Law's Wars, Law's Trials

The Fate of the Rule of Law in the U.S. 'War on Terror'

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ABSTRACT

The rule of law is a foundation of the liberal state. There is broad consensus about its core, extending across the political spectrum. Our own experience tragically teaches that the rule of law is most endangered when those exercising state power feel threatened: during and after wars and in response to social protest.

Keywords – Rule of law, “war on terror”

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Summary:

- I. *Law’s Wars*
- II. *Law’s Trials*
- III. *The Fate of the Rule of Law*

I. LAW’S WARS

On May 2, 2004 I heard Seymour Hersh break the Abu Ghraib story on National Public Radio. This had personal significance because I remembered vividly when Sy, who is my brother-in-law, had exposed the My Lai massacre 35 years earlier. I felt compelled to explore whether the rule of law would fare better in the US after a terrorist attack than it had in South Africa under apartheid, about which I had also written. I wrote two books to understand which strategies had been most effective to protect the

rule of law during the 16 years of the Bush and Obama administrations—because its defenders must maximize their limited material resources and political capital in the seemingly endless “war on terror.”

I organized *Law’s Wars*¹ around five sites of contestation: Abu Ghraib, Guantánamo Bay, torture, electronic surveillance, and what I grouped under the heading of battlefields: extraordinary renditions, secret prisons,

¹ Abel, Richard L. 2018. *Law’s Wars: The Fate of the Rule of Law in the U.S. ‘War on Terror’*. New York: Cambridge University Press; Abel, Richard L. 2018. *Law’s Trials: The Performance of Legal Institutions in the U.S. ‘War on Terror’*. New York: Cambridge University Press.

targeted killings, and civilian casualties. Here are my provisional conclusions.

First, law matters. Governments operate through law, which demands that those wielding state power give reasons for their actions. The Bush administration sought to clothe itself in legal garb by soliciting secret Office of Legal Counsel opinions from apparatchiki chosen for their political loyalty and eager to curry favor in the hope of career advancement, such as a federal judgeship. They offered specious justifications for the regime's numerous abuses. But though secret laws cannot legitimate, they did create an unbreakable circle of impunity. Lawyers could not be disciplined for writing the memos because of law's inherent indeterminacy. And the memos immunized those who followed them.

Second, sunshine is the best disinfectant. The Bush administration guiltily sought to conceal its actions. The CIA hid "ghost detainees" within existing prisons and built secret prisons to hide others (creating Rumsfeld's notorious "unknown unknowns"). The administration immured detainees in Guantánamo to render them invisible and incommunicado. The military classified the entire Taguba report on Abu Ghraib² and much of the dozen other military investigations. The CIA and NSA briefed only the Congressional Gangs of Four or Eight, who were sworn to secrecy. Surveillance was necessarily secret and battlefields inaccessible. José Rodríguez, director of the National Clandestine Service, shamelessly explained why the CIA destroyed videotapes of torture:

We knew that if the photos of CIA officers conducting authorized EITs [enhanced interrogation techniques—the Bush euphemism for torture] ever got out...the propaganda damage to the image of America would be immense. ... I was not depriving anyone of information about what was done or what was said. I was just getting rid of ugly visuals.... But the government's strategy was inherently flawed.

Secrecy can never be hermetic. Bureaucracies must document and share information. Officials boast about their achievements. Military Police in Abu Ghraib were infected with their generation's exhibitionism, photographing the sexual abuse of detainees and broadcasting the incriminating evidence. Legislation

and adjudication must be public. And hiding information perversely valorizes it (just as a cover-up can provoke more anger than the crime itself).

Revelations have different effects. Empathy may vary *inversely* with the number of victims. There was less concern about American bombs slaughtering dozens of Afghan civilians than the targeted killing of Anwar al-Awlaki. The "war on terror" generated its own iconography: Abu Ghraib detainees piled naked into pyramids; hooded manacled Guantánamo detainees kneeling in front of barbed wire under a pitiless sun. But the focus of these images on the *aberration* rather than the norm limits their effect. By emphasizing the sexualized gratuitous nature of the crimes in Abu Ghraib, the Bush administration could dismiss them as the actions of a few bad apples, whom it was glad to see court martialled.

Third, the buck stops here (in Harry Truman's famous phrase). The executive wields the greatest power and bears ultimate responsibility in matters of national security. But even within the Bush administration there was dissent from his intimates, the FBI, and high military officials. And it mattered *who* occupied the Oval Office. On his second day as president, Obama issued executive orders ending EITs and secret prisons and vowing to close Guantánamo within a year. Unfortunately, he was better at formulating policy than implementing it. He spent his limited political capital on the *Affordable Care Act* (ACA), leaving too little to overcome Congressional resistance to closing Guantánamo. And Attorney General Holder failed to lay the groundwork to prosecute High Value Detainees in federal court in New York.

