

## LAW'S TRIALS

The US “war on terror” has repeatedly violated fundamental rule-of-law values. When executive and legislature commit such egregious wrongs, courts represent the ultimate defense. *Law's Trials: The Performance of Legal Institutions in the US “War on Terror”* offers the first comprehensive account of judicial performance during the 16 years of the Bush and Obama administrations. Richard Abel examines criminal prosecutions of alleged terrorists, courts-martial of military personnel accused of law-of-war violations, military commission trials of “high value detainees,” habeas corpus petitions by Guantánamo detainees, civil damages actions by victims of both the “war on terror” and terrorism, and civil liberties violations by government officials and Islamophobic campaigners. *Law's Trials* identifies successful defenses of the rule of law through qualitative and quantitative analyses, comparing the behavior of judges within and between each category of cases and locating those actions in a comparative history of efforts to redress fundamental injustices.

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# LAW'S TRIALS

The Performance of Legal Institutions  
in the US "War on Terror"

*Richard L. Abel*  
UCLA

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## FOREWORD

Do courts in fact preserve the rule of law? We all assume they do, but we rarely study precisely how they do it, and when and why they fail. The real test comes not in ordinary times, but when judges are under the most intense stress and political pressure to trade off the rights of those brought before them for unquantifiable, yet not easily dismissed, claims of national security. Nearly two decades after September 11, 2001, a broad and confusing landscape of legal actions has unfolded – courts-martial, criminal prosecutions, military commissions, habeas corpus petitions, and civil actions for grave civil liberties and human rights violations – that finally give us the kind of ecosystem-shocking episode that is ripe for serious scholarly examination. But how do we know which legal institutions in fact best protected the rule of law, and which have abjectly failed?

Understanding how and why trials mattered during this bracing historical era is one of the central challenges facing those who want to understand better the interaction between law and society. For while this is ground overtilled by many, it has been notably underexamined by serious scholars who conscientiously research where, when, and how challenges to the rule of law arise; how legal institutions weather those challenges; and how those responses compare with other responses by parallel institutions in other societies or during other historical eras. Over his long and most distinguished academic career, Richard L. Abel has consistently proven himself to be one of our most discerning law and society scholars. In the 1990s he instructed us on how law and lawyers mattered in winning another searing social justice challenge: the decades-long struggle against apartheid. In this prodigious volume, and its equally ambitious companion *Law's Wars*, Abel offers a nuanced, deeply thoughtful, and overarching vision of how law can preserve its essential core under intense political pressure, and what long-term overall impact the so-called “war on terror” has had on our nation’s bed-rock values.

## FOREWORD

These volumes should be read and remembered by historians, political scientists, sociologists, anthropologists, as well as lawyers willing to draw the fundamental lessons of this era. Those of us who have lived through these decades as observers and participants have often anguished when we have sought deeper understanding, only to find transient commentary. We both need and should learn from Abel's essential and painstaking research, which provides the kind of detailed quantitative and qualitative analysis that has been too sadly missing from the daily blogosphere's spontaneous reactions. Abel's moving final chapter – which after surveying more than one hundred other social justice campaigns, suggests that most remedial rule-of-law projects take a generation or more to reach fruition – offers comfort and insight at the same time as it demands patience. Abel's greatest achievement may be in reminding us that the vigilance that preserves liberty is sadly unceasing, and demands the kind of dogged persistence and perseverance we wish we could be spared from, but will always be both destined and obliged to provide.

Harold Hongju Koh<sup>+</sup>

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## FOREWORD

Professor Rick Abel's stunning new book tells the story of how the US Constitution has failed since September 11, 2001, and during crises throughout American history. As Professor Abel describes, so often since the earliest days of the nation, when there has been a crisis – especially a foreign-based crisis – the response has been repression. In hindsight, we realize that the country was not made any safer by taking away rights. The goal of ensuring safety and security is a noble one, but its pursuit too easily has led to the compromise of our basic values.

Professor Abel's focus is on what has occurred since September 11, 2001. He paints a bleak picture of how our institutions have failed to uphold the rule of law and to live up to even basic notions of human rights. He shows how this continues to this day, more than sixteen years after 9/11, a period far longer than any war in American history and that shows no prospect of ending.

This, of course, is not the first book to be written about the loss of rights since 9/11. But it is different from any others. In part, this is because of its scope, especially combined with its companion volume, *Law's Wars*. This is the most comprehensive book yet on what has occurred over the last decade and half as part of the “war on terror.” It focuses not just on the Supreme Court, or even the courts, but on all of the actors in the legal system, telling the story of each of the criminal prosecutions, of the military tribunals, of the habeas proceedings, of the civil suits. Although this is not its primary purpose, it is going to be a vital reference book for what has occurred in the legal system since 9/11.

