new, although Tribe may take the argument in new directions; he certainly acknowledges the influence of Charles Black and his famous structural interpretation of the Constitution.

Surface attractions aside, however, there are aspects of Tribe's account of the invisible Constitution that will not convince doubters and should trouble even its adherents. At the level of specifics, not all of his examples are wholly convincing. His reading of *Lochner* and the privacy cases, for example, leaves much room for disagreement over whether the invisible Constitution really contains a presumption against relationships that involve "hierarchy and exploitation," and does not tell us when that presumption applies. His suggestion that government torture *must* be "categorically forbidden by the Constitution," although he thinks no constitutional provision forbids it, simply because it is "an affront to everything America stands for," presumes rather than proves its conclusion. And, having already argued that substantive due process rights would have been better located within the Fourteenth Amendment's Privileges or Immunities Clause, he leaps to the argument that we cannot now "stick to the text" of the Due Process Clause because to do so would condone a host of terrible results. Not so. To insist on "sticking to the text" in this instance is simply to insist on reading the *right* part of the text. It seems odd to allow the invisible Constitution to triumph here simply because the Court happened to misread the Privileges or Immunities Clause. To do so only distorts the actual text and prolongs the Court's error.

At a higher level of abstraction, there is a larger problem. Tribe may be right to say that it is impossible to "generate constitutional law entirely from within a constitutional text." Some meta-interpretive rules are surely necessary. Some of them may even be substantive rules, not just procedural ones. But Tribe does not justify the *breadth* of the substantive rules he proposes. We could just as easily imagine an approach to the invisible Constitution that emphasizes the primacy of the written text and strives to be as parsimonious as possible in generating unwritten substantive rules. Tribe's general point about the invisible Constitution may be true, but he hardly justifies the sweeping invisible principles that he proposes in these pages. They are "the substance of things hoped for," not "things unseen" but proven.

Moreover, some of Tribe's prose is as thick as molasses: pity the poor reader who encounters the quicksand of language discussing "the plane determined by the vertices of the 'life, liberty, property' triangle" and "the pyramid formed from that triangle when the axis indicated by the Take Care Clause of Article II is included." The book is also a marvel of repetition. Sentence after sentence in the first hundred pages announces what Tribe will be saying, what the book is about, what he has already done, and what he will not be doing. Shorn of its repetition, this short book could be shorter still.

That repetition comes at the expense of his last and most novel section, which introduces six "modes" of reading the invisible Constitution. These modes—playfully but unhelpfully illustrated with graphics drawn by Tribe himself—are dubbed the "geometric, geodesic, global, geological, gravitational, and gyroscopic" modes of constructing the invisible Constitution. Tribe says that his alliterative approach comes "at some loss in transparency of meaning." That is an understatement. This discussion, which is crammed into the last quarter of the book, is far less clear and convincing than it might be. It is a shame that the most original section of his book is also the least developed and persuasive.

That said, Tribe's aim is to provoke a discussion, not to end it. In that, *The Invisible Constitution* must be counted as a success, although perhaps not as great a success as he would hope. What is most persuasive in this book will come as no surprise to those—textualists and non-textualists alike—who already understand that the Constitution rests on broader interpretive principles; what is most innovative in the book may still be too underdeveloped to elicit much useful dialogue. But Tribe nevertheless does a fine job of demonstrating the necessity and value of plumbing the depths of the Constitution's "dark matter."

Law and the Long War
By Benjamin Wittes

Terror and Consent
By Philip Bobbitt

*Reviewed by Vincent J. Vitkowsky**

Public attention to the war on terror has waned. The financial crisis, general weariness, and a natural preference to live within the fiction that the threat is contained have all contributed to this state of affairs. Unfortunately, the terrorists' war on us continues.

In response to the September 11 attacks, the Bush Administration implemented a policy built primarily on the law of armed conflict and the exercise of executive authority. This was an appropriate paradigm for the immediate aftermath, when it was imperative to attack and neutralize al Qaeda. To that Administration's credit, for over seven years its efforts have been successful in protecting the U.S. at home.

