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A Larger War on Terror?

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By David Cole

Terror and Consent: The Wars for the Twenty-first Century
by Philip Bobbitt
Knopf, 672 pp., $35.00

The United States of America is fighting a war against terrorists of global reach. The enemy is not a single political regime or person or religion or ideology. The enemy is terrorism—premeditated, politically motivated violence perpetrated against innocents.

—The National Security Strategy of the United States, September 2002

1.

When historians reflect on the Bush administration's legacy, the "war on terror" will almost certainly be its most important feature. That "war," declared by the President shortly after the terrorist attacks of September 11, 2001, has defined the administration in its relations both to the rest of the world and to its own people at home. In the name of the "war on terror," the administration has invaded and occupied two countries, implemented a single-minded and often unilateral foreign policy, asserted unprecedented executive power, and sought to justify a host of human rights violations, from disappearances to torture.

The "war on terror" has received extensive criticism. Our European allies maintain that waging war against terrorists—much less against "terror" itself—is a category mistake; terrorism should be treated as a law enforcement matter. Declaring war elevates criminals into warriors, thereby playing into the terrorists' desire for renown. In the United States, many accept the use of military force as a response to the al-Qaeda attacks but reject the notion that this is a global war on all forms of terrorism, or on all terrorist organizations of global reach. Terrorism, it is said, is not an enemy, but a tactic, and one that will be with us forever, so declaring war on terror commits us to an unending and unwinnable war.

Many others insist that the war against al-Qaeda, centered in Afghanistan and the northwest tribal areas of Pakistan, must be distinguished from the Iraq war, launched not in self-defense in response to an armed attack but for asserted "preventive" purposes, to stop Saddam Hussein before he gave (what turned out to be nonexistent) weapons of mass destruction to terrorists to use against us. Finally, many have argued that any military response must conform to the laws of war and the Geneva Conventions, which from the outset the administration dismissed as quaint and obsolete.

In Terror and Consent, Philip Bobbitt, a distinguished law professor at Columbia Law School and former national security official in the Carter, George H.W. Bush, and Clinton administrations, takes on the daunting task of salvaging the war on terror. No apologist for George W. Bush, Bobbitt justly castigates the current administration for treating international law as an inconvenient obstacle to be thrust aside in the pursuit of parochial interests. And he deserves much credit for moving beyond crude rhetorical appeals to fear and attempting to construct a comprehensive intellectual justification for a war that has often seemed more an unthinking reflex than a considered policy response. But in theory, Bobbitt supports much of what the administration has done, including ousting Saddam Hussein from Iraq,
coercive interrogation of terror suspects, warrantless spying by the National Security Agency, and extensive mining of computer data such as the Total Information Awareness program, run by Admiral John Poindexter for the Defense Department until Congress barred any public funding for it in 2003. He vigorously defends the concept of a war on terror, or as he puts it, hardly distinguishing himself from the administration, the "Wars against Terror."

Where Bush has invoked simplistic images of "evil men in caves," Bobbitt quotes Thucydides, Hobbes, Shakespeare, Hardy, and Wis awa Szymborska, among many others, as he seeks to situate the conflict with al-Qaeda in a grand if idiosyncratic narrative of the historical evolution of the state and its enemies. At the center of this story is the opposition between what Bobbitt calls "states of consent" and "states of terror":

States of consent govern on the basis of authority freely derived from the unfettered consent of the governed, authority that must be regularly and frequently renewed and that can be withdrawn; states of terror govern by means of repression and are not bound by the freely given decision of the public....

Bobbitt maintains that the defining struggle of the twenty-first century will pit "market states of consent," such as the United States and the European Union, against global terrorist organizations. He insists that we have no choice but to fight the "Wars against Terror," because the terrorists are already at war with us—over nothing less than the constitution of the future.

*Terror and Consent* is nothing if not ambitious. Bobbitt opens his 672-page book by boldly asserting that "almost every widely held idea we currently entertain about twenty-first century terrorism and its relationship to the Wars against Terror is wrong and must be thoroughly rethought." But many of Bobbitt's proposals are surprisingly conventional. He advocates stronger efforts to stem the proliferation of weapons of mass destruction; improvements in our ability to recover from catastrophes, whether natural or man-made; more extensive use of computer data and other forms of surveillance to identify and track terrorists; reform of international law to reflect the asymmetrical nature of modern warfare, in which insurgent groups often use illegal tactics; and respect for human rights and the rule of law. Many of those suggestions are sensible; but they are hardly unconventional, and one is left wondering what his grand vision of history adds to the conventional wisdom he claims to reject but often appears to echo. Where he is at his most unconventional—in defending coercive interrogation and "preventive war," and in reimagining world history to salvage his conception of the "Wars against Terror"—he is least persuasive.

