Soviet Union in the Cold War. And yet as the thousands of Americans who have lost their lives in this conflict demonstrate — and as al-Qaeda's ongoing quest to acquire weapons of mass destruction also demonstrates — that is by no means our enemies' view of this war.

Napoleon once remarked that God favors the side with the heaviest artillery. It is less than clear that He will favor the side with the most lawyers.

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