Fourth, the House of Representatives calls itself the People's House. But though Congress can restrain executive power, Republicans generally supported Bush and thwarted Obama at every turn. Secrecy limited Congress's oversight. Its silence was deemed acceptance. Even when Democratic Senators enjoyed a majority, they failed to use confirmation hearings to extract information, much less block nominees—notably Alberto Gonzales as Attorney General.

Fifth, the US "war on terror" repeatedly violated "Equal Justice under Law", the ideal engraved on the Supreme Court

² Officially titled US Army 15-6 Report of Abuse of Prisoners in Iraq (May 2004).

pediment. After the 9/11 attacks, government detained, abused, and deported hundreds of *undocumented* Muslims and forced tens of thousands of documented Muslims to register. *Only* non-citizens were rendered to torture, detained in Guantánamo and secret prisons, subjected to EITs, tried by military commissions, or surveilled in the US. And the US refused to expose its *own* citizens to foreign law, demanding extraterritoriality in Afghanistan and Iraq and exfiltrating those not immune.

Sixth, civil society's responses to rule-of-law violations varied greatly. Most Americans ignored Snowden's revelations about NSA surveillance, having blithely surrendered their privacy to the siren lure of electronics and feeling confident the Agency was preoccupied with foreigners. But allied leaders felt compelled to complain about offenses to dignity, friendship, and national sovereignty. Most Americans were content to let detainees languish in Guantánamo (although other countries successfully freed their nationals). By contrast, proposals to transfer Uighurs to the Washington, D.C. suburbs or move other detainees to federal prisons or try them in federal courts sparked predictable and successful NIMBY objections.

Seventh, although most victims of the US "war on terror" were unable to resist, history repeatedly demonstrates the powers of the weak. Guantánamo detainees threw bombs of vomit, feces and urine at guards, engaged in self-mutilation and hunger strikes, and attempted suicide, sometimes succeeding. Although the military responded by forcibly feeding them and concealing their numbers, the protests sometimes improved conditions of confinement. But demonstrations in the US on the anniversary of the prison's opening—most recently, the seventeenth—had no effect, and protests in Muslim countries provoked by false reports of Koran desecration led to deaths and injuries but no change in policy. By contrast, public anger in Afghanistan and Pakistan against civilian casualties sometimes persuaded the US military to modify its tactics.

Eighth, which moral discourse? The most powerful criticism of EITs was deontological. John McCain, whose torture during six years in a North Vietnamese prison endowed him with unique moral authority, famously declared "it's about us. It's about who we were, who we are and who we aspire to be." "War on terror" hawks sought

to force adversaries to engage on the terrain of utility. But that discourse, though hegemonic, is fatally flawed. It ignores a fundamental asymmetry: only *Americans* enjoy the dubious benefits of torture, while *others* suffer all its costs. The utilitarian trump card—the notorious "ticking bomb" hypothetical—is premised on numerous unknowns: that only under torture would the suspect disclose *truthful* information *uniquely necessary* and *sufficient* to *stop an attack* otherwise *certain to occur*. Proponents did not and probably could not quantify *any* of these five variables. And if utilitarianism could justify what apologists dismissed as "torture lite", it could justify anything: forcing a suspect to watch his wife raped or his child torn apart, killing a million of "them" to save a million and one of "us."

Before his inauguration, Obama declared: "we need to look forward as opposed to looking backwards." Praising the "extraordinarily talented people" at the CIA "who are working very hard to keep Americans safe," he said: "I don't want them to suddenly feel like they've got [to] spend...all their time looking over their shoulders." Attorney General Holder promised not to prosecute anyone "who acted in good faith and within the scope of the legal guidance" from Bush administration lawyers. And *no one* has been prosecuted.

This is a tragic error. Only courts can authoritatively answer legal questions. Their silence lets perpetrators and enablers reiterate flawed legal positions. John Yoo keeps repeating his discredited views. Just before Trump's inauguration Alberto Gonzales said the new president could revive waterboarding because he "is head of the executive branch, and he could have the final say if he chooses to exercise his authority on the law".

II. LAW'S TRIALS

For this reason, the companion volume, '*Law's Trials*', addresses the judicial record in six substantive areas: criminal prosecutions, habeas corpus petitions, military commissions, courts martial, civil damages actions, and civil liberties violations.