2.

As Bobbitt sees it, the twenty-first century will be defined by the transformation from "nation-states" to "market states," and how we respond to terrorism will play a central part in the character of that transformation. According to Bobbitt, nation-states, the dominant form of the state during the twentieth century, served their people by seeking to provide for their welfare. Economic and technological developments in the late twentieth and early twenty-first centuries, however, limit any individual nation's effective control over the economic and political realities it confronts, and therefore undermine its ability to assure its citizens' welfare.

As a result, Bobbitt contends, states such as the United States and the EU are in the process of becoming "market states," whose function is not to provide welfare but to maximize citizens' "opportunities through market-bred strategies":

Poverty is to be alleviated by providing the poor with education and job retraining sufficient to permit them to participate fully in the labor market rather than by giving them welfare
payments.... The total wealth of the society is to be maximized, which will enrich everyone to some degree, rather than enlarging the wealth of any particular group (like the poorest) through interventions in the market that tend to depress total economic performance.

The recent global credit crisis painfully confirms that individual nations are increasingly ill-equipped to protect their citizens' welfare; but this also ought to fundamentally shake Bobbitt's confidence in the unrestricted global "market" as a solution.

In Bobbitt's account, the emergence of the "market state" is the latest in a series of constitutional shifts in the political organization of the state, shifts that in his previous book, *The Shield of Achilles*, he traced back to the "princely states" of the Renaissance. Each form of state, he contends, inspires its own brand of terrorist opponents. Thus, nation-states confronted terrorists—such as the Irish Republican Army, the Basque separatists in Spain, or the African National Congress—that had their own competing claims of national identity. Al-Qaeda, in contrast, is a virtual state that more closely resembles the multinational franchising corporation than the centralized and militarized nation state.... This new terrorist network outsources operations; it depends on local groups to carry out warfare and pays them for it, supplying planning and infrastructure (including weapons). Like the market itself, this network is global and not territorial.

Bobbitt sees al-Qaeda as a "market state of terror," one that governs on the principle of terror rather than consent.

Simply as description, Bobbitt's schema seems flawed in a number of respects. First, it seems more a matter of rhetoric than reality to claim, as he does, that the epochal struggle of the twenty-first century concerns whether "consent" or "terror" will form the basis for legitimate governance. Does anyone truly believe that citizens throughout the world are undecided over whether they would prefer to be governed by consent or terror? Or that al-Qaeda, as dangerous as it is, really threatens to establish the priority of "terror" as a model of governance?

Second, Bobbitt's depiction of al-Qaeda as a response to the development of "market states" seems off the mark. Al-Qaeda's ideological roots lie in an extreme and twisted version of fundamentalist Islam, not an opposition to globalization and free-market strategies as such. In order to fit al-Qaeda into his vision of terror vs. consent, Bobbitt contends that al-Qaeda sees terrorism as an end in itself rather than a means to an end. This makes al-Qaeda out to be a kind of collective serial killer. But while there is little doubt that al-Qaeda is one of history's most ruthless terrorist organizations, its many statements and manifestos make clear that its goal is not to kill for the sake of killing, or even for the sake of maintaining a reign of terror. Rather, it aims to install a caliphate, which would then rule by its own understanding of Islamic law, not pure terror.

In addition, while al-Qaeda is decentralized, has networks, and operates around the globe, such characteristics seem less a reaction to the development of "market states" than to the fact that the world is generally becoming more decentralized, globalized, and networked. It would be surprising if the conditions and technology that permit the international operation of Nabisco Foods, *The New York Times*, and Human Rights Watch would not also be exploited by al-Qaeda. But the fact that all organizations, political or private, are adapting to globalization hardly establishes that al-Qaeda is a "market state of terror."