But what most distinguishes the book is its sociolegal perspective. It focuses on the people involved: the parties, law enforcement officers, prosecutors, defense lawyers, and judges. Ultimately, it is a story of how well-intentioned people – and there is no doubt that the vast majority of those involved were acting to protect the country – came to undermining the Constitution and basic norms of human rights. It is a powerful story of how US courts largely have failed in their willingness

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to convict on inadequate evidence, their refusal to grant habeas corpus, and their dismissal of civil suits. It forces the reader to think about how the institutions of American government so easily can be used for repression and how the checks and balances that should protect everyone can fail.

Professor Abel recognizes that there is much more to know and consider. He suggests questions for further research, knowing that this era of American history will be studied for generations to come.

The sheer comprehensiveness of Professor Abel's effort is what makes it so powerful – and frankly, so distressing. The only conclusion from all of this is that the US legal system has profoundly failed. It requires us to think about whether it realistically could have done better. I believe so. But we must think about what it would take for government institutions to adhere to the rule of law even in a time of crisis, such as in fighting the war on terror.

Professor Abel concludes on an optimistic note. He details the many instances in which other countries have come to recognize their human rights abuses and act to reconcile with them. But it is an open question whether the United States will do so. Even the Obama administration steadfastly refused to prosecute the war crimes committed in the earlier years, such as in torture and inhumane treatment of detainees. Surely, the Trump administration – which wants to expand the use of Guantánamo – is not going to do so.

Professor Abel reminds us that future generations may learn from our mistakes and will be less likely to repeat them. The repression of free speech during World War I – which Professor Abel describes early in the book – did not happen again. The internment of Japanese Americans during World War II is almost universally condemned, and that has prevented a subsequent similar experience.

The most hopeful conclusion from this book is that by telling this history, and realizing the tragic mistakes since 9/11, we are less likely to repeat them. I hope Professor Abel is right, though there is no way to know how the future will look at what has occurred and what lessons will be drawn from it.

Ultimately, Professor Abel tells us of how a society that prides itself on observing the rule of law has compromised it in pursuing security above all else. Underlying his story is how government officials charged with combating terrorism pursued that even when it meant violating the Constitution and basic norms of human rights. Can we ever change this so that they see their role as much as upholding the Constitution as

FOREWORD

protecting society? That is the question that every reader must ask after finishing this magnificent book.

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## PREFACE

The “war on terror,” which the USA launched after the 9/11 attacks, profoundly challenged the rule of law during the 16 years of the Bush and Obama administrations. In the companion volume, *Law's Wars*, I define the rule of law, explain its importance, and chart its fate across five contested terrains: Abu Ghraib, Guantánamo Bay, interrogation and torture, electronic surveillance, and battlefield law of war crimes. I focus on the roles of two state institutions (executive and legislature) and civil society (media, lawyers, and NGOs) in defending the rule of law. Because the judiciary claims to be independent and apolitical, it is seen as the ultimate bulwark of the rule of law. The present volume, therefore, deals exclusively with judicial proceedings. Chapter 1 draws on history, primarily US and especially in moments of crisis, to derive research questions about when and how courts successfully defend the rule of law. The book then discusses six legal processes: criminal prosecutions of accused terrorists; courts-martial of military service members for law of war violations; military commissions for Guantánamo prisoners, especially the so-called high-value detainees; habeas corpus petitions by Guantánamo detainees (and a few others); civil damages actions by (and compensation schemes for) victims of both the “war on terror” and terrorism; and civil liberties violations and responses to Islamophobia. The concluding chapter compares the fate of the rule of law across these six domains, as well as with the contested terrains examined in *Law's Wars*. Although the two volumes address some of the same issues, they contain almost no overlap and can be read separately.

Many other books have done an excellent job of explicating and criticizing the legal doctrine spawned by the “war on terror.” My goal is different: to understand when and why courts preserved the rule of law in the face of (sometimes overwhelming) pressure to sacrifice liberty for (an often illusory) security. My method, therefore, is sociolegal: investigating the actions of all those who sought to defend the rule of law (parties, law enforcement officers, prosecutors, defense lawyers, and

## PREFACE

judges), how they did so, the rhetoric they deployed, and the outcomes. For this reason, I do not restrict myself to the most recent majority decision by the highest court (the only authoritative source of doctrine); I am equally interested in lower court decisions and concurrences and dissents, process as well as outcome. That broader vision allows me to engage not only in qualitative analysis of the reasons for actions but also in quantitative analysis of the actions themselves, asking whether judges' votes are correlated with their political orientations (as measured by the party of the appointing president) and how this differs across domains.