First, terrorism-related prosecutions generally resembled those for other crimes: appropriate charges, disclosure of exculpatory evidence, thorough voir dire, no undue

delay, and zealous defense. Although most were resolved by guilty pleas—like all prosecutions—judges in the few trials showed admirable restraint in handling disruptive *pro se* accused, ruled fairly on defense objections (excluding evidence tainted by torture), and correctly instructed jurors, who often deliberated at length because of a single holdout, hanging on multiple occasions. But this simulacrum of the criminal process concealed troubling features. Almost all prosecutions were based on material support statutes rarely used before 9/11, which obviated the need to prove specific intent. Many accused were poor racial minorities profoundly ignorant about the radical Islamist ideology allegedly inspiring them. The government relied heavily on undercover agents and confidential witnesses, who gave or promised suspects huge sums, provided the necessary (but inoperable) weapons, explained how to use them, and badgered the accused into committing criminal acts. Although many defendants alleged entrapment, none could prove it. Almost all received long prison terms, often decades—sentences that might have been appropriate for what they allegedly *intended* but seemed excessive given that almost none caused any harm.

Second, habeas corpus petitions. In its June 2004 *Rasul v. Bush* decision, the Supreme Court upended the belief (reflected in lower court decisions) that aliens held outside the nation's *de jure* sovereignty could not seek habeas corpus. (The fact that Abu Ghraib broke the day of oral argument may have influenced some Justices). In *Rasul and Boumediene v. Bush*, as well as lower court decisions, judges split into two camps, inhabiting incompatible normative and empirical universes. These differences produced an unusual number of divided panels, *en banc* re-hearings, and appellate reversals. Opinions were saturated with inflated rhetoric, hyperbole, and personal attacks on judicial brethren. Justices like Stevens and O'Connor declaimed ringing endorsements of liberty. Their opponents valorized security in equally freighted language. Justice Scalia pontificated, without any evidence, that allowing habeas review would have “devastating consequences” and “almost certainly cause more Americans to be killed.” In the Fourth Circuit, Judge Wilkinson proclaimed that Americans’ “paramount right” was the commander-in-chief’s unlimited power, not liberty. His colleague, Judge Williamson, luridly warned that terrorists “aim to murder

scores of thousands of civilians,” who “can be slaughtered in a single action,” while “large swathes of urban landscape can be leveled in an instant.” In the end, Republican appointees dominating the DC Circuit reversed petitions granted by District Judges, casually jettisoning the deference owed to trial judges as fact finders and concocting a novel presumption that the government’s evidence was true. And Congress passed Bush’s *Military Commissions Act* (MCA), stripping civilian courts of habeas jurisdiction.

Third, just as Bush sought to insulate detainees from the scrutiny of Article III judges by isolating them in Guantánamo and secret prisons, so he created military commissions to minimize defendants’ procedural rights and maximize the likelihood of conviction. Aside from keeping the High Value Detainees (HVD) out of the criminal justice system, however, commissions have been ineffective at best and a shambolic fiasco at worst. The first five prosecutions targeted small fry: two chauffeurs, two juveniles, and a naïve young Australian adventure seeker (David Hicks). Plea bargains prevented commissions from either demonstrating that detainees were “the worst of the worst” (in Rumsfeld’s lying words) or showcasing the virtues of American justice. Most received short sentences (partly because of their lengthy detention without trial). Torture precluded some prosecutions (by rendering accused incompetent to stand trial) and reduced the likelihood of conviction (by excluding evidence). The politicization of commissions became embarrassingly obvious when the Pentagon removed three Convening Authorities (CA) and one of their legal advisers, and another CA (a Cheney protégé) quit after aborting al Qaeda’s prosecution because he had been tortured. Apparently unable to stomach the unfair process, six prosecutors resigned, the most aggressive of them switching sides. Most commission judges were less experienced than their civilian counterparts; and proceedings were repeatedly derailed as judges were redeployed, completed tours of duty, or retired, sometimes in disgust at the process, most recently in all three pending cases: Pohl in *U.S. v. al-Nashiri*, Spath and Schools in the *High Value Detainees* (HVD) trials, and Rubin in *U.S. v. al-Hadi*.

But personnel were the least of the problems. Unrestrained by a *Brady v. Maryland* rule, prosecutors obstructed or delayed discovery. Defense lawyers lacked adequate

resources and had difficulty gaining and keeping the trust of clients who had been harshly abused by Americans, some wearing the same uniform as military counsel. Accused who boycotted proceedings posed difficult ethical dilemmas for their lawyers. Interpreters were expensive, slow, and sometimes incompetent. Lawyer-client confidentiality was repeatedly compromised, sometimes deliberately. Commission judges refused to address *in limine* challenges to their jurisdiction, committing what even the conservative DC Circuit called “plain error” by entertaining charges that were *ex post facto* or not war crimes. So 17 years after Bush created the commissions, 11 after he sent the HVDs to Guantánamo, and seven after Holder abandoned civilian prosecutions, commission trials are still years away from starting and, given legally mandated appeals, a decade or more from finality—a chaos that was predictable in a criminal process created from scratch and entrusted to a novice institution exposed to political influence. And this is the moment when the Pentagon, in its wisdom, decided to initiate three more prosecutions, for alleged Southeast Asian terrorist plots.

