



# **BOOK REVIEW ROUNDTABLE: Law's Wars, Law's Trials**

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## 1. Introduction: Past and Present as Prologue

*Sudha Setty*

Professor Richard Abel has gifted scholars and students of the rule of law with a two-volume opus. *Law's Wars* and *Law's Trials* examine various aspects of counter-terrorism programs and related judicial processes that were developed and tested in the post-9/11 context. Abel provides detailed descriptions of how governmental and nongovernmental actors, including the executive branch, Congress, Article III courts, the military, and lawyers, responded to the pressures of a given situation. His books encourage further research into military detention, the systems of courts martial and military commissions, how civil remedies influence national security decision-making, civil liberties and human rights, surveillance, and related contexts. Throughout both volumes, Abel offers a clear-eyed argument as to how the U.S. government and court system have occasionally failed the rule of law and the ideals of liberal democracy.

The authors in this roundtable use Abel's work as a starting point to explore thought-provoking interstitial questions about fundamental principles undergirding the rule of law. These questions illustrate the power of Abel's work to frame scholarly inquiry in the field of national security. Yet, they also carry immediate resonance. The authors submitted their pieces in early 2020, as the United States began to grapple in earnest with the spread and ramifications of the novel coronavirus pandemic. I wrote this framing piece against the backdrop of a quickly shifting patchwork of federal, state, and local guidance on social distancing, school and business closures, and allowable gatherings; preparations by local health care systems bracing for an overwhelming number of coronavirus cases; and intermittent threats of localized quarantines by President Donald Trump, who broadened his powers by declaring a national emergency in mid-March 2020.

In other words, these pieces were written at a time of uncertainty. In recent months, high levels of stress have been placed on various structures of federal, state, and local governments. Although Abel's encyclopedic research dives deeply into the context of the post-9/11 period and explores the U.S. legal system's response to terrorism and national security threats, the lessons to which he points us are ones we should bear in mind during other times of emergency — including the one we are living through now.

### **Roundtable Contributions**

Professor Deborah Pearlstein's contribution to this roundtable focuses on the rule of law's central meaning: "the core principles and institutional structures by which any lawful action may be taken, by which any legal rule may be applied, interpreted, or changed." Pearlstein reflects on Abel's work as a close examination of how legal structures meant to constrain presidential maximalism in the so-called "War on Terror" fared in the context of the Bush and Obama administrations. She argues that it is unclear what a victory for the rule of law would mean in some of the contexts Abel analyzes. As such, she wonders whether all of the failures cataloged by Abel are necessarily failures of the rule of law, as opposed to failures of political, moral, or military judgment.

Pearlstein considers numerous examples, including the Obama administration's decision not to prosecute federal agents implicated in the deaths of two detainees who had been tortured. As she notes, this incident has been described by many political commentators and legal scholars as a failure of the rule of law. Pearlstein argues that the choice not to prosecute based on a lack of sufficient admissible evidence, while disappointing, did not represent a failure of the rule of law. The decision was reasonable, given the low likelihood of being able to secure convictions under the circumstances. She suggests that prosecutors may have determined that convictions would only have been possible had

they pushed for lower evidentiary standards or other deviations that would, themselves, have weakened the rule of law, and that the choice of prosecutors not to pursue that possibility was, in some respects, a limited victory for the rule of law. In this context and in others, Pearlstein encourages precision in analyzing whether the failures identified implicate the rule of law, general principles of justice, other political or military institutions, or a combination, asking readers to resist a weakening faith in the rule of law that might occur with the over-labeling of mistakes as rule-of-law failures.

Col. David Wallace draws upon his military service and teaching career to provide a thoughtful critique of Abel's chapter on *jus in bello*, or "law in war." Wallace notes the importance of Abel's discussion of targeted killing and the long debate surrounding this issue in the Bush, Obama, and Trump administrations. Wallace, like Pearlstein, seeks definitional clarity — in this case, he attempts to determine what precisely constitutes a targeted killing, and whether and how to distinguish among a battlefield killing, a signature strike, a personality strike, and an assassination under Abel's framework. Wallace presents another possible source of confusion, one that underlies some government arguments justifying targeted killings: whether one should consider targeted killings in a war paradigm or a law enforcement paradigm and whether that choice implicates international law and norms. Wallace furthermore suggests that a more detailed and nuanced explanation of the core principles of *jus in bello* might be helpful to non-lawyers attempting to engage with Abel's work.

Professor Mitt Regan considers Abel's discussion of "secret law." Regan probes the issue of whether the United States betrayed the rule of law by keeping the legal authority cited to support its counter-terrorism programs and operations a secret. He observes that secret law is normative — by definition, it is inconsistent with the rule of law. He uses this observation to focus on the purposes of disclosure and secrecy in various contexts.

Regan offers a framework by which to analyze the validity of claims that some law ought to be kept secret, focusing on the principles of government accountability and fair notice. With regard to fair notice in the realm of post-9/11 counter-terrorism programs, Regan observes that depriving individuals of life and liberty may occur outside of the framework of criminal prosecution, particularly with non-U.S. actors, and considers whether the demands of the rule of law extend to fair notice in this context. Regan argues that privacy interests, as a corollary to liberty interests, should also be part of the consideration of fair notice. He offers the particular context of surveillance as one in which an individual may believe she is acting or expressing herself in private, but that private behavior may result in deprivations of fundamental rights based on secret laws. After laying out some of the key values of transparency in different contexts, Regan also considers the purpose of secrecy, and its importance in some law enforcement and counter-terrorism work. He argues that the executive branch should not engage in the “deep secrecy” that would allow it to avoid disclosing when it has created laws increasing its ability to surveil both citizens and noncitizens. The values of liberal democracy, according to Regan, demand transparency.

## **The Vulnerability of Transparency Mechanisms**

As part of my contribution to the roundtable, I considered Abel’s illustration of the failure of Congress and the courts to uphold the rule of law. Abel credits nongovernmental organizations, including civil society organizations and the press, for attempting to create transparency and accountability around counter-terrorism programs. I agree with him and want to consider the potential — and potential pitfalls — of an additional avenue of transparency: the Privacy and Civil Liberties Oversight Board (PCLOB).

As Abel notes, while courts have occasionally insisted on greater transparency and accountability in the national security sphere,<sup>1</sup> the general trend over many decades has been a decline in the ability of courts to demand increased transparency — based on government invocations of the state secrets privilege, a lack of standing, qualified immunity, and other procedural hurdles.<sup>2</sup> Critics of secrecy have turned to other transparency-promoting mechanisms that operate with some independence within government, such as inspectors general or agency counsel.<sup>3</sup> As Abel acknowledges, these bodies do important work in upholding the rule of law when they are functioning adequately. The efficacy of these groups depends on the power that they are granted (whether statutorily or otherwise), their ability to disseminate their findings, and their available resources.

A look at the genesis, operations, and limitations of the PCLOB illustrates the vulnerability of transparency in this type of mechanism that is not subject to democratic controls. Although the PCLOB has produced reports and recommendations that demonstrate a genuine commitment to transparency in the name of assessing and improving national security programs and a prioritization of democratic values, when the board has been hobbled by vulnerabilities, it has been largely ineffectual. This demonstrates the dangers of relying on mechanisms like the PCLOB, and reinforces Abel's observation that nonstate actors like the press and nongovernmental organizations may

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<sup>1</sup> See, *Ibrahim v. Department of Homeland Security*, 669 F.3d 983 (9th Cir. 2012).

<sup>2</sup> See, Sudha Setty, *National Security Secrecy: Comparative Effects on Democracy and the Rule of Law* (Cambridge, UK: Cambridge University Press, 2017), 55–64; and Michael J. Glennon, “National Security and Double Government,” *Harvard National Security Journal* 5, no. 1 (2014), <https://harvardnsj.org/wp-content/uploads/sites/13/2014/01/Glennon-Final.pdf>.

<sup>3</sup> Shirin Sinnar, “Protecting Rights from Within? Inspectors General and National Security Oversight,” *Stanford Law Review* 65, no. 5 (2013): 1027.

be a more reliable source of accountability, despite having less access to information and resources.

The PCLOB was established in 2007, three years after the 9/11 Commission recommended it be created to serve as an avenue for accountability with regard to national security matters.<sup>4</sup> The PCLOB's mission is to assess aspects of the government's national security programs for efficacy and unnecessary incursions into civil liberties. The board exercises some independence from the executive branch.<sup>5</sup> In 2013 and 2014, its promise to curb potential abuses seemed significant. For example, the PCLOB issued a highly critical report in January 2014 that pressured the Obama administration to curtail its collection of telephonic and internet metadata of U.S. persons. The board's report encouraged the congressional debate on a bill that eventually passed as the USA Freedom Act.<sup>6</sup> At that time, it was believed that intelligence agencies would consult the PCLOB whenever they considered an issue to be new or novel. Nonpartisan external input from a body with the PCLOB's expertise and autonomy would improve self-policing within the intelligence community and help agencies avoid implementing controversial programs while setting better parameters around new programs. Ideally, the PCLOB offers an additional level of transparency to inform the public as to the types of surveillance programs that the government operates.

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<sup>4</sup> See *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* (2004), 395. See also Public Law No. 110-53, paragraph 801(a), 121 Statute at 352-58 (making the PCLOB an independent agency within the executive branch).

<sup>5</sup> See Garrett Hatch, Cong. Research Serv., RL34385, *Privacy and Civil Liberties Oversight Board: New Independent Agency Status* (2012) (describing the establishment of the PCLOB).

<sup>6</sup> "Report on the Telephone Records Program Conducted Under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court," Privacy & Civil Liberties Oversight Board, (2014), 10-11, [http://www.pclob.gov/Library/215-Report\\_on\\_the\\_Telephone\\_Records\\_Program-2.pdf](http://www.pclob.gov/Library/215-Report_on_the_Telephone_Records_Program-2.pdf).

