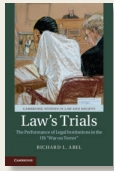


Book review

Law's Trials: The Performance of Legal Institutions in the US 'War on Terror'



Author: Richard L. Abel
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Richard Abel has had a long and productive career as a legal scholar, retiring in 2002 after nearly 30 years as professor of law at the University of California, Los Angeles. His work has focused on law in society, in Britain and South Africa as well as in the US. In his 'retirement', he has been studying in depth the 'War on Terror' (a term he dislikes) as conducted by the administrations of George W. Bush and Barack Obama in the US. Clearly the subject has worldwide importance.

The result is two substantial and absorbing volumes. *Law's Wars* reviews the measures taken by government following the cataclysmic terrorist attack on New York on 11 September 2001. *Law's Trials* examines the role of the courts, categorising and analysing the judicial reaction to the use and abuse of government powers of arrest, detention and punishment of those accused or suspected of terrorist offences. Together these books present a devastating exposure of the failure of government and the courts to uphold the rule of law to the detriment of national security and to the ability of the US to promote international stability.

The attack on 9/11 has become a tragic symbol of the shift in the pattern of international conflict away from the traditional confrontations between the armed forces of sovereign states to random and unpredictable attacks by freelancers with uncertain allegiances. Governments have been slow to adapt laws and law enforcement to face these new challenges, and have been too ready to sacrifice prudence and practical experience to placate the clamour from those who seek unprincipled and legally indefensible remedies.

In *Law's Trials* Abel examines the notorious scandals of Abu Ghraib and the widespread use of torture disguised by the euphemism 'extraordinary interrogation techniques' (EITs), including such horrors as waterboarding. Though EITs were stopped by Obama when he became

president, they had been justified by those who authorised them, such as Vice-President Cheney and Defense Secretary Rumsfeld, and endorsed by senior government lawyers. Abel catalogues these and other abuses of the many individuals incarcerated on the basis of often scant or non-existent evidence that they were 'enemy combatants'—another convenient euphemism with no legal pedigree. Another challenge to the rule of law under the Bush administration was the creation of the offshore prison camp at Guantánamo Bay. This too was an attempt to bypass the rule of law by denying to those imprisoned there their rights under the US Constitution. Obama did not fulfil his promise to close Guantánamo and it survives today, continuing to hold untried prisoners in defiance of international law.

“ Politicisation of the judiciary has seemed less of a problem in Britain—though we should never be complacent about it ”

A recipe for barbarism

In *Law's Wars*, Abel reviews the ways in which the courts and the legal system have reacted to the abuses and evasions of established law in pursuit of terror suspects. Abel believes the war metaphor is misleading—that measures to combat terrorism should be embraced within the current constitutional and legal framework. Abandoning the rule of law is a recipe for barbarism and ultimately counter-productive because it perpetuates conflict. He examines the use of the legal tools deployed by government—criminal

prosecutions, courts martial, military commissions, and deportation to secret prisons in other complicit states. He considers the effectiveness of defensive responses: access of suspects to the courts and quasi-judicial bodies as defendants, or through *habeas corpus* applications or damages claims. He finds that the odds are heavily weighted against the suspect.

Abel demonstrates the policy of concealment pursued by the government in order to avoid criticism of abuses and illegalities. An official military report which exposed the barbarities of Abu Ghraib was classified and suppressed. Photographs and videotapes of bullying interrogations were deliberately destroyed by the CIA. A congressional report documenting systematic torture by the CIA has led to little or no disciplinary action. Fortunately, much of the evidence has leaked out but those at the top who were ultimately responsible have never been held accountable.

Abel records his disappointment with the failure of Obama to restore the reputation of US justice. He did not carry out his promise to close Guantánamo and his attorney-general, Eric Holder, promised not to prosecute anyone 'who acted in good faith and within the scope of the legal guidance' from Bush administration lawyers. That advice is now widely agreed to be wrong. In any event, superior orders or advice cannot justify criminal conduct, as we know from Nuremberg.

A tale of two camps

Abel acknowledges that the best traditions and practices of the US judicial system were not always compromised. He suggests that the often-avowed political partisanship of US judges has had an unfortunate impact in many cases. He talks about judges splitting into two camps, one giving greater weight to the supposed security risk and the other to the presumed innocence of the suspect. 'Opinions were saturated with inflated rhetoric, hyperbole, and personal attacks on judicial brethren', he says. Abel's study does not extend to the Trump era but the threat to the rule of law may be even greater from his authoritarian leadership.

Politicisation of the judiciary has seemed less of a problem in Britain—though we should never be complacent about it. Yet the challenges to the rule of law posed by terrorism in Britain are just as great. We can learn much from Richard Abel's scholarship.

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Reviewer: Sir Geoffrey Bindman QC, NLJ columnist & consultant, Bindmans LLP.