Fourth, the dismal record of self-regulation by lawyers, doctors, clergy, police, politicians, and universities reveals the danger of letting foxes guard henhouses. The military is no different. It deals severely with those who threaten or injure Americans, sentencing Chelsea Manning to 35 years for leaking classified information and Nidal Hasan to death for killing 13 fellow soldiers. But when victims are foreigners in war zones, military justice is to justice as military music is to music. The fog of war obscures vision. Military investigators (often on short tours of duty) are far less expert than the FBI. Their ignorance of local languages and cultures hinders interviews with witnesses embittered by the alleged crime. Investigators often reach the scene weeks later—after evidence has disappeared—and then lose what they collect. Soldiers, who must have each other’s backs in combat, display the same loyalty afterwards in the *omertà* of the closed group. They are trained and motivated to commit acts that would be criminal off the battlefield. Law of war demarcations between permitted and prohibited behavior are unavoidably ambiguous. In courts martial, moreover, these are applied by a true jury of the defendant’s peers: soldiers of at least equal rank, usually with similar combat experience. And

in the name of military discipline, commanders can and do reduce charges and penalties.

Courts martial for alleged crimes in Afghanistan and Iraq had predictable outcomes: acquittals were frequent (whereas they are extremely rare in civilian prosecutions), and punishments were lenient (compared to those civilian courts imposed on military contractors and ex-soldiers for similar offenses). The likelihood of conviction varied inversely with the accused’s rank: no officer was convicted for the Abu Ghraib abuses. By contrast, courts martial dealt harshly with actions lacking military justification: Abu Ghraib’s sexualized abuse, thrill-seeking murders, rape, and the massacre of women and children.

Fifth, civil damages actions by “war on terror” victims confronted an obstacle course that defeated nearly every plaintiff: the Supreme Court’s “disfavor” for *Bivens v. Six Unknown Named Agents* actions, the difficulty of proving a constitutional right was “clearly established” when the harm occurred, exhaustion of administrative remedies, the alleged existence of other illusory remedies (such as criminal prosecution, Congressional action, or elections), qualified immunity, state secrets, and the MCA’s jurisdiction-stripping provision. Judges again split into irreconcilable camps. The “rights-oriented” began with Justice Marshall’s foundational assertion in *Marbury v. Madison* that courts have a duty “to say what the law is.” By contrast, “deferential” judges belittled plaintiffs’ injuries as the “inevitable” tragedies of war, where “risk-taking is the rule,” and blamed “terrorists” who “cunningly morph into their surroundings.” Conservative judges, who routinely invalidated regulations for failing to satisfy a cost-benefit analysis, refused to demand it of the military. Originalists casually invented novel doctrines like “battle-field preemption.” Conservative judges who angrily accused lawyers of “lawfare” for representing “war on terror” victims fulsomely praised lawyers representing *terrorism* victims. They made wholly speculative assertions that claims against the *government* would impede its “war on terror,” while claims against *terrorists* would eliminate terrorism.

The “war on terror” distorted tort law in other ways. The US paid \$2 million to Brandon Mayfield, an American lawyer wrongly detained for two weeks on suspicion of

terrorism because he had married a Muslim woman, converted to Islam, and represented Muslim clients. By contrast, the government successfully moved to dismiss a claim by Maher Arar, a Canadian it mistakenly rendered to a year of torture in Syria, although his own government apologized and paid him CAD\$ 10 million. And both courts and compensation funds were far more solicitous of and generous to US victims of terrorism than to foreign victims of the US “war on terror.”

Sixth, the Bush administration responded to the 9/11 attack just as Bin Laden had hoped—by embracing Samuel Huntington’s ideological mystification of a “clash of civilizations.” Bush lumped together Iran and Iraq in an “axis of evil”, oblivious to the centuries-old animosity between these countries, who recently had fought a devastating eight-year war. His casual reference to a new crusade revived Islam’s most painful memory. Both the military and the CIA deliberately insulted Muslim beliefs to interrogate and humiliate: stripping detainees before men and women, accusing them of homosexuality, making them simulate sexual acts, forcing them to embrace Christianity, wrapping them in the Israeli flag, desecrating corpses and the Koran, and violating the modesty of their women.