However, the board's potential influence in protecting civil liberties is limited. First, it possesses the soft power of giving advice to agencies or providing prospective guidance only when guided by an agency to do so. If the National Security Agency or any other governmental agency does not view a security or foreign policy program or initiative to be "new or novel," it is unlikely to raise the issue with the PCLOB prior to inception. In such cases, that program or initiative might only come under the purview of the PCLOB if it were leaked, which undercuts the board's ability to serve as an accountability and transparency mechanism.

The PCLOB is limited by its position as an advisory body. It can recommend reforms and changes, but it cannot mandate them. The ability to recommend changes in programs can be useful, as illustrated by the PCLOB's high level of activity in 2014. But relying on nonbinding advice to resolve the accountability and transparency gap with regard to programs and initiatives that push the boundaries of legality and constitutionality would be a mistake. In 2016, Congress moved to curtail the statutory power of the PCLOB by limiting its ability to review covert operations and explicitly excluding specific national security programs from its purview.<sup>7</sup> This further hampered the ability of the PCLOB to serve as a genuine mechanism of transparency in the national security space.

Second, the effectiveness of the PCLOB depends on its access to information and its ability to disseminate its findings. The high level of secrecy surrounding the Trump administration's national security and intelligence programs has manifested in expansive

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<sup>7</sup> Marcy Wheeler, "Why Is Congress Undercutting PCLOB?" *Emptywheel*, Jan. 2, 2016,

<https://www.emptywheel.net/2016/01/02/why-is-congress-undercutting-pclob/>.



and frequent claims of executive privilege,<sup>8</sup> which have implicated the work and efficacy of the PCLOB. One example relates to a key PCLOB report essential to matters of foreign relations. In early 2014, the Obama administration issued Presidential Policy Directive 28, which made public some parameters surrounding signals intelligence activities. The directive acknowledged that

signals intelligence activities must take into account that all persons should be treated with dignity and respect, regardless of their nationality or wherever they might reside, and that all persons have legitimate privacy interests in the handling of their personal information.<sup>9</sup>

The directive included a recommendation that the PCLOB provide the president with a report on any aspects of the administration's program that fell within the purview of the PCLOB's mandate.<sup>10</sup> The PCLOB submitted its classified report on the directive in December 2016.<sup>11</sup> However, a declassified or redacted version of the report was not released, as the Trump administration claimed executive privilege over the report as a

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<sup>8</sup> Neal K. Katyal, "Trump's Abuse of Executive Privilege Is More Than a Present Danger," *New York Times*, June 17, 2019, <https://nyti.ms/2WHMHpm>, (listing the relative frequency and expansiveness of Trump's claims of executive privilege).

<sup>9</sup> *Presidential Policy Directive—Signals Intelligence Activities*, The White House, Jan. 17, 2014, <https://obamawhitehouse.archives.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities>.

<sup>10</sup> The White House, *Presidential Policy Directive*, par. 5(b).

<sup>11</sup> Elisebeth B. Collins, *Privacy and Civil Liberties Oversight Board: Fiscal Year 2018 Budget Justification*, 13, [https://documents.pclob.gov/prod/Documents/BudgetJustification/29/\(U\)%20PCLOB%20CBJ%20FY%202018%20L.pdf](https://documents.pclob.gov/prod/Documents/BudgetJustification/29/(U)%20PCLOB%20CBJ%20FY%202018%20L.pdf).

“deliberative document.”<sup>12</sup> This broke with the pattern established for prior PCLOB reports.

The decision to assert executive privilege illustrated the vulnerability of PCLOB’s promise to ensure transparency. It also created unnecessary friction in the field of foreign relations. Obama’s Presidential Policy Directive 28 extended privacy protections to foreign nationals in the United States. This was threatened by the Trump administration’s statements in early 2017 that all non-U.S. citizens would be subjected to heightened scrutiny and surveillance while in the United States. In 2017, the European Commission undertook its first annual review of whether the U.S. government was upholding its obligations to protect the privacy and dignity rights of European Union citizens under the E.U.-U.S. Privacy Shield. The European Commission deemed that the United States had adequately protected E.U. citizens’ privacy interests, but recommended the release of the PCLOB’s report on Presidential Policy Directive 28. The European Commission sought to ensure that the privacy protections outlined in the directive were actually being upheld by the U.S. government.<sup>13</sup> In this particular instance, the U.S. Commerce Department offered unsubstantiated assurances to the European Commission that it was not making any changes to Presidential Policy Directive 28 in order to assuage E.U. concerns.<sup>14</sup>

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<sup>12</sup> “Letter from Deirdre M. Walsh to Senator Ron Wyden,” Office of the Director of National Intelligence, Director of Legislative Affairs, May 10, 2017, [https://www.wyden.senate.gov/imo/media/doc/Letter from ODNI in response to PPD-28 report request.pdf](https://www.wyden.senate.gov/imo/media/doc/Letter%20from%20ODNI%20in%20response%20to%20PPD-28%20report%20request.pdf).

<sup>13</sup> “Report from the Commission to the European Parliament and the Council on the First Annual Review of the Functioning of the EU-U.S.,” European Commission, Privacy Shield, COM(2017) 611, Oct. 18, 2017, page 6.

<sup>14</sup> “First Annual Review of the EU-U.S. Privacy Shield—Fact Sheet,” European Commission, IP/17/3966, Oct. 18, 2017.

Finally, the PCLOB is limited by resource allocation issues. The board was fully staffed in 2013, almost contemporaneously with the start of the Edward Snowden disclosures, at which point it began to investigate and produce significant reports. In 2017, the PCLOB staff shrunk from its full complement of five board members to one member due to resignations, term limits, and the lack of replacements nominated to fill vacant positions. Not having a quorum rendered the board unable to fulfill its obligations or take on new oversight projects.<sup>15</sup> Only in mid-2019, after over two years of dormancy and five years without releasing a major report, was the PCLOB fully staffed and ready to set an agenda for new investigations and oversight efforts.<sup>16</sup> Whether that agenda will be fulfilled is yet to be determined.

The ups and downs of the PCLOB over the last several years serve to illustrate Abel's point: It may be wiser to look to nongovernmental sources of transparency over the long term than rely on potentially unreliable governmental bodies that may be unwilling or unable to do the work we expect them to do.

## Conclusion

I am pleased to be able to join three distinguished scholars in engaging with Abel's work. Abel charges scholars and students to use *Law's Wars* and *Law's Trials* as the springboard for thinking about the ways in which the rule of law has been distorted (and sometimes upheld) by each of the three post-9/11 presidents and their administrations. He

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<sup>15</sup> See, Andrea Peterson, "Key Government Privacy Watchdog Muzzled During Surveillance Debate," *Slate*, June 26, 2017, <https://slate.com/technology/2017/06/trump-hasnt-appointed-anyone-to-a-privacy-oversight-board.html>.

<sup>16</sup> "Active Oversight Projects and Other Engagements," Privacy and Civil Liberties Oversight Board, July 2019, [https://www.pclob.gov/library/Agenda July 2019.pdf](https://www.pclob.gov/library/Agenda%20July%202019.pdf).

also urges his readers to consider how courts, Congress, and nongovernmental actors assist with the navigation of accountability, institutional design, clarity in legal understanding, and transparency. This roundtable has served as a terrific opportunity to take up Abel's charge — in reflecting on his work, we reflect on how our institutions of law respond to emergencies and long-term stressors, sometimes succeeding, sometimes failing, and hopefully improving over time.

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## Threats to Law, Threats to the Rule of Law

*Deborah Pearlstein*

As the long post-9/11 era of U.S. counter-terrorism enters its third decade, it has grown easier to identify distinct genres within the sizable body of work assessing the legal costs of U.S. actions. One body of work has focused squarely on the damage counter-terrorism policies have inflicted on individual civil liberties and human rights, including how expansive surveillance compromised the right to privacy, how torture and abuse undermined the promise of human dignity, how indefinite detention of some individuals violated the right to liberty, and how particular acts of targeted killing violated the right to life.<sup>17</sup> Such policies implicated, and at times transgressed, a long list of prohibitive rules codified in domestic and international law and designed to limit the kinds of things governments can do to people in the name of “national security.”

A second collection of work has looked at the damage wrought by the post-9/11 wars on legal and political institutions, on process values of regularity and fairness, and on the ability of legal structures to constrain government power or hold it to account. It is a body of scholarship commonly characterized by its attention to the much used and abused concept of “the rule of law.”<sup>18</sup>

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<sup>17</sup> See, e.g., Mark Fallon, *Unjustifiable Means: The Inside Story of How the CIA, Pentagon, and US Government Conspired to Torture* (New York: Regan Arts, 2017).

<sup>18</sup> See, e.g., Jack Goldsmith, *Power and Constraint: The Accountable Presidency After 9/11* (New York: W.W. Norton & Co., 2012).

While the rule of law is today invoked with increasing frequency as though it is synonymous with “the list of rules,” the phrase classically meant something quite different. Rule of law referred to the core principles and institutional structures by which any lawful action may be taken and by which any legal rule may be applied, interpreted, or changed.<sup>19</sup> Without hoping to engage the many libraries’ worth of scholarship devoted to debating what those principles are, few would dispute that they include the very basic idea that people will be governed by publicly available rules that are known in advance, are applied equally in all cases according to their terms, and are binding on both private individuals and the conduct of the government itself. In works focused on the rule of law, the concern is with *how* policies were introduced and implemented. Did the president have the constitutional authority to take a particular action? Did the secrecy surrounding government action compromise the ability to hold public officials to account? Were like cases treated alike, according to fixed or predictable applications of law, or did the government slip into seemingly arbitrary assertions of power?<sup>20</sup>

Richard Abel’s sweeping two-volume collection fits firmly within the latter body of work. It aims not to catalog particular violations of legal rules after 9/11, but rather to examine how legal structures built for constraining power, inside the government and out, fared in pushing back against those violations. The answer he offers is mixed: “[D]efenders of the rule of law achieved only partial victories — all that is ever possible.”<sup>21</sup>

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<sup>19</sup> See, e.g., Jenny S. Martinez, “Process and Substance in the ‘War on Terror,’” *Columbia Law Review* 108, no. 5 (2008): 1013–92, <https://www.jstor.org/stable/40041795>.

