

LAWFARE

Hard National Security Choices

Is it Time to End the War on Terror?

by Benjamin Wittes

That was the subject of a debate the other day put on by a group called Intelligence Squared—which was attended and summarized by Lawfare reader John Mattiace. Mattiace is an attorney practicing in New Jersey, who earned his J.D. from Seton Hall Law School in 2010. While in law school, he studied Islamic Law at the American University in Cairo, Egypt and served as an intern to the Staff Judge Advocate of the XVIII Airborne Corps at Fort Bragg in North Carolina. He can be reached by email at johnmattiace@yahoo.com:

On September 7, 2011, Intelligence Squared held a debate at New York University on whether it was time to “end the war of terror.” Given the ten year anniversary of the 9/11 attacks and the recent killing of Osama bin Laden, the issue of whether the war this country is fighting remains vital or has run its course is a useful one to discuss. The spirited debate featured discussion of legal issues that are important ten years after the war on terror began.

On the side of the motion, the debate participants were Peter Bergen, a journalist for CNN who personally interviewed Osama bin Laden in 1997 and has written various books on the conflict in the Afghanistan and Pakistan region, along with Juliette Kayyem, a former Obama Administration official in the Department of Homeland Security and was the highest ranking Arab-American woman in the federal government. On the side arguing against the motion was General Michael Hayden, the former director of the NSA and CIA, along with Richard Falkenrath, a former deputy Homeland Security advisor to President Bush and deputy commissioner for counterterrorism for the New York City Police Department. A transcript is available [here](#). For those who don't want to wade through the entire transcript, I have prepared a brief summary.

The motion to “end the war on terror” was framed in the following way. After the death of Osama bin Laden, Al Qaeda's ideological leader, the almost daily killing of its high ranking members, and the destruction of its assets and finances, Al Qaeda has been rendered ineffective in attacking the United States. Furthermore, as evidenced by the recent “Arab Spring,” bin Laden's and Al Qaeda's ideology is bankrupt and has no prospect of affecting change in the Middle East. The result, the motion stated, is that the war on terror should end because the enemies we have been fighting have been rendered largely irrelevant and should not be a part of U.S. policy going forward. The opposition to the motion stated that terrorism is still a threat to U.S. interests because of Al Qaeda's and its affiliates' ongoing capability and desire to attack. It

added that the U.S. is still hated by jihadists and therefore we must continue the policies that have kept us safe for the past ten years.

The debate was accompanied by direct audience voting, with the side having generated the biggest percentage change in opinion deemed to have “won” the debate. By this metric, the debate was won by Hayden and Falkenrath, with their side having changing the minds of 15 percent of the audience, and the other side having only changed the minds of 3 percent. On the other hand, a plurality at the end of the debate still favored ending the war on terror; the overall vote at the end was 46 percent for ending it, with 43 percent against ending the war and 11 percent undecided.

I will summarize the Hayden-Falkenrath side of the debate first, as they made legal arguments the centerpiece of their presentation, and the Berger-Kayyem argument second.

Hayden and Falkenrath framed the debate by defining the notion of “war” largely as the legal state which was created by the passage of the AUMF shortly after September 11. They reasoned that this legal state, undergirded by the AUMF, gives the government the authority to carry out acts of war, such as the killing of bin Laden, legally. As Hayden put it:

The point we want to make is the legal construct—the legal belief that we are a nation at war; that we are a nation in conflict; and we have a right, because we are in that status, to use the legal tools and the legal authorities that a nation at war is allowed to use. What it is we’re supporting is to keep all available tools on the table—to keep a menu of options from law enforcement, diplomacy, or to arm conflict in order to keep you safe.

Falkenrath echoed this by arguing:

[W]ar is a legal state, as Mike said. It exists in law. It is decreed by Congress and, in fact, they did decree it in this case with the Authorization for the Use of Military Force, passed by Congress on Sept. 14, signed by President Bush on Sept. 18, and still in force today.

...

[I]t’s worth noting exactly what [the AUMF] says because this is what it means to be in a War on Terror. It means to have this as your law of the land. It says that the President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11th or harbored such organizations or persons in order to prevent any further acts of international terrorism against the United States by such nations, organizations or persons. Now, our position is quite simple: it’s that this should stay the law of the land. This should be the law in the United States, because, if it’s not, then something [Peter Bergen] said is no longer the case: having the number two job in al-Qaeda is no longer the most dangerous job in the world.

Thus, Hayden and Falkenrath’s position is that without this legal state of war, the government can no longer legally carry out such acts like the killing of bin Laden or the various “number

twos” of al Qaeda. Hayden specifically used the killing of bin Laden to strengthen his position. He put the killing in stark terms, describing it in the following way:

Let me give you a slightly different description of [bin Laden’s killing]. A heavily armed agent of the United States government was in a room with an unarmed man who was under indictment in the United States judicial system and was offering no significant resistance to the heavily armed agent of the United States government, and that heavily armed agent of the United States government killed him.

Hayden’s rhetorical purpose is clear with the inclusion of the phrases “under indictment in the United States judicial system” and “offering no significant resistance.” Any attorney hearing or reading this description in a vacuum would be instantly troubled by these facts and even a first year law student could “issue spot” the various Fifth and Fourth Amendment violations. Even someone with no legal training at all would be revolted. But that same action taken by the same “heavily armed agent of the United States” does not constitute a violation of the Constitution, nor any criminal statute, precisely because the country is in the legal state of war. Hayden added that:

[i]f you do not think we are at war, there are some very troubling definitions that you might want to attach to that act [of killing bin Laden]. . . . We acted perfectly lawfully because we are a nation at war and generally recognized as such.