Third, Bobbitt insists, on the basis of very little evidence, that his account of terrorism is not unique to al-Qaeda, but describes a much broader historical (and seemingly inevitable) phenomenon. For example, he argues that Hezbollah has also turned "from nation-state terrorism to global, networked terrorism." But the only evidence he cites is a statement by Hezbollah leader Hassan Nasrallah that "Hezbollah is not
fighting a battle for Hezbollah, or even for Lebanon. We are now fighting a battle for the [Islamic] nation.” It is unclear whether such claims truly reflect a fundamental transformation in the nature of terrorism or merely opportunistic rhetoric not dissimilar from appeals to class-based solidarity made by many twentieth-century terrorists.

Bobbitt goes even further, lumping ecoterrorists, antiglobalization terrorists, and animal rights terrorists in the same "market state terrorist" camp as al-Qaeda. Yet there is no evidence that these groups seek to use weapons of mass destruction, operate as "market states,” treat terrorism as an end rather than a means, or are qualitatively more ruthless than any number of predecessors who have used violence for political ends.

These questionable descriptive claims about the nature of twenty-first-century terrorism and its role in human history drive all of Bobbitt's prescriptions for new policies. If one accepts that we are in a life-or-death struggle over whether future governance will be a matter of "consent" or "terror,” as Bobbitt sees it, one may be more likely to countenance extreme responses. But if the picture Bobbitt paints is vastly overblown, the calculus changes dramatically.

3.

Even if one were to accept Bobbitt's view that the world is beset by "market state terrorists,” however, it is not clear that his theory offers much guidance on how such threats should be countered.

At the highest level of generality, Bobbitt insists on the importance of the rule of law. In his view, the real threat is that al-Qaeda's attacks will prompt the United States or other "states of consent" to abandon their commitment to consent and become "states of terror" themselves. It follows that a state of consent must not abandon respect for principles of human rights and the rule of law. Indeed, these principles are its reason for being. But far from offering a novel insight into how to fight modern terrorism, this simply restates what many before Bobbitt have said: if we sacrifice our principles in the struggle against terrorists, we will in an important sense have lost the battle.\[2\]

When Bobbitt turns to more specific prescriptions, the connection between his theory and his proposals seems even more fragile. For example, eleven of Bobbitt's twelve suggestions for reforming international law involve efforts to stem the proliferation of weapons of mass destruction. There is little dispute that we should be deeply concerned about terrorists obtaining and using weapons of mass destruction; even if at present it remains a low-probability risk, the extent of damage they could cause is terribly high. But one hardly needs a "market state" analysis to make that point. Security and foreign policy experts have been stressing the need for drastic policies against proliferation for years.\[3\]

Similarly, Bobbitt proposes a grab bag of measures that he thinks would improve intelligence and security, including national identity cards, more extensive use of data mining and profiling, national security courts for terrorists, and a statute allowing preventive detention. But again, the "market state" terrorism diagnosis offers little support for these proposals. Identifying terrorists is useful, regardless of how one labels the terrorists. And if the "market state" concept has anything to offer concerning the debate over whether we should establish specialized courts to hear national security cases, Bobbitt does not tell us. In the end, most of his proposals can and should be judged on their own merits, irrespective of Bobbitt's larger argument about the emergence of "market states of terror."

Consider Bobbitt's treatment of torture and coercive interrogation. He endorses an absolute ban on torture, contending, as I and many others have, that in those extraordinarily rare instances where a government official might decide she has no option other than torture—for example to try to locate and defuse a ticking time bomb when all other efforts have failed—she should act knowing that what she is doing is illegal, and be willing to take the consequences. Bobbitt's view of a grand struggle between
consent and terror seemingly supports his argument here, because it is critical to the legitimacy and self-definition of a state of consent that it not adopt tactics of terror.

But Bobbitt then advocates the use of juries of citizens to authorize coercive interrogation of foreign terrorist leaders, so long as the pain inflicted is less than "severe," and therefore not technically torture. This proposal is a perverse admixture of the views of John Yoo and Jay Bybee, the Justice Department officials who infamously authorized coercive interrogation so long as it inflicted pain short of "organ failure, impairment of bodily function, or even death"; Harvard Law Professor Alan Dershowitz, who advocated "torture warrants"; and Alberto Gonzales, who maintained that foreigners were not entitled to equal protection from degrading and inhuman interrogation tactics.

The proposal seems deeply inconsistent with Bobbitt's maxim that states of consent must not compromise basic human rights principles. If the infliction of severe pain is a tactic of terror that violates principles of consent, is not the infliction of somewhat less severe pain for coercive purposes equally undermining? Why should "severe" be the dividing line between terror and consent, rather than "pain" or "coercion"? And if the state of consent's "reason for being" is respect for inalienable human rights, why advance a proposal built on a double standard, authorizing coercion only against noncitizens? Bobbitt does not answer any of these questions. Moreover, his conceptions of "consent" and "market states" give no hint about how he might.