<sup>20</sup> See, e.g., Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* (New York: Back Bay Books/Little, Brown and Company, 2008).

<sup>21</sup> Richard L. Abel, *Law’s Wars: The Fate of the Rule of Law in the U.S. “War on Terror”* (Cambridge, UK: Cambridge University Press, 2018), 682.

In one sense, it is hard to contest that conclusion, particularly when so many of the policies studied in Abel’s books, as well as the institutional responses to them, are still unfolding. Forty detainees remain at Guantanamo Bay, for example,<sup>22</sup> while multiple legal cases involving those detainees are pending in U.S. federal court. Proceedings in military commissions are now entering their 17th active year.<sup>23</sup> CIA “black sites” and “enhanced interrogation techniques” are formally no longer part of the U.S. repertoire, but 2016 presidential candidate Donald Trump campaigned and won on a platform that called for a resumption of such techniques.<sup>24</sup> Efforts continue apace in U.S., foreign, and international courts to hold original perpetrators of torture to account.<sup>25</sup> Analogous policy issues continue to arise as U.S. forces are still in Afghanistan and Iraq, and continue to carry out counter-terrorism missions in multiple other countries. The wisdom and legality of operations in putative service of those missions — including, for some, the controversial strike last year against Iranian Gen. Qasem Soleimani — remain a chronic part of the national political debate today.<sup>26</sup>

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<sup>22</sup> “The Guantánamo Docket,” *New York Times*, accessed Jan. 11, 2021,

<https://www.nytimes.com/interactive/projects/guantanamo/detainees/current>.

<sup>23</sup> See, e.g., Carol Rosenberg, “Trial Guide: The Sept. 11 Case at Guantanamo Bay,” *New York Times*, Feb. 21, 2020, <https://www.nytimes.com/2020/02/03/us/politics/september-11-trial-guantanamo-bay.html>.

<sup>24</sup> Jenna Johnson, “Trump Says ‘Torture Works,’ Backs Waterboarding and ‘Much Worse,’” *Washington Post*, Feb. 17, 2016, [https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425\\_story.html](https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html).

<sup>25</sup> See, e.g., Hayley Evans and Paras Shah, “International Criminal Court Appeals Chamber Holds Hearings on Afghanistan,” *Lawfare*, Feb. 10, 2020, <https://www.lawfareblog.com/international-criminal-court-appeals-chamber-holds-hearings-afghanistan>.

<sup>26</sup> See, e.g., Max Fisher and Amanda Taub, “A One-Word Accusation Swirls Around Trump’s Deadly Strike: Assassination,” *New York Times*, Jan. 7, 2020, <https://www.nytimes.com/2020/01/07/world/middleeast/iran-soleimani-assassination.html>.

Yet even within the existing record, Abel's account leaves unclear what he would consider a more decisive victory for the rule of law. While Abel regularly describes failures to correct or punish government officials who violated laws as failures of the rule of law, not all post-9/11 excesses or accountability gaps are attributable to failures of the particular structural checks he describes. Or, as the examples below illustrate, they may reflect rule-of-law problems in some institutions but not others.

The distinction is not merely semantic. Calling an action a threat to or failure of the rule of law — an accusation made with frequency and accuracy against the Trump administration — can have serious rhetorical and practical effects. Just as false claims about the structural integrity of elections may destructively undermine confidence in American democracy,<sup>27</sup> misplaced claims about the threat to structural legal norms can be used to justify extraordinary institutional responses that may themselves undermine the rule of law. Moreover, even where underlying structural or process failures exist, they may be the result of institutional deficits unrelated to failures of legal rules or norms. In those cases, viewing the problem as primarily legal in nature risks obscuring the need for other vital reforms. Quite often — as was certainly the case in many of the government's post-9/11 errors — there are failures of more than one kind occurring at once, and there is ample institutional blame to go around. As institutions today work to recover from the exceptional Trump presidency, it seems essential to make sure the post-9/11 story is told in a way that squarely diagnoses what went wrong.

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<sup>27</sup> See, Rick L. Hasen, *Election Meltdown: Dirty Tricks, Distrust, and the Threat to American Democracy* (New Haven, CT: Yale University Press, 2020).



## Trading One Rule Violation for Another

Consider one of the episodes Abel invokes to demonstrate a failure of the rule of law: the Obama Justice Department's decision not to move forward with prosecuting federal agents implicated in the torture-related deaths of two detainees in U.S. custody. As Abel recounts, Attorney General Eric Holder explained the decision not to prosecute by citing Justice Department investigators' conclusion that "the admissible evidence would not be sufficient to obtain and sustain a conviction beyond a reasonable doubt."<sup>28</sup> Critics of the decision, including the *New York Times* editorial board, called "the implications for the rule of law ... deeply troubling."<sup>29</sup> Abel ultimately agrees, describing the failure to secure prosecutions for such offenses as the "rule-of-law defenders' ... greatest defeat."<sup>30</sup> Because no court had been able to declare such conduct criminally unlawful or formally punish the perpetrators, "rule-of-law [i.e., law] violators can keep claiming their actions were legal."<sup>31</sup>

Having labored extensively to document scores of detainee deaths in U.S. custody since 9/11, including those who had been tortured to death,<sup>32</sup> I well recall the acute disappointment of Holder's announcement. Yet, a failure to prosecute seems an inadequate place to lay blame. Prosecutors decide not to move forward with cases for lack of sufficient admissible evidence all the time. And the prospect that there was insufficient admissible evidence to win these cases was unfortunately plausible. As my colleagues and

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<sup>28</sup> Abel, *Law's Wars*, 290.

<sup>29</sup> Abel, *Law's Wars*, 290.

<sup>30</sup> Abel, *Law's Wars*, 683.

<sup>31</sup> Abel, *Law's Wars*, 684.

<sup>32</sup> Hina Shamsi, "Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan," *Human Rights First*, February 2006.

I discovered in combing through the government's own investigative reports, the initial mishandling of evidence by various personnel often put ordinary criminal prosecution out of reach. Notwithstanding, for example, a U.S. Army medical examiner's report finding that a detainee in U.S. custody had been strangled to death, the physical evidence that would have been required to prove his cause of death was destroyed due to the detainee's body having been left on an Iraqi airport tarmac for hours in the blistering heat.<sup>33</sup> Similar problems arose when multiple individuals participated in an interrogation over time. There might be sufficient ordinary evidence to establish the specific culpability of some participants, but not all.

Abel is entirely right to see non-prosecution in such cases as tragic. He would be equally right to call such decisions a failure of justice. But it is not at all clear that non-prosecution was a failure of the rule of law. On the contrary, for the Justice Department to attempt to secure a criminal conviction in a case despite conventionally inadequate proof would risk weakening the regular evidentiary safeguards that aim to make the criminal process fair. No ordinary application of the existing public rules of evidence in such a case would suffice. It would lead us away from the application of ordinary law, publicly known and equally applied. It would likewise risk damaging the credibility of the Department of Justice — an indispensable institution, but not the one responsible for the evidentiary failures that made prosecution impossible. Torturing detainees violated the rules. Asserting state power to evade ordinary rules of evidence risks violating the rule of law.

If evidentiary obstacles were to blame for the decision not to prosecute, a rule-of-law-protecting response to the problem would focus on other ways to make clear the social

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<sup>33</sup> Shamsi, "Command's Responsibility," 13.

and political condemnation of the practice of torture — by, for example, imposing adverse career consequences on perpetrators of torture and abuse. It would also address any failures that took place at the evidence-collection stage by holding individuals who failed to preserve evidence to account through internal disciplinary processes (including the military justice system) and by strengthening the availability of those accountability measures, as well as the procedures and training that support them. There may well have been rule-of-law failures in those earlier stages. But whether any efforts were made to address *those* failings in response to the deaths Holder declined to prosecute is a topic Abel does not address.

### Missing Policy Failures for Law

Other examples that Abel considers involve a mix of failures — some attributable to different institutional failings, some more accurately characterized as failures of the rule of law. Take the original February 2002 “torture memo” produced by the Justice Department’s Office of Legal Counsel. The infamous memo informed federal agencies that interrogation techniques could not be considered a violation of the criminal law against torture unless they produced a level of pain “equivalent in intensity to the pain accompanying ... organ failure ... or even death.”<sup>34</sup> Abel rightly identifies the memo as “enabling those practices” that resulted in abusive interrogation after 9/11.<sup>35</sup> Parts of the torture memo can be said to pose a serious challenge to the rule of law. But it was not the implausibly narrow definition of torture the memo embraced that caused bipartisan legal

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<sup>34</sup> “Memorandum for Alberto R. Gonzales Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A,” U.S. Department of Justice, Office of Legal Counsel, Aug. 1, 2002.

<sup>35</sup> Abel, *Law’s Wars*, 317.

condemnation and led the Bush administration itself to withdraw it. It was the office's claim — without engaging the most relevant legal authorities — that the ordinary federal criminal law against torture did not apply to constrain those acting on behalf of the president of the United States.<sup>36</sup> Here was a rule-of-law failure in the extreme: An internal executive branch structure designed to promote adherence to the constitution's separation of powers (an allocation giving Congress the power to enact criminal prohibitions against torture) instead promoted its evasion.

Yet, the Office of Legal Counsel was hardly alone in contributing to the torture and abuse of detainees that Abel recounts in several chapters of his book. While Bush administration defenders touted the importance of flexibility in U.S. counter-terrorism,<sup>37</sup> organization theorists had long recognized the importance of systems, planning, and process in security management and response.<sup>38</sup> Indeed, while Abel criticizes vague and erroneous legal guidance and inadequate criminal prosecution for what went wrong in U.S. detention operations, it would be a mistake to view the prisoner abuse at Abu Ghraib, for example, as a rule-of-law failure alone. Among other things, as military investigators ultimately found, “pre-war planning had not included planning for detainee operations” in Iraq.<sup>39</sup> Indeed, the 372nd Military Police Company — the unit in charge of military police

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<sup>36</sup> “Memorandum for Alberto R. Gonzales.”