By contrast, courts generally vindicated First Amendment rights, perhaps because protests did not significantly obstruct the “war on terror.” And multiple efforts failed to incite a moral panic against Islam. Cynical politicians and demagogues have been unable to block the construction of mosques, notably at Ground Zero. Infantile stunts like burning the Koran or making a film insulting Mohammed grabbed the spotlight their perpetrators craved but were condemned by a broad spectrum of political and religious leaders. And courts opposed campaigns to legislate against the illusory threat of Sharia.

Comparisons across the six legal domains expose the variable influence of politics on law. In four categories—habeas corpus, civil damages actions by “war on terror” victims, electronic surveillance, and civil liberties—outcomes correlated very significantly with whether the judge had been appointed by a Democratic or Republican president. Among damages claims, judges were nearly twice as favorable to those by *terrorism* victims as they were to those by “war on terror” victims. By contrast, there were

no significant differences in judicial reviews of military commissions; and in criminal prosecutions, Democrats favored the prosecution *more* than Republicans.

One reason for these differences is that in cases where politics was significant—habeas petitions, civil damages actions by “war on terror” victims, civil liberties, and electronic surveillance—plaintiffs were brandishing law as a *sword* against the government, whereas in cases where politics was not significant—criminal prosecutions, military commission reviews, and courts martial—defendants were invoking law as a *shield*.

Ambiguity had different consequences across domains. Civilians were harshly punished for material support, even though many might never have acted without encouragement and assistance by informants, and almost none caused any harm. By contrast, US soldiers who killed or wounded Afghan or Iraqi civilians successfully invoked the fog of war to avoid responsibility. Circumstances that *never* diminish responsibility in civilian prosecutions, such as revenging a buddy’s death or harsh living conditions, and even aggravating factors, like substance abuse, excused or mitigated culpability in courts martial. Although the entrapment defense *never* succeeded in civilian prosecutions, courts martial acquitted defendants who had not been given Miranda warnings, even officers who knew their rights. Court martial convictions of Americans were overturned because of unlawful command influence; but far more egregious political interference in HVD trials—such as prejudgment by the commander-in-chief—never derailed a military commission. Civilian courts convicted almost every accused. Courts martial often acquitted because soldiers were tried by a jury of their peers. If military commissions ever try the HVDs, the jurors will be their enemies—true victors’ justice.

III. THE FATE OF THE RULE OF LAW

The most important lesson of these books is a paradox: the fate of the rule of law—whose *raison d’être* is to immunize law from political distortion—itself depends on politics. Party control of the White House and Congress was the single most powerful determinant. Republican senators blocked Obama’s judicial nominations and have enthusiastically confirmed Trump’s. The conclusion is

inescapable: defenders of the rule of law *must* engage in politics, including the electoral process.

I began my research expecting to find the rule of law far more resilient in the US—a hegemon wounded but not existentially threatened by the 9/11 attacks—than it had been in South Africa, whose small white minority desperately clung to power under apartheid. But the rule of law in the US has suffered more defeats than victories and faces even greater threats under Trump, who neither understands nor values it. Concerned that my books might induce despair and political passivity, I collected nearly 200 examples of efforts to confront a wide variety of grievous social wrongs: wars and their crimes; genocide; Hiroshima; sexual and other abuse of vulnerable populations by powerful men and cover-ups by religious, media, educational and athletic institutions; government mistreatment of racial, religious, ethnic, sexual and other minorities; colonialism; political persecution; wrongful convictions; human experimentation; and accidental mass injuries. Despite the enormous diversity of time, place, actor, and subject matter, the responses display one striking similarity: they took a generation

or more. Perpetrators must relinquish power or die, and their immediate descendants remain defensive. The worse the wrong, the greater the resistance to admitting it. Yet as the #MeToo movement shows, there often is a snowball effect: voicing one wrong inspires other victims to complain, and an apology by one perpetrator increases pressure on others.

These examples recalled the lessons of South Africa. After the National Party constructed apartheid in 1948, it took nearly half a century for Blacks—85 percent of the population—to win power in the first democratic election. Victims of the US “war on terror”, by contrast, are fewer in number, non-citizens, isolated in Guantánamo or dispersed across war-torn nations, with little ability to influence the world’s greatest power. But I have to believe their time will come and hope those victims and their champions, who have tenaciously defended the rule of law since 9/11, draw strength from the successful struggles of South Africans and other oppressed peoples and inspiration from Martin Luther King Jr.’s promise that “the arc of the moral universe is long, but it bends towards justice.”