Bobbitt's arguments for change are sometimes based on a misunderstanding of existing law. Thus, in discussing the insufficiency of law enforcement as a response to terrorism, he repeats the canard that law enforcement is backward-looking, while war is strategic and preventive. But law enforcement can also be preventive and forward-looking. It can prevent crimes from occurring, as when it intervenes to expose conspiracies and prosecute wrongdoers well before the bomb goes off.

Bobbitt's account of existing legal constraints on criminal investigation is often simply wrong on the law. He claims that any questioning of suspects without Miranda warnings is presumptively unconstitutional. In fact, warnings need not be given unless someone is actually arrested, so they don't apply to brief questioning on the street or during an automobile stop. Even in custody, Miranda warnings need not be given if the officer has a legitimate concern about a threat to public safety. And questioning without giving warnings is not unconstitutional if the answers are not used to incriminate the person being interrogated.

Similarly, Bobbitt complains that the government can scrutinize citizens or resident aliens only where "demonstrated facts, not suspicion or tips, establish probable cause that a crime has been or is about to be committed." In fact, the government is free to scrutinize individuals without probable cause in a wide range of ways, including by surveilling them in public, questioning them or those who know them, and using undercover informants. It can compel them to submit to brief stops and frisks on "reasonable suspicion," a standard substantially lower than probable cause. Probable cause itself is often based on tips and suspicions. And under the Foreign Intelligence Surveillance Act, wiretaps can be established without probable cause of a crime.

Bobbitt's errors are important because a key element in his argument for aggressive "preclusive" antiterrorism measures—including coercive interrogation, data mining, and profiling—is the asserted inadequacy of criminal law to deal with terror. But many of the limitations that Bobbitt points to simply do not exist, or are greatly exaggerated. Properly understood, criminal law enforcement offers much greater flexibility than his account would suggest—and may often be far more effective than launching "Wars against Terror."

4.
The most controversial aspect of Bobbitt's argument is his assertion that twenty-first-century terrorism legitimates "preventive war," that is, war undertaken not in response to an actual or imminent armed attack, but to prevent some longer-term danger from coming to pass. Ever since World War II, the UN Charter and international law have prohibited nations from unilaterally attacking other nations except in response to an actual or imminent armed attack. Recognizing that the vast majority of wars have been started on assertedly "preventive" grounds, the UN Charter sought to place a substantial institutional check on such warmaking. Thus, preventive war is illegal unless it has been authorized by the Security Council.

The Bush administration dismissed this rule as outdated in the run-up to the Iraq war, arguing, as does Bobbitt, that the risks posed by weapons of mass destruction, new kinds of international terrorist organizations, and rogue states necessitate preventive warmaking to forestall gathering dangers. It sought to justify the Iraq war on expressly preventive grounds, without Security Council approval. A late October US military strike at an al-Qaeda suspect within Syria reportedly reflects an expansion of this policy, giving a green light to preventive military attacks against al-Qaeda outside Afghanistan and Iraq.[4]

Bobbitt, a supporter of the Iraq war,[5] agrees with President Bush that the possibility that terrorists might have access to weapons of mass destruction justifies the use of military force to intervene before an attack is imminent. His vision of a global struggle of consent vs. terror leads him to conclude that we have no choice but to use military force preventively, or in his term, "preclusively."

While there is no doubt that the proliferation and increasing accessibility of weapons of mass destruction make prevention critically important, a "preventive war" doctrine poses enormous dangers. It rests on predictions that are necessarily speculative, and as Iraq demonstrates, easily mistaken. Warfare almost inevitably involves extensive human misery, and "preventive wars" are more likely to be unnecessary wars. History shows that the concept offers a ready pretext for aggression. And as Bobbitt himself acknowledges, widespread adoption of such a doctrine would lead to "international anarchy," since it would justify any state attacking its rivals whenever it felt it might gain an upper hand. Israel could attack Iran, India could attack Pakistan, South Korea could attack North Korea—and of course, vice versa.