<sup>37</sup> See, e.g., John Yoo, “War, Responsibility, and the Age of Terrorism,” *Stanford Law Review* 57, no. 3 (2004): 793,

813–22, <https://www.jstor.org/stable/40040189>. Yoo argues that the post-September 11 world poses threats that require affording the president greater flexibility in decisions involving the use of force.

<sup>38</sup> See, e.g., Lee Clarke, *Mission Impossible: Using Fantasy Documents to Tame Disaster* (Chicago: University of Chicago Press, 1999).

<sup>39</sup> Lt. Gen. Anthony R. Jones, AR 15-6 Investigation of the Abu Ghraib Prison and the 205th Military Intelligence Brigade 24 (2004) 6–33, <https://www.hsdl.org/?view&did=451656>.

operations at Abu Ghraib during the period when the worst abuses were taking place — was a combat support unit with no training at all in detainee operations.<sup>40</sup>

It is entirely reasonable for Abel to focus his book on the performance of *legal* structures, rather than, for example, political or military institutions. But ignoring the multifarious causes of disasters like Abu Ghraib risks overstating the extent to which the failure belongs to legal structures alone. It may also obscure the importance of reforms beyond those that checks to the rule of law alone can reasonably provide.

## Conclusion

In this era of extreme political polarization, it is essential to remain clear-eyed about the distinctions between official behaviors that violate the rules, and those that compromise the rule of law. The post-9/11 era featured more than its share of policy and organizational failures, and far more rule-breaking in the treatment of detainees than any good government should tolerate. And efforts by leaders and advocates to craft what remedy they still can for those behaviors should and do continue. But it would be a mistake to sell short the extent to which commitments to the rule of law in the national security realm remain. Despite stark legal and policy disputes over the propriety of the military detention of U.S. citizen Yaser Esam Hamdi, an alleged Taliban fighter handed over to U.S. forces in Afghanistan in 2002, the Supreme Court voted 8-1 to require that Hamdi have access to legal counsel and an opportunity to challenge the legality of his detention before an independent court.<sup>41</sup> Even this past year, though members of Congress differed

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<sup>40</sup> “Summary of Interview by Taguba Panel with Sgt. First Class, 372d Military Police Company, in Abu Ghraib, Iraq,” Feb. 9, 2004, <http://www.aclu.org/torturefoia/released/a85.pdf>.

<sup>41</sup> Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

sharply over the wisdom of the Soleimani strike, one of the very few bills that won bipartisan majorities in both the House and the Senate was war powers legislation aimed at securing Congress's institutional involvement in any decision to embark upon a major new conflict with Iran.<sup>42</sup> And despite Trump's extraordinary efforts to engage the uniformed military in policing domestic political protests, the bipartisan condemnation of those efforts, as well as condemnation from within the military itself,<sup>43</sup> should offer some reassurance that America has thus far weathered the post-9/11 era with some core rule-of-law beliefs intact.

Where one can find them, such bipartisan expressions of a commitment to shared principles are essential in helping to shore up slipping confidence in governmental institutions. They enable officials to rebuild some muscle memory of what it is like to govern across partisan lines and to reinforce normative beliefs in law's ability to constrain power. And they offer some cause for hope that when the inevitable next set of rule violations arise, there remains a rule-of-law system still able, over time, to correct itself.

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<sup>42</sup> H.R. Con. Res. 83, 116th Cong. (2020) (enacted); S. Res. 68, 116th Cong. (2020) (enacted).

<sup>43</sup> Deborah Pearlstein, "Banish Trump to the Anticanon," *The Atlantic*, June 24, 2020,

<https://www.theatlantic.com/ideas/archive/2020/06/trump-anticanon/613366/>.

## Jus in Bello: Targeted Killings and Law on the Battlefield

David Wallace

Richard Abel adds to the growing body of literature on the “Global War on Terror” with his impressive two-volume set: *Law’s Wars: The Fate of the Rule of Law in the U.S. “War on Terror”* and *Law’s Trials: The Performance of Legal Institutions in the U.S. “War on Terror.”* Abel explores the Global War on Terror through the prism of the rule of law, arguing that the U.S. response to the 9/11 terrorist attacks critically compromised this important principle.<sup>44</sup> The author takes a sociolegal approach to identify who responded to the rule of law, how they did so, and with what responses.<sup>45</sup> Abel emphasizes and contextualizes the danger of compromising the rule of law:

In the more than two centuries since the [United States] was founded, the rule of law has been tested and compromised in numerous ways: the oppression of Native Americans, slavery, Jim Crow, labor struggles, the treatment of German Americans in World War I, Japanese Americans in World War II, and radicals after both wars, the civil rights movement, protests against the Vietnam War, and more recently the distortion of the electoral process by money, gerrymandering, and disenfranchisement, and police responses to the Occupy movement and killings of young black men documented by Black Lives Matter. The “war on terror” has posed as great a danger.<sup>46</sup>

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<sup>44</sup> Richard L. Abel, *Law’s Wars: The Fate of the Rule of Law in the US “War on Terror”* (United Kingdom: Cambridge University Press, 2018), xiii.

<sup>45</sup> Abel, *Law’s Wars*, xviii.

<sup>46</sup> Abel, *Law’s Wars*, xviii.

Abel's books cover some of the most controversial legal, political, and policy issues faced by and involving the United States during the post-9/11 period. Although there have been many books written on this topic, Abel's volumes comprehensively cover the entirety of the Bush and Obama administrations. In a conflict of such length and complexity, the author's broad, long-term, and in-depth perspective is valuable for readers as they sort through the various narratives, decisions, and policies of the period.

I will focus my review on Abel's chapter on *jus in bello* in *Law's Wars*. *Jus in bello* is a neo-Latin expression that literally means "law in war."<sup>47</sup> This part of public international law is commonly referred to by one of three names: international humanitarian law, the law of armed conflict, or the law of war.<sup>48</sup> The purpose of this body of law is to regulate the conduct of hostilities and the protection of civilians in international and non-international armed conflicts.<sup>49</sup> There are two broad topic areas that Abel discusses in this chapter: the U.S. debate over targeted killings and law on the battlefield. I will critique each section separately.

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<sup>47</sup> Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Portland, OR: Hart Publishing), 16.

<sup>48</sup> *Law of War Manual* (Washington, D.C.: Office of General Counsel, Department of Defense, June 2015), 8. As noted in the Manual, "[t]he law of war is often called the law of armed conflict. Both terms can be found in DoD directives and training materials. International humanitarian law is an alternative term for the law of war that may be understood to have the same substantive meaning as the law of war. In other cases, international humanitarian law is understood more narrowly than the law of war (e.g., by understanding international humanitarian law not to include the law of neutrality)."

<sup>49</sup> *FM 6-27, MCTP 11-10C, The Commander's Handbook on the Law of Land Warfare* (Washington, D.C.: Headquarters, Department of the Army, and Quantico, VA: Headquarters, United States Marine Corps, August 2019), 1-1.



## The U.S. Debate Over Targeted Killings

After a brief mention of the core principles of *jus in bello*, the chapter unpacks the U.S. debate over targeted killings. In doing so, Abel chronicles the political, legal, and policy debates surrounding the practice of targeted killings during the Bush and Obama administrations. His narrative is descriptive, rather than analytical, and emphasizes some of the most significant issues in the debate over the U.S. targeted killing program. These include the targeting of American citizens, the killing of innocent civilians, the highly secretive nature of targeted killing operations, the role of the CIA, and the use of drones as a means and method of warfare. For those who were paying close attention to the debate while the events in this book were unfolding, the details of Abel's account will resonate. One noteworthy feature of his narrative is his inclusion of multiple viewpoints, including the media, political figures, lawyers, and policymakers. Abel's treatment of targeted killings is important from a historical perspective, but it also carries relevance to contemporary conflict, as evidenced by the Jan. 3, 2020 killing of Maj. Gen. Qassem Soleimani of the Islamic Revolutionary Guard Corps by a U.S. drone strike in Baghdad.<sup>50</sup>

Abel's description and analysis of the debate over targeted killings will naturally lead readers to think deeply about why there is so much confusion and disagreement on this issue, even among respected experts. There are several reasons for the varying positions, at least from a legal perspective. The first reason is rather straightforward and concerns the question of definition. What is "targeted killing," and how is it similar to or different from assassination and other battlefield killings? Also, what are "signature strikes," and

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<sup>50</sup> Michael Crowley, Falih Hassan, and Eric Schmitt, "U.S. Strike in Iraq Kills Qassim Soleimani, Commander of Iranian Forces," *New York Times*, Jan. 2, 2020,

<https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html>.

how do they differ from “personality strikes?”<sup>51</sup> Any debate on this topic cries out for definitional clarity and precision. The fact that there are multiple definitions of targeted killing makes the debate more complicated.<sup>52</sup>

The second reason for the debate and confusion is that targeted killings specifically, and the Global War on Terror generally, straddle both war and criminal justice paradigms. As noted by author David Wippman,

To many, the magnitude of the September 11 attacks on the World Trade Center and the Pentagon demonstrated that non-state terrorist groups now possess the ability and intent to wreak harm on a scale previously reserved to states with organized military forces. For the U.S. government, the appropriate response was to acknowledge the transformed nature of the threat and to shift from a criminal justice approach to terrorism to a war-fighting model.<sup>53</sup>

Abel’s narrative is replete with examples of how some individuals and organizations approached targeted killings under a war-fighting paradigm, while others focused on a criminal justice or law enforcement approach. For example, Abel cites former Department of State Legal Adviser Harold Koh, who explained how U.S. targeting practices comply with all the laws of war, including the principles of distinction and proportionality.<sup>54</sup> Koh specifically noted that “[i]ndividuals who are part of ... an armed group are belligerents

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<sup>51</sup> Gary D. Solis, *The Law of Armed Conflict – International Humanitarian Law in War*, 2nd Ed. (United Kingdom: Cambridge University Press, 2016), 554–61.

<sup>52</sup> Solis, *The Law of Armed Conflict*, 555.

<sup>53</sup> Abel, *Law’s Wars*, 511.