But public advocacy explaining these choices was not a high priority for the Bush Administration. Over time these policy choices had two negative consequences. First, within the U.S., the treatment of terrorist suspects became politically divisive. The public dialogue has been dominated by misinformation, misunderstanding, and partisan posturing. Next, the nation's reputation in the international community suffered. Granted, protecting American lives is more important than promoting the illusion of an international consensus that, by the nature of reality, cannot fully exist. Yet more could have been done to engage our principal allies, whose support and cooperation are vital.

In the long run, the law of armed conflict is neither sufficiently comprehensive nor sufficiently nuanced to address the full threat. Even assuming that counterterrorism policy could be determined primarily by the Executive Branch, participation from Congress could provide considerable public acceptance and support. The next Administration should work with Congress to build a comprehensive legal architecture for counterterrorism.

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This legal architecture must be designed for two purposes. The first and most vital is the prevention of future attacks through detention and interrogation of would-be attackers. The secondary purpose is punishment for attacks which have already occurred. This priority is what makes the legal dimension to counterterrorism different from criminal law, and what makes criminal law inadequate. Its preventive function is much more incidental than central. As a result, an effective system would almost surely require the creation of specialized national security courts with specific, carefully designed procedures.

Americans need to understand the baseline Constitutional parameters, analyze, and debate the policy options, and agree on the best framework to protect themselves. A calm, comprehensive discussion of the legal architecture should be a matter of paramount priority.

Both Benjamin Wittes' *Law and the Long War: The Future of Justice in the Age of Terror* and Philip Bobbitt's *Terror and Consent: The Wars for the Twenty-First Century* make important contributions to this discussion.

Benjamin Wittes writes with clarity and discipline. He is a former editorial writer for the *Washington Post*, and a fellow at the Brookings Institution, but his analysis defies stereotypes. He is evenhanded in his criticism, objecting to the Bush Administration's "consistent—sometimes mindless—aggressiveness and fixation on executive authority." But he also takes on the Administration's critics, whenever their opposition is "not a tenable position for anyone with actual responsibility for protecting a country."

Wittes is a pragmatist who understands the need for powers of presidential preemption against terrorist attacks. His book frames the issues central to the structure which Congress must create to legitimize this power.

His analysis is replete with respect for the duty of consequentialism. His chapter on detention and trial recognizes the need to cross what he calls a "psychological Rubicon," acknowledging that there are some people "too dangerous to set free but impossible to put on trial." He would distinguish between aliens, on the one hand, and citizens and permanent resident aliens, on the other. For aliens, he suggests a statutory scheme modeled on the administrative detention procedures for detaining the insane, and offers a few broad outlines. A federal judge should serve as an impartial finder of fact. The detainees should be provided competent counsel. Standards for admissibility of evidence should be relaxed. Detention could continue indefinitely, as long as the detainee poses a substantial threat to the security of the United States.

To implement this system, Wittes calls for the creation of a specialized national security court, broadly fashioned after the FISA court. His priority is on prevention, but he argues that this court also should be used for trials, instead of the general criminal courts.

For citizens and permanent resident aliens, however, Wittes sees the criminal courts as the only viable option for now. Here, he would limit administrative detentions to a fixed period, suggesting six months to neutralize, interrogate, and build a case for trial.