Bobbitt proposes a set of general principles designed to establish common ground for legitimating preventive wars. He argues that states surrender their sovereignty and invite military intervention by others if they support terrorism, develop or trade in weapons of mass destruction, or engage in large-scale human rights violations. And he seeks to avoid the chaos of all-against-all preventive war by limiting the prerogative to wage such wars to "states of consent," and by requiring that preventive wars be approved, at a minimum, by an ill-defined "concert of states" of consent. By his standards, such powerful and potentially threatening authoritarian states as Russia, China, and Iran could be the targets—but not the initiators—of preventive war.

Bobbitt suggests that military intervention in the affairs of another state should be permissible in any of three circumstances: (1) when substantial strategic and humanitarian interests coincide to make intervention pragmatic; (2) when there is an acute humanitarian crisis because of large-scale human rights abuses and intervention poses only low risks; or (3) when vital strategic interests are in truly imminent danger.

But if preventive war is to be the exclusive prerogative of "states of consent," who gets to say which states merit that label? What are "substantial strategic and humanitarian interests," and what constitutes a "concert of states"? Is it enough, to pick one example, that the United States, the United Kingdom, and a "coalition of the willing" agreed on a military attack on Iraq, said to be justified by the presence of weapons of mass destruction, strategic interest in Middle East oil, and Saddam Hussein's atrocious human rights record? The notion that international consensus can be based on such vaguely
defined and selectively applied principles seems wildly optimistic.

More fundamentally, Bobbitt's theory fails to address the central problem with preventive war, namely, that it is inconsistent with the principle that war, precisely because of the human misery it inflicts, should be an alternative of last resort. Bobbitt's approach moves war from a tactic justified only where absolutely necessary to a measure that can be employed when there may be many other options available.

Iraq, Bobbitt's blind spot, illustrates the flaw in his approach. The absence of weapons of mass destruction there suggests that sanctions and inspections had been working to contain the threat that Saddam Hussein allegedly posed. Bobbitt does not mention Hans Blix, the UN official who inspected five hundred sites in Iraq before the US told him to leave. In a speech to the Security Council on March 7, 2003, two weeks before the US invasion, Blix explained that he had found no weapons of mass destruction, that disarmament could be fully verified in a matter of months, and that

in accordance with the governing resolutions, a sustained inspection and monitoring system is to remain in place after verified disarmament to give confidence and to strike an alarm, if signs were seen of the revival of any proscribed weapons programs.

Sanctions are not without their own tragic costs, of course, but they are much less risky and generally less harmful than all-out war; and inspections such as Blix's can establish the truth about nuclear and other threats. The UN Charter requirement of either an actual or clearly imminent attack, or Security Council approval, ensures that war remains an option of last resort. Bobbitt's abandonment of that rule is far more likely to spread terror than consent.

5.

_Terror and Consent_ opened with the charge that virtually everything we know about fighting terrorism needs to be rethought. There is no question that rethinking is necessary, as seven years from September 11, the world hardly seems a safer place, and resentment and hostility toward the United States are alarmingly widespread. Bobbitt has advanced the most sophisticated effort to date to justify an aggressive, preventive, military approach to terrorism. But relabeling the "war on terror" the "Wars against Terror" is not the kind of rethinking we need. Repackaging President Bush's rhetoric of good and evil into a struggle between "consent" and "terror" does not advance analysis of the problem. Nor does treating al-Qaeda and environmental "terrorists" as if they are the same phenomenon, or attempting to justify the unjustifiable Iraq war as a permissible preventive undertaking.

No grand theory can salvage the "war on terror," because it was fundamentally ill-conceived from the outset. We will not defeat terrorism by declaring "wars" against it, even if we sometimes will have to use military force to defend ourselves from particular terrorist groups. Preventing terrorism is of course a worthy goal, but we are far more likely to succeed if we instead work to reduce the social, economic, and ideological forces that lead people to take such extreme measures in the first place. In addition, we must carefully control access to the weapons of mass destruction, adopt preventive measures that increase security without disrespecting and alienating large swaths of the world's population, and begin the really difficult work of salvaging the United States' reputation around the world. With a new administration, we may have the opportunity to do just that—but it will not be by following Bobbitt's lead.

—November 6, 2008

**Notes**

The notion dates back at least to Ben Franklin, who maintained that "they that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."

See, for example, the bipartisan legislation sponsored by Sam Nunn and Richard Lugar on securing nuclear stockpiles in the former Soviet Union, enacted in 1991.


Like John McCain, Bobbitt generally supports the war, but criticizes the failure to provide sufficient troops to secure order in the aftermath of the fall of Baghdad.