Hayden argued that because the war is a legal state created by the AUMF, in order to end the war on terror, Congress would have to repeal it. Doing so, however, would make acts like the killing of bin Laden illegal. He concluded that because killings of terrorists like bin Laden help keep us safe, there is no reason to take away that legal authority.

Hayden also argued that taking away present legal tools would have the paradoxical effect of taking away civil liberties. He presented the example of the “underwear bomber” who, after thankfully failing to detonate his bomb, was questioned under the public safety exception to the *Miranda* rule. After the incident, the Attorney General suggested in testimony before Congress that there should be legislation passed to make *Miranda* more malleable. Hayden argued that this is the wrong route to take stating that:

I don’t want to make *Miranda* more malleable. *Miranda* defends me. Defends you. Defends your rights. And we’re forced to contort the law enforcement approach when we attempt to make it answer and deal with questions it was never designed to deal with.

In essence, Hayden is implying that a different legal regime should apply to those like the underwear bomber. He made this point even more clearly in response to an Australian audience member who asked the following question:

Don’t you feel that over the long arch [sic] of history that maybe that the greatest inhibition of people’s freedom is governments and not so much terrorism and outside threats, and do you fear that maybe an open-ended war that goes forever that you’re not even able to say when it could possibly end, is more of a liability, even if it gives us more of a tool, more tools in the arsenal in the short term, that maybe the long-term liability outweighs that[?]

Hayden responded that there are certain authorities that government officials like him are given and that those officials must exercise the full extent of those authorities to prevent bad things from happening. He stated that in his view there is a sort of legal box he works within, in essence a legal playing field, adding that:

If we play back from those lines, and we fail, and bad things happen to you—of a catastrophic nature [like what] happened ten years ago, . . . you're going to draw a different box . . . and the box is going to be this way [*drawing a larger box with his hands*]. [T]he way we security professionals, the intelligence community view this is we have to be very aggressive within the law doing our job because if we fail the natural tendency of a country like ours or a country like Australia would be to do things probably destructive to the long term liberties out of fear.

Thus, the overall point is that if rules meant to protect ordinary citizens are made more malleable when applied to terrorists, those changes will eventually be applied to ordinary citizens and result in decreased civil liberties of most people. Moreover, if the security apparatus is forced to cut corners within the box of legal tools it is given, and a catastrophic attack occurs, then the citizenry will give that apparatus stronger tools later, thus taking away civil liberties to a greater extent and for a longer time.

Bergen and Kayyem ended up agreeing with Hayden and Falkenrath that the legal tools that allow the Executive to kill people like bin Laden should not be taken away. Kayyem specifically stated that:

There is authority for the President to use force, including killing Bin Laden, under the Authorization for the Use of Military Force. I support that.

Nevertheless, they argued that the term “war” means more than a simple legal state in the context of the phrase “war on terror.” Bergen described their position as follows:

[W]e're just calling for an end of this all-encompassing, global conflict that has cost us so much money. We're not calling for [the end of] a global police action against terrorists, certainly. We reserve the right for a certain kind of war-like activities, but it's time to stop this sort of grandiose approach, where we're at war with any person who's ever said the word “Jihad” around the world, which is going to cost us a lot of money.

Kayyem argued that the war on terror represented many negative things listing the following:

the enhanced interrogation, the dark side, the with us or against us, the indiscriminate interviewing [of] particular Arab and Muslim communities, the registration of Arab immigrants, military tribunals that adhere to standards unrecognized in military law, the color code alerts, the breathless press conferences, the rejection of the law of wars, the treating of the Geneva Conventions as quaint, secret wiretapping and violation of established law, the disdain for the judiciary—those were also part of that war.

Bergen also added that:

The War on Terror was not the war on Al-Qaeda and its allies. It was an open-ended conflict against a tactic that produced a lot of enormous problems for this country, including the Iraq War and all that, the legacy we have from that. . . . We're not just debating about what happened today. It's about a mindset which causes countries some serious economic problems—which we are still trying to recover from.

Thus, Bergen and Kayyem's position is that the "war on terror" does not only represent a legal structure but also carries with it a sort of grandiose global notion of war and includes things like warrantless wiretapping, black sites, rendition, harsh interrogation, the spending of over a trillion dollars and acts like the Iraq war. Overall, they contended that because the country has moved past these things and by extension changed its mindset, it should cease framing its counterterrorism as a war.

Ultimately, there may be less disagreement here than the debate format suggests, and both sides can be seen as correct within their respective definitions of the war. On the side of Hayden and Falkenrath, the actions by the Executive have been approved by Congress under the AUMF and therefore the actions can be legitimized politically. These actions have removed a dangerous entity's ability to strike us and as long as that ability exists, the participants in the debate all agree that those tools should persist because they keep us safe. Bergen and Kayyem's position, on the other hand, though less clear during the debate, are just as legitimate—though less legally oriented. They are objecting less to the legal structure of war powers than to maintaining the feelings of anxiety and emotion associated with keeping society on a "war footing." In a sense, their argument is that the ability of al Qaeda to strike us on the spectacular level of 9/11 has been reduced to the point that the society no longer needs to be galvanized on such a footing as a social matter.

In the final analysis, this debate highlights the interrelated nature of law and politics in the area of warfare. For war to be waged successfully, the citizenry must support it, which creates the political will necessary for elected officials to engage in it. If the American public feels that the war on terror is over, the political will for its continuation will end and officials will take action commensurate with those politics. In our country's case, this can include, among other things, the repeal of the AUMF and the election of new leaders. In essence, these two sides were debating the front lines of this war as citizens with the political responsibility to contribute to that collective "war" mindset which began ten years ago today. The results of the vote suggest that the American people are not ready to walk away from this war just yet.

This was written by Benjamin Wittes. Posted on Sunday, September 11, 2011, at 2:02 pm.