

THE WAR IN COURT: INSIDE THE LONG FIGHT AGAINST TORTURE.

By *Lisa Hajjar*. University of California Press. 2022. \$29.95.

Reviewed by *Michael Brier**

From its inception, the United States' War on Terror was shrouded in doublespeak. The Bush administration rebranded torture practices as “enhanced interrogation techniques.”¹ Pursuant to a November 2001 military order issued by President Bush, those whom the United States detained as enemies in the War on Terror were classified as “unlawful enemy combatants”² rather than prisoners of war. Whereas prisoners of war are guaranteed basic rights and protections by the Geneva Conventions, the newly invented unlawful enemy combatants would be guaranteed none. In May 2003, six weeks after the U.S. Army invaded Iraq, Bush delivered his infamous “Mission Accomplished” speech, celebrating victory in Iraq. After that six-week conflict gave way to a protracted, eight-year-long war, Bush admitted that the Mission Accomplished speech “sent the wrong message.”³ Even the term “War on Terror” is misleading, at best. Though absurd, these euphemisms, misrepresentations, and public relations stunts masked a disturbing reality: an eight-year period during which the U.S. military and the Central Intelligence Agency detained and tortured thousands of people without any due process.⁴

Untangling this knot of misrepresentations, Lisa Hajjar's⁵ new book *The War in Court* weaves together an illuminating account of the post-9/11 legal battles over U.S. detainment and torture policies. Her account begins with the Bush administration's attempt to legalize trial-less, incommunicado detention and torture in the wake of the 9/11 attacks; it ends with the provocative claim that the Obama administration replaced trial-less detention with drone strikes as the primary tactic for dealing with suspected “enemy combatants.”⁶ To appreciate the connection between Bush-era torture policies and Obama-era drone strikes, Hajjar suggests, one must grasp the legal contests which have shaped both the War on Terror in general and

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1. P. 149.

2. P. 8.

3. Aliyah Frumin, *10 Years Later: Mission Accomplished?*, NBC NEWS (Mar. 1, 2013, 3:20 PM), <https://www.nbcnews.com/id/wbna51736273> [<https://perma.cc/V4TY-NWZT>].

4. P. xix.

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6. P. 231.

U.S. torture policies in particular. In short, to see the big picture of the War on Terror, one needs to understand the war in court.

While *The War in Court* cites many legal cases, arguments, and strategies, the account does more than rehash interesting disputes. A sociologist, Hajjar advances three main claims about the Bush administration's torture policies and the legal battles they triggered. First, she argues that the Bush administration instituted both extralegal and illegal practices as part of a broader bid for unfettered executive power, loosened from the constraints of international law, treaty obligations, and judicial review (pp. 23, 311). Second, since the U.S. government prides itself on its commitment to the rule of law, the Bush administration could not simply disregard the law; they needed to generate legal arguments to justify and "legalize" their torture and detainment policies (p. 52). And third, because the Bush administration built its torture and detainment program upon a foundation of legal arguments, the battles against Bush's torture program needed to take place on legal terrain. That is, lawyers were the only ones with the combination of resources, expertise, and access necessary to dismantle the legal scaffolding of this inhumane program (pp. xix, 2).

Hajjar persuasively supports these three contentions with a robust body of evidence and skillful analysis. Indeed, a brief review cannot convey the vast scope and detail of this book. Each chapter deploys a dense trove of evidence, including legal history, detailed background on military sites like Guantánamo Bay, and declassified documents from the War on Terror. Hajjar also draws on interviews that she conducted with hundreds of lawyers, first-hand accounts from people who were detained at Guantánamo Bay, and material from the infamous "Collateral Murder Wikileaks."⁷ Tying together these vibrant sources with great facility, *The War in Court* contextualizes key legal battles, distills their stakes, and tracks their consequences, all while painting a textured picture of the lives of those involved.

The War in Court builds upon themes and questions explored throughout Hajjar's oeuvre. Her first book, *Courting Conflict*, examined the way that Israeli military courts justified the use of torture in the Israel-Palestine conflict.⁸ Though there are many noteworthy differences between *Courting Conflict* and *The War in Court*, both books examine the rationalization of torture by putatively democratic states that pride themselves on a commitment to the rule of law. Her investigations emphasize that both Israel and the United States have instituted the illegal practice of torture through legal argumentation and the exploitation of legally endowed emergency powers.

7. Cline, *supra* note 3, at 235.

8. LISA HAJJAR, *COURTING CONFLICT: THE ISRAELI MILITARY COURT SYSTEM IN THE WEST BANK AND GAZA* (2005).

Thus, Hajjars' research contributes to the rich body of literature on the legal, the extralegal, and emergency powers in modern governance. However, she does not merely reiterate the familiar thesis that modern states regularly exploit "state of emergency" exceptions to endow the sovereign with extralegal powers.⁹ Her studies do the illuminating work of identifying the particular legal strategies used to legitimate extralegal and illegal activities in specific historical cases.