<sup>54</sup> Abel, *Law’s Wars*, 476.

and, therefore, lawful targets.”<sup>55</sup> Others, such as former Defense Department General Counsel Jeh Johnson, analogized targeted killings to the U.S. Navy shooting down Adm. Isoroku Yamamoto’s plane during World War II.<sup>56</sup> In reference to killing Anwar al-Awlaki, Harvard Law School professor Jack Goldsmith noted that an attack on enemy soldiers is not an assassination, while Berkeley law professor John Yoo commented that anyone who takes up arms with the enemy gives up any right to due process.<sup>57</sup>

Abel’s treatment of the topic is rich precisely because he chooses to include these diverging opinions. For example, he includes the musings of U.S. District Judge John Bates in the al-Awlaki case. Specifically, he questions why the U.S. government needs a warrant to eavesdrop but not to kill.<sup>58</sup> Adding to such a perspective, George Washington University law professor Jonathan Turley noted, “No republic can long stand if a president retains the unilateral authority to kill citizens whom he deems a danger to the country.”<sup>59</sup>

I believe the overlapping paradigms of war and criminal justice lie at the heart of the debate over targeted killing. In armed conflict, the use of lethal force is a *first* resort. Individuals are targeted not only because of their conduct, but also because of their status (i.e., as members of organized armed groups). To imagine courts playing a role in targeting and other battlefield operations is unrealistic and counterproductive. By contrast, under a criminal justice or law enforcement paradigm, the use of lethal force is a *last* resort. Individual rights are sacred and courts are a central component of ensuring

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<sup>55</sup> Abel, *Law’s Wars*, 476.

<sup>56</sup> Abel, *Law’s Wars*, 484.

<sup>57</sup> Abel, *Law’s Wars*, 511.

<sup>58</sup> Abel, *Law’s Wars*, 478.

<sup>59</sup> Abel, *Law’s Wars*, 481.

due process and justice. When a legal principle straddles the two paradigms, confusion, ambiguity, and disagreement will naturally arise.

The final reason for the debate over the practice of targeted killing has to do with context: When targeted killings are addressed from a legal perspective, international norms and domestic authorities are often conflated. Commentators speak of presidential authority, congressional authorization, and constitutional rights in the same breath as the principles and rules of international humanitarian law, international human rights law, and when states can use force under the U.N. Charter and customary international law. In *Law's Wars*, Abel includes commentary on the legality of targeted killing from both international and domestic perspectives.

There are ways that Abel's narrative in this section could have been strengthened. The chapter would have benefited from an expanded discussion of the key definitions related to the debate on targeted killings. It would have been helpful to emphasize to the readers that these are distinct legal authorities with different rights, duties, and obligations. However, I am mindful of the fact that the author may not have wanted to frame the discussion in such a manner, as it may have presented the material in an overly legalized fashion that would have clashed with his sociolegal approach. Nevertheless, Abel does an excellent job outlining the U.S. debate over targeted killings.

## **Law on the Battlefield**

The second section of Abel's *jus in bello* chapter highlights law on the battlefield, including alleged war crimes and other tragic occurrences (such as the death of Pat Tillman) that occurred in the context of military operations after 9/11. Much like the section on targeted killings, Abel's treatment of law on the battlefield is descriptive in

nature, combining political, policy, and legal commentary and considerations.

Organizationally, the author breaks his discussion down by country: Afghanistan, Iraq, Pakistan, and Yemen.<sup>60</sup> Given my own deployment to Afghanistan, I was particularly interested in that discussion. Here, the author specifically discusses an incident involving Gen. Abdul Rashid Dostum, the Tillman incident, and an incident involving the desecration of corpses in 2005. He also includes a lengthy section on civilian casualties, followed by a short analysis section.

Although the section covering law on the battlefield made for very interesting reading, it was not entirely clear to me why the author selected these particular subtopics for discussion. I certainly understand the issues related to civilian casualties because of their central importance as a matter of law, policy, and practice in Afghanistan. However, I was far less clear on why he chose to discuss Dostum, Tillman, and the desecration incidents. It would have been helpful for readers if the author had connected those dots.

In addition, this section would have benefited from an orientation to and an expanded discussion of *jus in bello* itself. At the beginning of the chapter, the author mentions the core principles of *jus in bello*: distinction, proportionality, unnecessary suffering, and military necessity. Such a brief mention does not, in my opinion, sufficiently prepare readers to understand what these principles are and how they apply to specific circumstances. Nor does Abel explain the many specific rules that operationalize these core principles in practice. Having said that, it is important to note that not everyone agrees on what the core principles of *jus in bello* are. The U.S. Army's 2019 publication on *jus in bello*, titled *The Commander's Handbook on the Law of Land Warfare*, includes descriptions of the core principles of humanity and honor. However, it does not identify

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<sup>60</sup> Abel, *Law's Wars*, 516.

unnecessary suffering as a core principle.<sup>61</sup> There are also other critically important *jus in bello* issues, such as conflict classification, individual battlefield status, and command responsibility. Orienting the reader to these concepts would have helped contextualize Abel's broader points concerning law on the battlefield.

I understand that Abel wished to avoid a discussion of *jus in bello* that is overly legalistic. However, readers should understand that the very essence of *jus in bello* is a delicate balance between military necessity and humanitarian considerations. As noted by Yoram Dinstein, if military necessity were to prevail completely, there would be no limitation on belligerents' freedom of action during armed conflict. By contrast, if benevolent humanitarianism were the only guide or standard (i.e., no bloodshed, destruction, or damage), warfare would be impossible.<sup>62</sup> The nature of warfare is violence. Understanding this balance would have given readers a conceptual framework for thinking about how international law regulates the conduct of hostilities and protects the victims of warfare.

To illustrate the significance of this balance, Abel spends a considerable amount of time addressing the issue of civilian casualties in the U.S. war in Afghanistan.<sup>63</sup> He correctly observes that “[c]ivilian casualties are inevitable in warfare; but the number, identity, and circumstances can affect whether they violate the laws of warfare.”<sup>64</sup> To understand the legal complexities of civilian casualties in armed conflict, it is important to unpack several *jus in bello* concepts, principles, and rules. These include, but are not limited to,

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<sup>61</sup> FM 6-27, MCTP 11-10C, 1-1.

<sup>62</sup> Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (United Kingdom: Cambridge University Press, 2004), 16.

<sup>63</sup> Abel, *Law's Wars*, 520.

<sup>64</sup> Abel, *Law's Wars*, 520

proportionality,<sup>65</sup> direct participation in hostilities,<sup>66</sup> and precautions in the attack.<sup>67</sup> Each of these concepts represents the balance between military necessity and humanitarian considerations. For example, the principle of proportionality in attack has been described as “[l]aunching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>68</sup> This principle of proportionality requires the parties to a conflict to refrain from attacks in which the expected civilian casualties will be excessive in relation to the anticipated military advantage gained.<sup>69</sup> The principle reflects the reality of warfare, which is a balance between military necessity and humanity. More pointedly, *jus in bello* “has always tolerated ‘the incidence of some civilian casualties ... as a consequence of military action.’”<sup>70</sup>

I have deployed to Afghanistan twice, known hundreds of U.S. soldiers, sailors, airmen, and marines that served there, and paid close attention to the applicable rules of engagement, tactical directives, and related documents that governed the conduct of U.S. coalition operations. I can therefore say without any doubt that the United States and its

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<sup>65</sup> “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Articles 51(5)(5)(b) and 57(2)(a)(iii),” Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, Geneva, June 8, 1977.

<sup>66</sup> “Protocol Additional to the Geneva Conventions of 12 August 1949,” at AP I, Art. 51.3

<sup>67</sup> “Protocol Additional to the Geneva Conventions of 12 August 1949,” at AP I, Art. 57

<sup>68</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (United Kingdom: Cambridge University Press, 2005), 46.

<sup>69</sup> Laurie R. Blank and Gregory P. Noone, *International Law and Armed Conflict – Fundamental Principles and Contemporary Changes in the Law of War* (New York, NY: Wolters Kluwer Law & Business, 2013), 51.

<sup>70</sup> Blank and Noone, *International Law and Armed Conflict*, 51.

coalition partners have gone and continue to go to extraordinary lengths to limit the number of civilian casualties. Abel suggests that “[t]he [United States] constantly boasted it did more to avoid civilian casualties than any country had done in any war.”<sup>71</sup> I don’t know about any country and any war, but I can say comfortably that reducing civilian casualties is a priority for the U.S. military. In sum, I believe readers would have benefited from the author providing a more detailed explanation of these important concepts of *jus in bello*.

Finally, I believe the author could have done more with his analysis sections in this chapter. There are significant issues pertaining to *jus in bello* that cry out for greater analysis. For example, the author notes,

The [United States] also blamed the Taliban for hiding among and thereby endangering civilians in order to hinder the coalition response and fabricating or inflating civilian casualties to inflame Afghan anger at Americans. There was evidence for some of those charges. The [United States] noted — accurately — that the Taliban inflicted four or five times as many civilian casualties as did coalition forces, often intentionally, and never apologized.<sup>72</sup>

This passage hints at a significant and overarching concern related to *jus in bello* that permeates the conflict in Afghanistan. How well will *jus in bello* work when one of the parties to the conflict (i.e., the Taliban) does not abide by the law, but rather uses the United States and its coalition partners’ compliance as a weapon against them? The

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<sup>71</sup> Abel, *Law’s Wars*, 570–71.

<sup>72</sup> Abel, *Law’s Wars*, 571.



somewhat obvious answer is that it makes compliance more difficult. This dynamic within *jus in bello*, as well as many others, requires greater analytical attention.

## Conclusion

In conclusion, I believe Abel's two-volume work is an important contribution to the growing body of literature on the Global War on Terror. Well-written and comprehensively researched, it highlights a panoply of important issues related to the rule of law. My review was intentionally limited and focused to the U.S. debate over targeted killings and law on the battlefield. My critique was, in no way, intended to detract from the work of Professor Abel. Rather, it was intended to add a different perspective on areas with which I am more familiar.