By examining more than a hundred other campaigns to redress major social wrongs, the concluding chapter offers a historical context for understanding the efforts described in this book to correct the deplorable errors of the “war on terror.” I advance the tentative hypothesis that such remedial projects often take a generation or more to bear fruit, offering hope to those discouraged by the performance of US legal institutions during the “war on terror.” This reminds us of what several early nineteenth-century commentators observed: eternal vigilance is the price of liberty. I hope the narratives and analyses of these hundreds of cases from the first 16 years of the “war on terror” will offer insight and inspiration to those who must persevere in unending defense of the rule of law.

## ACRONYMS AND ABBREVIATIONS

1st Lt.	First Lieutenant
2nd Lt.	Second Lieutenant
ABA	American Bar Association
ACLU	American Civil Liberties Union
ADL	Anti-Defamation League
ADMAX SHU	Administrative Maximum Special Housing Unit
AFB	Air Force Base
AFDI	American Freedom Defense Initiative
AG	Attorney General
AI	Amnesty International
AK-47	Kalashnikov assault rifle
AP	Associated Press
AQAP	Al-Qaeda in the Arabian Peninsula
AR 15–6	Army Regulation 15–6 (governing criminal investigations)
ARB	Administrative Review Board
Art. 32	Military equivalent of civilian court arraignment or grand jury indictment
ATA	Anti-Terrorism Act
ATS	Alien Tort Statute, 28 U.S.C. §1350
AUEC	alien unlawful enemy combatant
AUMF	Authorization for the Use of Military Force
AUSA	Assistant US Attorney
AWOL	Absent Without Official Leave
BDO	Behavioral Detection Officer
BDS	DoS Bureau of Diplomatic Security
BGen.	Brigadier General
BoI	Bureau of Investigation
BoP	US Bureau of Prisons
CA	Military Commissions Convening Authority (also called Appointing Authority)

## ACRONYMS AND ABBREVIATIONS

CAIR	Council on American–Islamic Relations
Capt.	Captain
CAT	Convention Against Torture
CBC	Canadian Broadcasting Corporation
CBS	Columbia Broadcasting System
CBP	Customs and Border Patrol (DHS)
CCR	Center for Constitutional Rights
CD Cal	US District Court for the Central District of California
CD Ill	US District Court for the Central District of Illinois
CENTCOM	US Central Command
CIA	Central Intelligence Agency
CID	Criminal Investigation Command (Army)
CLEAR	Creating Law Enforcement Accountability and Responsibility (CUNY Law School project)
CMCR	Court of Military Commission Review
CMDR	Commander
CNN	Cable News Network
Col.	Colonel
CPA	Coalition Provisional Authority
Cpl.	Corporal
CS	confidential source
CSO	Court Security Officer
CSRT	Combatant Status Review Tribunal
CUNY	City University of New York
D Az	US District Court for the District of Arizona
D Colo	US District Court for the District of Colorado
D Hi	US District Court for the District of Hawaii
D Id	US District Court for the District of Idaho
D Mass	US District Court for the District of Massachusetts
D Md	US District Court for the District of Maryland
D Minn	US District Court for the District of Minnesota
D Mont	US District Court for the District of Montana
D NJ	US District Court for the District of New Jersey
D Ore	US District Court for the District of Oregon
D RI	US District Court for the District of Rhode Island
D SC	US District Court for the District of South Carolina
D Utah	US District Court for the District of Utah
DCI	Director of the CIA



## ACRONYMS AND ABBREVIATIONS

DDC	US District Court for the District of Columbia
DHS	Department of Homeland Security
DIA	Defense Intelligence Agency
DNI	Director of National Intelligence
DoD	US Department of Defense
DoE	Department of Energy
DoJ	US Department of Justice
DoS	Department of State
DSC	US District Court for the District of South Carolina
DTA	Detainee Treatment Act of 2005
EC	enemy combatant
ECHR	European Court of Human Rights
ED Cal	US District Court for the Eastern District of California
ED Mich	US District Court for the Eastern District of Michigan
ED Va	US District Court for the Eastern District of Virginia
ED Wash	US District Court for the Eastern District of Washington
EDNY	US District Court for the Eastern District of New York
EEOC	Equal Employment Opportunities Commission
EIT	enhanced interrogation technique
EO	Executive Order
EPIC	Electronic Privacy Information Center
FBI	Federal Bureau of Investigation
FDR	Franklin D. Roosevelt
FISC	Foreign Intelligence Surveillance Court
FOIA	Freedom of Information Act 2000
FSIA	Foreign Sovereign Immunities Act
FTCA	Federal Tort Claims Act
GAO	Government Accountability Office
Gen.	General
Gitmo	Guantánamo Bay Naval Base
GTMO	Guantánamo Bay Naval Base
HASC	House Armed Services Committee
HIG	Hezb-I-Islam Gulbuddin
HJC	House Judiciary Committee