The middle of the book highlights the fierce advocacy of lawyers who waged battle against the Bush administration's program of trial-less detention and torture. Focusing on cases like *Rasul v. Bush*¹⁰ and *Hamdan v. Rumsfeld*,¹¹ *The War in Court* synthesizes the strategies that lawyers developed to challenge the Bush administration's illegal, inhumane policies. These challenges started when late attorney Michael Ratner filed *Rasul v. Bush* in February 2002. As a lead attorney for the non-profit Center for Constitutional Rights (CCR), Ratner, along with other lawyers like Neal Katyal and Joseph Margulies, employed what Ratner called "the inside-outside" strategy.¹² The inside strategies referred to conventional litigation strategies: filing writs of habeas corpus on behalf of detainees and pursuing lawsuits in federal courts. The outside strategies boiled down to political advocacy. For instance, while Ratner filed *Rasul* in the U.S. courts, he also "petitioned the Inter-American Commission on Human Rights for an urgent review of Guantánamo."¹³ Oriented toward international watchdog groups and the general public, the CCR's outside strategies were meant to focus both domestic and international attention on the grave human rights violations taking place at Guantánamo Bay and C.I.A black sites. Hajjar's attention to various inside-outside strategies offers a fount of evidence and insights for any scholar interested in the relationship between social movements and the law.

While *Rasul v. Bush* and *Hamdan v. Rumsfeld* began as lawsuits over unlawful detention, *The War in Court* emphasizes that they ultimately centered around three questions. First, in the case of *Rasul*, do federal courts have jurisdiction over U.S. military sites like Guantánamo Bay? Second, in the case of *Hamdan*, can federal courts enforce the articles of the Geneva Conventions? And third, under what conditions does the Constitution empower federal courts to intervene in the executive's wartime decisions? This

9. This thesis is articulated in Giorgio Agamben's influential study *The State of Exception*, in which Agamben argues that modern states make frequent use of "indefinite states of exception" to legitimate extralegal activity on the part of the sovereign. GIORGIO AGAMBEN, *THE STATE OF EXCEPTION* (Kevin Attell trans., 2005).

10. 542 U.S. 466 (2004).

11. 548 U.S. 557 (2006).

12. P. 28.

13. P. 32.

final question links up with the war powers debates, and more specifically, the vexed issue of presidential war powers. In a sense, the issue of presidential war powers lies at the heart of Hajjar's account, as the study focuses on the Bush administration's efforts to exploit these powers.

Despite the importance of presidential war powers in *The War in Court*, however, Hajjar's analysis of this contentious, complex subject is somewhat shallow. In her study *War Powers*, Mariah Zeisberg observes that the issue of war powers is so vexed because the U.S. Constitution does not provide a bright line answer as to which branch settles disputes over the law of war powers. Zeisberg states, "The Constitution... fails to provide for one authoritative institution to settle this controversy."¹⁴ The absence of a well-defined authority for identifying and enforcing the limits of presidential war powers has presented the opportunity for presidents to test and redefine the limits of executive power during wartime, states of emergency, and periods of vaguely-defined "hostilities."¹⁵ Hajjar's account clearly emphasizes that the Bush administration exploited this opportunity to horrific ends and provides a detailed account of the strategies that Bush's administration used to expand executive powers, but Hajjar provides little analysis of the conditions which made this expansion possible.

The final chapters of *The War in Court* home in on the Obama Administrations' regular use of drone strikes and "targeted killings."¹⁶ Though drone strikes may seem tangential to the subject of torture and incommunicado detention, Hajjar argues that the two are directly linked. In the wake of the controversy over the Bush-era torture and detainment policies, Obama's administration opted to substitute drone strikes for trial-less detention. Hajjar demonstrates that the Obama administration chose drone strikes, in part, because drone strikes are not vulnerable to legal challenges. It is already difficult to file lawsuits for secret detainees at confidential C.I.A. black sites; it is much more difficult to file a lawsuit for a drone strike victim in a war zone.

Finally, the facts presented in *The War in Court* raise serious questions about international law and its efficacy. For instance, although the United States brazenly flouted customary international law and the Geneva Conventions during the War on Terror, the state and C.I.A officials responsible for these violations were never held accountable. While Hajjar consistently expresses outrage at the United States' disregard for international law, and the heinous acts of Bush's administration are surely outrageous, a basic question remains. When a superpower can repeatedly violate international law with impunity, what does this say about international law itself? This question

14. MARIAH ZEISBERG, *WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY* 6 (2013).

15. *Id.* at 5.

16. *See* p. 231.

does not receive much attention in Hajjar's account, which is surprising given the central role that international law plays in the book.

The fact that *The War in Court* raises so many questions about U.S. domestic law, international law, and the powers of the executive is a testament to the book's richness and depth. While the War on Terror has technically ended, the story of unlawful detention and mistreatment of detainees in U.S. custody continues. In 2023, fifteen years after Obama entered office and promised to close Guantánamo Bay, the prison site still holds thirty-two detainees in captivity. Moreover, none of the C.I.A. officials responsible for wrongfully detaining and torturing innocent people, like Khalid El Masri, have faced any sanctions or been held accountable. Given these ongoing violations, it is safe to assume that the war in court will carry on.