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## National Security and “Secret Law”

*Mitt Regan*

Richard Abel’s work on the rule of law during the “Global War on Terror” is grounded in the belief that the rule of law is a meaningful principle that can constrain the exercise of power. In his two volumes on the rule of law in U.S. counter-terrorism policy and legal proceedings after the attacks of Sept. 11, 2001, Abel performs a valuable service by bringing together a wealth of material that can be used to assess the extent to which law has served this function.<sup>73</sup>

Abel’s conviction that the rule of law can make a difference in constraining the exercise of power is based on his view that most governments, including the U.S. government, can act only through law, which requires giving reasons for the exercise of power: “What cannot be justified cannot be authorized.”<sup>74</sup> He therefore maintains that an important way in which the United States betrayed the rule of law was by concealing the legal authority on which it relied in its counter-terrorism operations. For legal interpretation “to provide effective legal cover, it had to include detailed descriptions of the actions authorized.” Had legal advice “been exposed to public scrutiny, the ensuing criticism ... might have made the government more cautious, prompting it to seek other opinions or simply reflect the earlier advice.”<sup>75</sup> To avoid this possibility, “[t]he Bush administration ...

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<sup>73</sup> Richard Abel, *Law’s Wars: The Fate of the Rule of Law in the US “War on Terror”*; (2018); and Richard Abel, *Law’ Trials: The Performance of Legal Institutions in the US “War on Terror,”* (2018).

<sup>74</sup> Abel, *Law’s Wars*, 653 (2018).

<sup>75</sup> Abel, *Law’s Wars*.

jealously guard[ed] the secrecy of all its legal opinions.”<sup>76</sup> In contrast, contends Abel, the Obama administration “vacillated between transparency and secrecy.”<sup>77</sup>

Concern about these practices has led to a surge of interest in the phenomenon known as “secret law.”<sup>78</sup> It is a fundamental requirement of the rule of law that governments may not rely on law that is withheld from the public. According to Lon Fuller, publication of a sovereign’s commands is a crucial element of the very notion of law.<sup>79</sup> The term “secret law,” however, is sometimes used pejoratively to describe something that should be disclosed in order to comply with the rule of law, without rigorous analysis of the term itself.

What constitutes a “law” and when it is deemed “secret” are not self-evident. Opinions by the Office of Legal Counsel, for example, fit in a distinct gray area. Some claim that these opinions are not law because they regulate the executive branch, not the public.<sup>80</sup> On this view, agencies consider them, but are not bound by them, when choosing a course of

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<sup>76</sup> Abel, *Law’s Wars*.

<sup>77</sup> Abel, *Law’s Wars*.

<sup>78</sup> See, e.g., Sudha Setty, *National Security Secrecy: Comparative Effects on Democracy and the Rule of Law* (Cambridge, UK: Cambridge University Press, 2017); Jonathan Manes, “Secret Law,” *Georgetown Law Journal*, no. 106 (2018): 803, [https://digitalcommons.law.buffalo.edu/journal\\_articles/911/](https://digitalcommons.law.buffalo.edu/journal_articles/911/); Elizabeth Goitein, “The New Era of Secret Law,” Brennan Center for Justice, Oct. 18, 2016, <https://www.brennancenter.org/our-work/research-reports/new-era-secret-law>; Dakota S. Rudesill, “Coming to Terms with Secret Law,” *Harvard National Security Journal*, no. 7 (2015): 241; Christopher Kutz, “Secret Law and the Value of Publicity,” *Ratio Juris* 22, no. 2 (2009): 197, <https://doi.org/10.1111/j.1467-9337.2009.00421.x>.

<sup>79</sup> Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University: 1964), 39.

<sup>80</sup> See, e.g., “Testimony of Bradford Berenson, Secret Law and the Threat to Democratic and Accountable Government,” Senate Judiciary Committee, 110th Congress, 2nd Session, April 30, 2008, 9–10.

action.<sup>81</sup> Others contend that the office’s opinions are law because they have precedential force within the executive branch, and that agencies treat them as establishing boundaries that constrain decision-making.<sup>82</sup> Some have argued that failure to publicly disclose opinions by the Office of Legal Counsel does not result in secret law, since Congress is free to question an administration about the legal basis for its activities.<sup>83</sup> On this view, disclosure to congressional oversight committees refutes any claim of secrecy.<sup>84</sup> Others maintain that these practices do not grant Congress any influence over an administration’s claim of legal authority.<sup>85</sup>

The intense debate over secret law reflects the fact that determining when something falls into this category carries powerful rhetorical importance. The term “secret law” is not simply descriptive but normative — anything that is described as secret law is, by definition, seen as inconsistent with the rule of law. Linguistic or conceptual analysis is unlikely to resolve this debate. At its core, the disagreement focuses on the relative weight we should give to different concerns. As Jonathan Manes has observed, “there are multiple competing values at stake in debates over secret law.”<sup>86</sup> He offers a helpful set of criteria to assess the values that are at stake and how they might be accommodated.<sup>87</sup>

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<sup>81</sup> “Testimony of John P. Elwood, Secret Law and the Threat to Democratic and Accountable Government,” Senate Judiciary Committee, 110th Congress, 2nd Session, April 30, 2008, 6.

<sup>82</sup> “Question of Senator Sheldon Whitehouse, Secret Law and the Threat to Democratic and Accountable Government,” Senate Judiciary Committee, 110th Congress, 2nd Session, April 30, 2008, 31.

<sup>83</sup> “Testimony of John P. Elwood,” 7.

<sup>84</sup> “Testimony of Bradford Berenson,” 10.

<sup>85</sup> “Statements of Senator Russell Feingold, Secret Law and the Threat to Democratic and Accountable Government,” Senate Judiciary Committee, 110th Congress, 2nd Session, April 30, 2008, 18, 23.

<sup>86</sup> Manes, “Secret Law,” 834.

<sup>87</sup> Manes, “Secret Law.”

I offer my own framework below, which focuses on the basic purposes of both disclosure and secrecy. With respect to disclosure, these include government accountability, fair notice generally, fair notice in criminal law, and privacy. With regard to secrecy, these include denying sensitive information to adversaries, preventing bad actors from conducting activities so as to avoid detection, and encouraging robust internal government deliberation. I make no attempt to address the varieties of putative secret law across all branches of government.<sup>88</sup> My approach is generally consistent with Manes, but it offers a more detailed discussion of the values served by disclosure and considers whether rule of law concerns might extend beyond the domestic sphere. I also discuss the implications of what David Pozen calls “deep secrets,” which means that “parties are unaware of a secret’s existence; they are in the dark about the fact that they are being kept in the dark.”<sup>89</sup> I use this term to describe instances in which a very small number of people are aware of the existence of a legal interpretation.

## Purposes of Disclosure

Disclosure serves a number of purposes that vary depending upon the nature of the legal material in question. These purposes should be taken into account when weighing the importance of disclosure compared with concerns that militate against it. One important purpose is relevant to any type of material: government accountability. A second purpose

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<sup>88</sup> For a review of forms of secret law in all three branches, see Rudesill, “Coming to Terms with Secret Law.”

<sup>89</sup> David E. Pozen, “Deep Secrecy,” *Stanford Law Review* 62, no. 2 (January 2010): 257, 260,

<https://www.jstor.org/stable/40649628>.

is fair notice — the idea that individuals know what behavior will subject them to government sanction.<sup>90</sup>

### *Accountability*

Concern for accountability is based in the value of democratic self-determination. If citizens are the ultimate sovereign, they must be aware of and have an opportunity to influence what a government does in their name. Immanuel Kant’s well-known publicity principle is often invoked to support this idea: “All actions relating to the right of other human beings are wrong if their maxim is incompatible with publicity.”<sup>91</sup> This principle is subject to different interpretations, but David Luban suggests that its basic premise is that “ordinary citizens [are] up to the task of deliberating and reflecting on political affairs.”<sup>92</sup> As Manes notes, “If the substance of the law is secret, the public cannot have any meaningful input or control over it.”<sup>93</sup> Publicity thus serves as a source of political legitimacy for a government’s claim to act in the name of its citizens. Importantly, the term “law” should not be confined to legal advice on government activities that directly regulate the public. This reflects the value of fair notice but neglects the value of accountability.

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<sup>90</sup> Some claim that disclosure of legal advice also encourages rigorous analysis, but I do not discuss that here.

<sup>91</sup> Immanuel Kant, “Perpetual Peace,” in *Kant: Political Writings*, ed. H.S. Reiss, trans. H. B. Nisbet, 2nd ed. (1795; Cambridge, UK: Cambridge University Press, 1991), 129.

<sup>92</sup> David Luban, “The Publicity Principle,” in *The Theory of Institutional Design*, ed. Robert E. Goodin (Cambridge, UK: Cambridge University Press, 1996), 154.

<sup>93</sup> Manes, “Secret Law,” 818.

If democratic accountability is a concern, it may be served in some cases by limiting disclosure of a legal interpretation to Congress. This is especially true if there are reasons it should not be more widely disseminated. Whether the law is regarded as secret in these cases depends on whether the extent of disclosure provides a meaningful opportunity for elected representatives to challenge the interpretation of law or revise the law itself.

Consider, for example, a 2001 opinion by the Office of Legal Counsel that found that the government could engage in electronic surveillance within the United States for national security purposes without approval by the Foreign Intelligence Surveillance Act (FISA) court.<sup>94</sup> This served as the basis for a 2002 executive order by President George W. Bush authorizing such activity.<sup>95</sup> Disclosure of the program was limited to the “gang of eight”: the chair and ranking members of the minority party of the House and Senate intelligence committees, and the majority and minority leaders in the House and Senate.<sup>96</sup>

Was the legal position of the administration still a secret after this disclosure? There is a good argument that it was. The claim of authority reflected the view that the president need not comply with FISA in conducting surveillance for national security purposes because Congress could not constitutionally limit the president’s surveillance authority for such a purpose. Eight members of Congress were informed of this view, but they were constrained from notifying their colleagues about it because of the classified nature of the

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<sup>94</sup> John C. Yoo, “Memorandum for the Attorney General,” U.S. Department of Justice, Nov. 2, 2001, <https://www.justice.gov/sites/default/files/olc/legacy/2011/03/25/johnyoo-memo-for-ag.pdf>.