Wittes shows his intellectual integrity in the chapter entitled "An Honest Interrogation Law." He starts with the observation that except for the purest ideologues, serious people recognize that consequentialism may at times compel coercive interrogation. This is necessary not just in the hypothetical ticking time bomb scenario, but also in the interrogation of high-ranking terrorists with operational knowledge of many future potential attacks, such as Khalid Sheikh Mohammed. He marshals the evidence to support his view that there is a strong possibility that "the president of the United States [Bush] may be telling the truth and that America would be giving up a lot of intelligence of titanic importance if it forswore all coercion in all circumstances." His policy proposal is to establish baseline rules for permissible techniques for CIA interrogation which are restrictive and somewhat transparent, while keeping the granular details in a classified version available only to the congressional intelligence committees. Deviations from the baseline would be permitted upon a presidential finding to the intelligence committees identifying the specific need for other methods concerning specific detainees, as well as the specific methods—never torture—to be used. The aggregate number of such findings would be publicly available each year, but not the details. Most critically, his proposal would provide vital protections for the men and women trying to protect the country. It would immunize the interrogators from all civil and criminal liability for carrying out the methods specified within the finding.

For anyone seriously interested in developing a legal structure to help prevent terrorist attacks, *Law and the Long War* is essential reading, cutting to the chase.

Philip Bobbitt's *Terror and Consent* is something else. It is a challenging adventure for the curious. Bobbitt is a professor at Columbia Law School who writes with intricacy, complexity, and showy erudition. Everything is analyzed from multiple historical, social, and geopolitical perspectives. He tries to connect everything to everything else, and argues that almost everyone else is wrong most of the time. The frequent lack of structure in his chapters, paragraphs, and sentences, the idiosyncratic use of headings and subheadings, the distracting placement of mid-sentence non-essential footnotes, and the absence of a remotely useful index all challenge the reader. Yet if one is willing to work long and hard, there are insights worth digging out, and even a few especially valuable recommendations.

For present purposes, the important point is that in many important respects, after his convoluted analysis, Bobbitt's fundamental conclusions tend to be consistent with those of Wittes, save one.

Bobbitt, too, urges the creation of a federal court with special jurisdiction over terrorism cases, whose principal interest would be to implement a statutorily-created comprehensive system of preventive detention. The court would have special evidentiary rules to permit the use of hearsay, anonymous witnesses, testimony by affidavit, and non-Mirandized self-incriminating statements. He would also keep the ordinary federal courts available in some cases.

Bobbitt, too, recognizes the duty of consequentialism. As he puts it, "the moral calculus is different for public officials." He thus recognizes the need for coercive interrogation, but here his analysis takes a strange turn. He argues that "there ought

to be an absolute ban on torture or coercive interrogations for the purpose of collecting tactical information, with the acceptance that this ban will be violated in the 'ticking bomb' circumstance." He would subject the interrogators in those circumstances to an ex-post facto jury trial as to whether a reasonable person would have violated the "absolute" ban. This is asking far too much of the public servants who do this disagreeable but essential work, often under great stress, and always with imperfect information. They deserve the benefit of clear guidelines, clear authority, and immunity. In short, they deserve the benefit of the proposal made by Wittes.

On close reading, Bobbitt also appears to support limited coercive interrogation of detainees within the operational leadership of terrorist organizations, for the purpose of collecting strategic information, with the prior approval of a non-governmental jury. He offers no suggestions as to how this might operate practically and in real time.

In the strongest and most valuable portion of his book, Bobbitt extensively covers a subject that Wittes does not address at all, and here he makes his most important contributions. He analyzes the need to reform international law, proposing twelve concrete initiatives relating to terrorism and non-proliferation. Reform of international law is surely daunting, yet worth the attempt. The U.S. should lead this effort, to demonstrate its commitment to the rule of law, which in itself would have symbolic importance. More importantly, Bobbitt's proposals on counter-proliferation are specific enough to produce real security benefits. One is to seek an international convention making it a crime against humanity to trade in biological or fissile stocks for weapons, or to materially facilitate such trade through financing or transport. Another is to seek a UN Security Council resolution that would permit the physical interdiction of nuclear-related products going to countries that fail the IAEA's standards of transparency, cooperation, and verification.

America and other liberal democracies are faced with ongoing threats from patient enemies. Both these books should be studied by the new Administration, coolly and deliberately, but quickly, before the next attack.