## ACRONYMS AND ABBREVIATIONS

HLF	Holy Land Foundation
HPSCI	House Permanent Select Committee on Intelligence
HRF	Human Rights First
HRW	Human Rights Watch
HUAC	House Committee on Un-American Activities
Humvee	High Mobility Multipurpose Wheeled Vehicle (HMMWV)
HVD	high-value detainee
IATA	International Air Transport Association
ICC	International Criminal Court
ICE	Immigration and Customs Enforcement (DHS)
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IED	improvised explosive device
IG	Inspector General
IMU	Islamic Movement of Uzbekistan
INA	Immigration and Naturalization Act
IRA	Irish Republican Army
IS	Islamic State
ISIS	Islamic State of Iraq and Syria
ITRSHRA	Iran Threat Reduction and Syria Human Rights Act
IWW	International Workers of the World
JAG	Judge Advocate General
JCS	Joint Chiefs of Staff
JFK	John F. Kennedy Airport
JTF	Joint Task Force
KKK	Ku Klux Klan
KMT	Kuomintang (Taiwan)
KSM	Khalid Sheikh Mohammed
LAPD	Los Angeles Police Department
LAX	Los Angeles Airport
LCpl.	Lance Corporal
LGen.	Lieutenant General
LOAC	Law of Armed Conflict
Lt.	Lieutenant
LtCol.	Lieutenant Colonel

## ACRONYMS AND ABBREVIATIONS

LtCdr.	Lieutenant Commander
Maj.	Major
MAM	military-aged male
MC	military commission
MCA	Military Commissions Act of 2006, 2009, or 2015
MD Tn	US District Court for the Middle District of Tennessee
MDC	Metropolitan Detention Center (federal prison in Brooklyn)
MEJA	Military Extraterritorial Jurisdiction Act
MEK	Mujaheddin-e-Khalq (People's Mujaheddin Organization of Iran)
MGen.	Major General
MNF-I	Multi-National Force–Iraq
MP	Military Police
MPAC	Muslim Public Affairs Council
MTA	Metropolitan Transportation Authority
NBC	National Broadcasting Company
NCIC	National Crime Information Center (FBI)
NCIS	Naval Criminal Investigative Service
NDAA	National Defense Authorization Act
ND Cal	US District Court for the Northern District of California
ND Fla	US District Court for the Northern District of Florida
ND Ill	US District Court for the Northern District of Illinois
ND Ok	US District Court for the Northern District of Oklahoma
NGO	nongovernmental organization
NPR	National Public Radio
NSA	National Security Agency
NYC	New York City
NYCB	New York City Bar
NYCLU	New York Civil Liberties Union
NYPD	New York Police Department
NYPD OIG	New York Police Department Office of the Inspector General
NYU	New York University

## ACRONYMS AND ABBREVIATIONS

OLC	Department of Justice Office of Legal Counsel
OMC	Office of Military Commissions
PA	Palestine Authority
PFC	Private First Class
PIVF	Passenger Identity Verification Form
PLO	Palestine Liberation Organization
PO3	Petty Officer 3rd Class (Navy)
POM	Presiding Officer Manual (MCs)
POW	prisoner of war
PRT	Privilege Review Team
PTSD	post-traumatic stress disorder
Pvt.	Private
RAdm.	Rear Admiral (Navy)
Ret.	retired
RFRA	Religious Freedom Restoration Act
RNC	Republican National Committee
ROE	Rules of Engagement
SASC	Senate Armed Services Committee
SD Fla	US District Court for the Southern District of Florida
SD Tex	US District Court for the Southern District of Texas
SDNY	US District Court for the Southern District of New York
SEPTA	Southeastern Pennsylvania Transportation Authority
SNP	Spanish National Police
SSCI	Senate Select Committee on Intelligence
Sgt.	Sergeant
SJA	Staff Judge Advocate
SJC	Senate Judiciary Committee
SOP	Standard Operation Procedure
SOUTHCOM	Southern Command
SPC	Specialist
SPOT	Screening Passengers by Observation Techniques (TSA)
SSgt.	Staff Sergeant
SUV	sport utility vehicle
TEI	Terrorism Enterprise Investigation (NYPD)
TIDE	Terrorist Identities Datamart Environment

## ACRONYMS AND ABBREVIATIONS

TRIP	Traveler Redress Inquiry Program (DHS)
TRO	Temporary Restraining Order
TSA	Transportation Security Administration
TVPA	Torture Victims Protection Act
UA	undercover agent
UCLA	University of California, Los Angeles
UCMJ	Uniform Code of Military Justice
UEC	unlawful enemy combatant
UECRB	Unlawful Enemy Combatant Review Board
USSC	US Supreme Court
VAdm.	Vice Admiral
WD Ky	US District Court for the Western District of Kentucky
WD Ok	US District Court for the Western District of Oklahoma
WD Pa	US District Court for the Western District of Pennsylvania
WD Wash	US District Court for the Western District of Washington

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