<sup>95</sup> James Risen and Eric Lichtblau, “Bush Lets U.S. Spy on Callers Without Courts,” *New York Times*, Dec. 16, 2005, <https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html>.

<sup>96</sup> Nancy Pelosi, “The Gap in Intelligence Oversight,” *Washington Post*, Jan. 15, 2006, <https://www.washingtonpost.com/archive/2006/01/15/the-gap-in-intelligence-oversight/217d7899-c9f3-45a0-a2e9-d93150359e37/>.

information. Furthermore, as Abel notes in his book, these members were not permitted to take notes or to have aides present who had more detailed familiarity with the statute.<sup>97</sup> Congress as an institution was effectively left unaware that the executive regarded the FISA statute as unconstitutional. Congress was thus unable to challenge this view or to enact new legislation in response. Abel suggests that Bush's decision against fuller disclosure of the program was not based on concern that Congress might not authorize more expansive surveillance powers, but rather that the president "must have feared that revealing the enormous scope of US surveillance would provoke criticism at home and abroad ... . To forestall this, everything about the new program had to be hidden, even (indeed especially) its legal authority."<sup>98</sup>

If accountability is understood as furthering democratic self-determination, it implies that the relevant public is domestic. However, legal advice that involves interpretation of international law is arguably of interest to a broader international community that has an interest in holding states accountable for complying with that body of law. As Alexandra Perina observes, "Through the iterative process of claim and response, customary international law is created, affirmed, altered, undermined, and in some cases, rendered obsolete and dispatched to the archives of history."<sup>99</sup> In order for this discursive process to work effectively, parties must know how states construe their legal authority to act. On this view, the international community was entitled to know the asserted international law bases for matters such as the U.S. detention of members of al-Qaeda and associated forces, the U.S. interpretation of the U.S. statute incorporating the prohibition of torture

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<sup>97</sup> Abel, *Law's War*, 334.

<sup>98</sup> Abel, *Law's War*, 463–64.

<sup>99</sup> Alexandra H. Perina, "Black Holes and Open Secrets: The Impact of Covert Action on International Law," 53 *Columbia Journal of Transnational Law*, no. 3 (2015): 507, 567,

[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2613731](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613731).



in the convention against torture, and the U.S. targeted killing program. The significance of acknowledging accountability to the international community is that, unlike the concern about self-determination, it cannot be served by limiting disclosure to Congress.

### *Fair Notice*

A second purpose of disclosure relates to interpreting laws that regulate individual behavior. As Dakota Rudesill has suggested, “[W]hen courts mention secret law it is often in connection with this conduct-conforming self-government idea.”<sup>100</sup> This was Fuller’s guiding idea in his analysis of publicity in *The Morality of Law*: The legitimacy of law rests on a social contract between the government and the people, under which the people agree to obey the law in return for having a clear idea of what it requires. Giving such notice gives citizens dignity by treating them as members of a self-governing community rather than as objects controlled by the sovereign. Recognition of this value is reflected in a section of the Freedom of Information Act:

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.<sup>101</sup>

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<sup>100</sup> Rudesill, “Coming to Terms with Secret Law,” 342. This principle is articulated in, for instance, *Lambert v. California*, 355 U.S. 225 (1957) (“Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process”).

<sup>101</sup> “Freedom of Information Act,” 5 USC 552(10)(E) (2020).

Thus, while the purpose of furthering accountability can be potentially addressed by disclosure to elected representatives, providing fair notice requires some form of disclosure to the general public.

The claim that opinions by the Office of Legal Counsel regulate the executive branch and not the public ignores the fact that these opinions advise executive branch entities on the scope of their authority, including their authority to regulate the conduct of the public. In this respect, the Office of Legal Counsel is but one part in a process that results in government prescription of citizens' conduct. Persons affected by this process are entitled to know the government's understanding of the authority it has over the public when it takes such action. Thus, one may argue that disclosing Office of Legal Counsel advice may serve the value of fair notice even when such advice is directed only to government agencies.

### *Deprivation of Life or Liberty*

While government action may affect individuals in various ways, fair notice of conduct that could deprive an individual of life or liberty is especially important. Courts have recognized this by imposing stringent demands on criminal law: Criminal statutes must be interpreted leniently, offenses will be struck down if they are defined too vaguely, and statutes ought to be interpreted narrowly where they are ambiguous and applied only prospectively.<sup>102</sup> This leads Rudesill to formulate a categorical rule, which he calls the "Anti-Kafka Principle": There is no secret criminal law.<sup>103</sup>

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<sup>102</sup> Kutz, "Secret Law and the Value of Publicity," 201.

<sup>103</sup> Rudesill, "Coming to Terms with Secret Law," 242.

American counter-terrorism operations after 9/11 present the possibility of depriving citizens of life and liberty not only through criminal prosecution but through military operations. The United States sees itself as engaged in a noninternational armed conflict with al-Qaeda and associated forces. It claims to reserve the legal right to use lethal force against and to detain persons engaged in that conflict as enemy combatants under the law of armed conflict. This includes U.S. citizens.

In order to designate nonstate actors without uniforms as combatants, the U.S. government must identify conduct that is sufficiently similar to the actions of uniformed state forces. American citizens have a legitimate interest in knowing what behavior their government regards as sufficient to meet this standard. As with concern about secret criminal law, insistence on publishing the legal authority for targeting and detaining U.S. citizens under the law of armed conflict seeks to prevent abuse of government power and the deprivation of life and liberty.<sup>104</sup> The executive has published the criteria it uses. The question now is whether this is sufficiently detailed to meet the demands of fair notice.

The entitlement of U.S. citizens to fair notice is based on the terms of the social contract between the government and its citizens. But what about those who are not parties to this contract? Specifically, what about foreigners who face the risk of being targeted by the United States? Are they entitled to know what criteria the United States uses in making its targeting decisions so that they might order their conduct accordingly? Do the demands of the rule of law extend this far? One could claim that the United States does not want foreigners to have this information because this may enable hostile individuals to evade detection. I address this concern below in my discussion of the purposes of

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<sup>104</sup> This was the issue regarding the targeting of Anwar al-Awlaki.

secrecy but will say here that this argument could be made with respect to any legal provision that regulates behavior.

The question may seem theoretical — after all, if the United States publishes criteria that provide notice to U.S. citizens, this will also provide notice to those who are not citizens. It's important to consider, however, whether the rule of law nonetheless independently entitles non-U.S. citizens to fair notice. Must a state involved in a noninternational armed conflict provide fair notice to the public it regards as a combatant? I will not attempt to resolve this issue here, but I will simply note the possibility that in an increasingly interdependent world rule of law may apply to certain operations beyond a state's borders.

Deep secrecy raises serious concerns about fair notice that are especially urgent with respect to potentially depriving citizens of life and liberty. An individual who knows that a law regulates certain conduct but not *how* it does so is at a significant disadvantage. Such a person may still be able, in some rudimentary way, to adjust her behavior. Someone unaware that such a law even exists, however, is deprived of information that would allow her even to do this.

### *Privacy*

Liberty and privacy are closely related values. Liberty involves the ability to develop one's own ideas, to experiment with different conceptions of the good life, and to enter into personal relationships without fear of government penalty. Privacy provides assurance to individuals that they have an area of life in which they may engage in these activities free from government observation. Privacy is also important to the realization of the broader political value of democracy. As First Amendment scholar Neil Richards suggests, "If we

are interested in a free and robust *public* debate we must safeguard its wellspring of *private* intellectual activity.”<sup>105</sup>

Fair notice of when individuals may be subject to surveillance informs them of when they may operate within the private domain. Uncertainty about when it is reasonable to have this expectation may not deprive individuals of liberty in the tangible way that detention does. Nonetheless, it intrudes on liberty in at least two ways. First, the belief that activities are private when in fact they are not means that individuals may unwittingly engage in behavior that the government regards as suspicious, which eventually could lead to punishment. Thus, intemperate remarks or extreme pronouncements in what one mistakenly believes in the private domain could result in tangible deprivations. Second, uncertainty about privacy could lead an individual to be cautious in expressing views, experimenting with ideas, or associating with others. This can also affect the larger community by leading to political conformity and a restricted exchange of ideas.

With respect to the value of fair notice of intrusions on privacy, whether legal advice is secret law depends on whether a reasonable person would be able to determine from publicly available material when her communications and behavior are likely to be under surveillance. Consider again the Office of Legal Counsel memo on warrantless domestic surveillance. An individual trying to assess whether the executive might be able to surveil her activities under FISA likely would not have understood from the text of the statute that the executive (and the FISA court) had authorized surveillance of U.S. persons who were not “agents of a foreign power.”<sup>106</sup>

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<sup>105</sup> Neil Richards, “Intellectual Privacy,” *Texas Law Review*, no. 87 (2008): 387, 391.

<sup>106</sup> 50 U.S. Code §1801(b) (2020), <https://www.law.cornell.edu/uscode/text/50/1801>.

Concerns over the privacy of U.S. citizens has been the impetus for claims regarding government surveillance activities — specifically, that the government engaged in surveillance of U.S. persons without fair notice of when persons were subject to this intrusion. Do foreigners have any privacy interest that entitles them to have some notice of when they could be under surveillance? David Cole suggests that they might, since “[p]rivacy is a human right, not a privilege of US citizenship.”<sup>107</sup> Orrin Kerr disagrees, on the ground that a government’s duties are based on “the consent of the governed, which triggers rights and obligations to and from its citizens and those in its territorial borders.”<sup>108</sup> I will not discuss the issue in full here but will simply note that globally connected communications networks may have the potential to expand the scope of the rule of law.<sup>109</sup>

## Purposes of Secrecy

Some of the values served by secrecy may present countervailing considerations that must be weighed against the values served by disclosure. Secrecy can serve at least three purposes: to deny sensitive information to adversaries; to prevent bad actors from

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<sup>107</sup> David Cole, “We Are All Foreigners: NSA Spying and the Rights of Others,” *Just Security*, Oct. 29, 2013, <https://www.justsecurity.org/2668/foreigners-nsa-spying-rights/>. See also, Kenneth Roth, “NSA: Our Analogue Spying Laws Must Catch Up with the Digital Era,” *The Guardian*, Nov. 10, 2013, <https://www.theguardian.com/commentisfree/2013/nov/10/nsa-analogue-spying-laws-surveillance-digital-era>.

<sup>108</sup> Orin Kerr, “A Reply to David Cole on Rights of Foreigners Abroad,” *Lawfare*, Nov. 2, 2013, <https://www.lawfareblog.com/reply-david-cole-rights-foreigners-abroad>. See also, Benjamin Wittes, “A Global Right to Privacy?” *Lawfare*, Nov. 11, 2013, <https://www.lawfareblog.com/global-human-right-privacy>.

<sup>109</sup> For a discussion of arguments regarding whether human rights law should be applied to transnational electronic surveillance, see, Ashley Deeks, An International Legal Framework for Surveillance, 55 *Virginia Journal of International Law* 291 (2015).

conducting activities in order to avoid detection; and to encourage robust internal government deliberation. With respect to the first concern, Rudesill notes:

[I]n the context of a perilous security environment, [secrecy] allows the state to collect, analyze, and disseminate information, advise decisionmakers, formulate plans, and counter the public and clandestine activities of other state and non-state actors without giving them notice.<sup>110</sup>

The second concern is reflected in the Freedom of Information Act's exemption for material that "would disclose techniques and procedures for law enforcement investigations or prosecutions." The exemption also covers material that "would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."<sup>111</sup> According to Manes, it is always possible to argue that disclosing the ways a government exercises its regulatory authority will enable people to circumvent that authority. For this reason, we must ask "if the government activity in question is particularly liable to circumvention," and if disclosure "undermine[s] [the government's] ability to carry out a legitimate function at all."<sup>112</sup>

This highlights the fact that much of the debate on whether law is secret concerns what level of detail disclosure should entail. Returning again to advice from the Office of Legal Counsel on warrantless surveillance, disclosure of the memo's expansive view of presidential authority under the U.S. constitution could have been made without

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<sup>110</sup> Rudesill, "Coming to Terms with Secret Law," 310.

<sup>111</sup> 5 U.S. Code 552(b)(7), [law.cornell.edu/uscode/text/5/552](http://law.cornell.edu/uscode/text/5/552).

<sup>112</sup> Manes, "Secret Law," 830.

reference to operational details of surveillance activities. Similarly, disclosure of the office’s interpretation of the torture statute as prohibiting only treatment that would result in “death, organ failure, or the permanent impairment of a significant bodily function” would have notified the public of the administration’s interpretation without revealing any of the interrogation techniques in question. In some cases, disclosure of a legal opinion with redactions of classified material can accommodate concerns about compromising national security interests.<sup>113</sup> In others, legal analysis may be inextricably intertwined with discussion of operational details.

In some cases, public explanations of legal authority may provide more transparency while avoiding the risk that information will be used to circumvent the law or avoid detection. Beginning in 2010, for instance, the Obama administration sought to be more transparent about the legal bases for its counter-terrorism operations without disclosing details that could reduce their effectiveness. This included speeches by members of the administration,<sup>114</sup> an announcement of criteria for engaging in direct action in areas

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<sup>113</sup> See, e.g., *New York Times v. Department of Justice*, 756 F.3d 100 (2<sup>nd</sup> Cir. 2014) (ordering disclosure of redacted version of OLC memo on targeting of Anwar Al-Awlaki).

<sup>114</sup> See, e.g., Harold Hongju Koh, “Keynote Address: The Obama Administration and International Law,” *American Society for International Law*, no. 104 (2010): 207–21, <https://doi.org/10.5305/procanmeetasil.104.0207>; John O. Brennan, “Strengthening Our Security by Adhering to Our Values and Laws,” Remarks at Harvard Law School, Sept. 16, 2011, <https://obamawhitehouse.archives.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>; Jeh Charles Jonson, “National Security Law, Lawyers and Lawyering in the Obama Administration,” *Yale Law and Policy Review* 31, no. 1, Feb. 22, 2012, <https://ylpr.yale.edu/national-security-law-lawyers-and-lawyering-obama-administration>; and Eric Holder, Northwestern Law School, March 5, 2012, <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law>.



outside of areas of active hostilities,<sup>115</sup> and publication of *Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*.<sup>116</sup> Drawing on this document, Congress required in the 2018 and 2020 National Defense Authorization Acts that the executive provide the information in the report on an annual basis, although it may contain a classified annex.

Some would maintain that these disclosures rebut the claim that an administration is operating on the basis of secret law. Others would disagree. The American Civil Liberties Union, for instance, said of the targeted killing program, “[D]espite efforts to make the program more transparent, it is still shrouded in excessive secrecy that shields it from public scrutiny” because of the failure to provide a more detailed description of “the law and policy the government uses” to conduct the program.<sup>117</sup> The question of whether the government is relying on secret law in this and other cases reflects an ongoing dispute over how much detail is required in a disclosure to permit accountability and provide fair notice. Jonathan Hafetz suggests that national security legal authority may take the form of broad standards whose meanings are clarified only through application to specific situations.<sup>118</sup> It is precisely the details of those situations, however, that a government

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<sup>115</sup> “Remarks by the President at the National Defense University,” White House, Office of the Press Secretary, May 23, 2013, <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

<sup>116</sup> *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations*, White House, December 2016, <https://www.justsecurity.org/wp-content/uploads/2018/03/Legal-and-Policy-Frameworks-on-US-Use-of-Force.pdf>.

<sup>117</sup> “ACLU v. DOJ – FOIA Case for Records Relating to Targeted Killing Law, Policy, and Casualties,” American Civil Liberties Union, April 23, 2019, <https://www.aclu.org/cases/aclu-v-doj-foia-case-records-relating-targeted-killing-law-policy-and-casualties>.

<sup>118</sup> Jonathan Hafetz, “A Problem of Standards? Another Perspective on Secret Law,” *William and Mary Law Review* 57, no. 6 (June 2016): 2141, <https://wmlawreview.org/problem-standards>.

may believe that it cannot disclose because of concern that doing so will undermine enforcement of the law.

A final purpose of secrecy is to encourage candid robust discussion among decision-makers. As the U.S. Supreme Court noted in discussing the Freedom of Information Act's exemption for material covered by a deliberative privilege,

[F]rank discussion of legal or policy matters' in writing might be inhibited if the discussion were made public ... Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances ... to the detriment of the decision making process.<sup>119</sup>

The Freedom of Information Act has been construed to require that when legal advice is adopted as the working law of an agency, it should be disclosed in order to provide fair notice.<sup>120</sup> The concerns that underlie the deliberative privilege do not disappear, however, when advice is adopted by an agency. The prospect of adoption and then disclosure of advice has at least the potential to limit candid discussion between lawyer and client. The Office of Legal Counsel's best practices reflect this concern. The office has adopted the presumption that it will publish its opinions, based on the importance of "Executive Branch transparency" in "contributing to accountability and effective government

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<sup>119</sup> *Sears v. NLRB* 150-151 (citations omitted).

<sup>120</sup> *Sterling Drug Inc. v. FTC*, 450 F.2d 698, 708 (D.C.Cir.1971).

action.”<sup>121</sup> The office, however, will “decline to publish opinions when doing so is necessary to preserve internal Executive Branch deliberative processes.”<sup>122</sup>

In addition, some have raised the possibility that “[c]lient entities within the executive might be less likely to seek [Office of Legal Counsel] advice on sensitive questions if they knew it would become public,”<sup>123</sup> which could be true of other legal advice as well. As evidence that this fear is warranted, some point to the recent decline in requests for legal advice from the Office of Legal Counsel in the wake of controversies resulting from publication of the office’s memos.<sup>124</sup>

Finally, sensitivity to the purposes served by secrecy should not result in deep secrets. As Elizabeth Goitein contends: “Whether the government may keep some legal interpretations secret from the public is a debate that is certain to continue for some time.” However, “there is no justification for keeping the public in the dark about how much secrecy exists.”<sup>125</sup> To this end, Rudesill suggests that the government “inform the public when secret law is created” and provide some basic information about it.<sup>126</sup>

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<sup>121</sup> David Barron, “Best Practices for OLC Legal Advice and Written Opinions,” Office of Legal Counsel, (2010), 5.

<sup>122</sup> Barron, “Best Practices,” 6.

<sup>123</sup> Cornelia T. L. Pillard, “The Unfulfilled Promise of the Constitution in Executive Hands,” *Michigan Law Review* 103, no. 4 (2005): 676, 751, <https://repository.law.umich.edu/mlr/vol103/iss4/2/>.

<sup>124</sup> Josh Gerstein, “Official: FOIA Worries Dampen Requests for Formal Legal Opinions,” *Politico*, Nov. 5, 2015, <https://www.politico.com/blogs/under-the-radar/2015/11/official-foia-worries-dampen-requests-for-formal-legal-opinions-215567>.

<sup>125</sup> Elizabeth Goitein, “There’s No Reason to Hide the Amount of Secret Law,” *Just Security*, June 30, 2015, <https://www.justsecurity.org/24306/no-reason-hide-amount-secret-law/>.

<sup>126</sup> Rudesill, “Coming to Terms with Secret Law,” 342.

## Conclusion

As Richard Abel observes, “the necessary first step in challenging rule-of-law violations is exposure.”<sup>127</sup> The debate over secret law therefore is one that carries enormous consequences. It is important to recognize, however, that what we regard as both “law” and “secret” depends upon an assessment of complex concerns. This complexity is exacerbated in the national security setting by considerations that may limit the amount of detail the government can provide in describing its legal authority. I have suggested a rudimentary framework for navigating this terrain, which is likely to remain an ongoing challenge for the rule of law.

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<sup>127</sup> Abel, *Law's Wars*, 657.