RULE of LAW, MISRULE of MEN

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A Boston Review Book
THE MIT PRESS Cambridge, Mass. London, England

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This book was set in Adobe Garamond by *Boston Review* and was printed and bound in the United States of America.

Library of Congress Cataloging-in-Publication Data
Scarry, Elaine.
Rule of law, misrule of men / Elaine Scarry.
p. cm.
"A Boston Review Book."
Includes bibliographical references.
ISBN 978-0-262-01427-4 (hardcover : alk. paper) 1. Civil rights—United States. 2. Rule of law—United States. 3. War on Terrorism, 2001– —Political aspects—United States. 4. United States—Armed Forces—Regulations. 5. War crime trials—United States. I. Title.
JC599.U5S345 2010
973.931—dc22
2009053482

10 9 8 7 6 5 4 3 2 1

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For my brother and sister, Joe Scarry and Patricia Scarry Jones

Introduction (January 2010)

In January 2009, the Government Accountability Office (GAO) delivered to Congress a report entitled "Homeland Defense: Actions Needed to Improve Air Sovereignty Alert Operations to Protect U.S. Airspace." The Air Sovereignty Alert program had been designed shortly after 9/11 to protect the U.S. population from air threats originating inside the country. It had arranged for eighteen air bases to be on "steady-state" ground alert with fighter jets ready to lift off at any moment. The Air Force had been given primary responsibility for enacting the program, which was presided over by the commander of NORAD.

But the GAO inquiry—which reviewed Air Sovereignty Alert Operations through September 2008—

found that many parts of the program had never been put into effect. The Air Force had abstained from carrying out the 140 directives it had been assigned at the program's outset, directives jointly formulated by NORAD, the Department of Defense, and the Air Force. Not only had the Air Force neglected to evaluate the readiness of airmen and equipment, it had not even "formally assigned Air Sovereignty Alert as a mission to the units and included it on the units' mission lists."[1] The report also found that NORAD had carried out almost no "risk assessment" studies of the eighteen sites.

Responding to inquiries from the GAO, the Air Force explained that it had neglected the program because it had given priority to its overseas obligations. NORAD attributed its own neglect to the fact that no explicit requirement for evaluating steady-state capabilities had been placed on it by the Department of Defense.

Salus populi—the well-being of the people—has since antiquity been understood as the central jus-

tification for having a government and for having a military. On September 11, 2001, the most expensive military in the world (unpracticed in defending the homeland) failed to protect the American people or even its own headquarters. Immediately following 9/11 and repeatedly in the seven years that followed, the Department of Defense identified the safety of the population as its primary aspiration.[2] But the 2009 Air Sovereignty Alert Report suggests that foreign wars were still its major concern.[3]

Between 2001 and 2008 (the years of the Bush-Cheney presidency), the safety of the people appears seldom to have been the central mission of the U.S. government. The indifference to air sovereignty (following a devastating attack from the air) is just one cinematic clip from a film that played before the population's eyes for eight years, as day after day the country watched coastal waters rise around a stranded population and saw young soldiers sent from home without body armor or vehicle armor and return in coffins that were not allowed to be photographed.[4]

But the book that follows is *not* about all those protective actions that the government failed to carry out, actions that would have been lawful and noble responses to the revelations of 9/11. It is instead about all the actions the government *did* carry out, relentless and ruthless acts of lawbreaking, actions designed to extend executive power, actions decoupled from (and steady degradations of) the aspiration encoded in salus populi.

Equally central to the book is a second subject, the sovereignty of the people, who, even under a government of misrule, retain the power to validate the rule of law: the population can refuse to participate in illegal acts even when instructed by government officials to do so (the subject of Chapter 1); the population can also work to ensure the prosecution of government leaders, if their illegal acts reach the level of perfidy, treachery, and war crime as defined by Constitutional law, international law, and our own Air Force, Army, and Navy handbooks (the subject of Chapters 2 and 3).

The chapters of this book were written at specific times throughout the eight-year Bush-Cheney period, and have been left almost unchanged:[5] written in *medias res*, they record presidential wrongs and forms of popular redress as they emerged into view. Chapter 1 focuses on the deformation of national law; Chapter 2, international law; Chapter 3, both national and international.

Is "deformation" too strong a word? The villages, towns, and cities across the United States that went on record saying they would not uphold the Patriot Act describe the locations within the Constitution they perceived to be at risk: among them, the First Amendment, the Fourth Amendment, the Fifth Amendment, the Eighth Amendment. Any one of these would be a cause for alarm. But as Chapter 1 shows, at risk was not just any one location within the Constitution but a central principle that radiates throughout its structure: the requirement that a government be transparent to its people, the people opaque to their governors. (For example, the ballot

a citizen casts for a senatorial candidate is secret unless the citizen herself chooses to reveal her vote; she also chooses the persons to whom any such revelation is made; in contrast, every vote a senator casts in Congress must be open and on record, legible to the entire population.) The Bush administration sought to turn this structural principle inside out: through various forms of surveillance, the population would be unknowingly exposed to its governors, whose own actions would remain hidden from view.

Again in the international realm, large structures—even the foundation of law itself—were violated. The prohibition of torture is, as Chapters 2 and 3 argue, not one important law among many important laws. Rather, it is the philosophic foundation on which all other laws are created and without which our confidence in all other laws wavers. Three other acts that the international laws of war and our own military handbooks designate grave crimes are examined in Chapter 2: misusing the white flag and red cross; flying a false flag; and assassination, posting

wanted-dead-or-alive signs, and issuing announcements of rewards.

Exactly how does an extra-legal universe get created? Some of the many fictions that went into creating this alternate world are chronicled in the pages that follow. But several key building blocks can be briefly surveyed here. First, a substantial head start on the building project is achieved if the architect already thinks of himself as an extra-legal agent: if a given law is X and the president announces "not-X," the law of X is cancelled just by virtue of that speech act. The President may announce that laws of long standing, such as the Geneva Conventions, are not in effect. He may take a law that has recently come into being though his own signature appended to Congressional legislation, and through a not-X signing statement eliminate the thing he a moment ago created. Especially helpful in this owning-while-disowning slide between X and not-X is any offshore geography leased but not owned (Guantánamo) or leased from a country that has itself leased it from a third country (Diego Garcia, leased by

Britain from Mauritania, and by the United States from Britain); supremely useful is a piece of ground that is itself in motion (a prison ship, a rendition plane), since that is reliably off-the-shore of even the offshore territories and not even specifiable in terms of time zone.[6] Remarkably, these offshore territories are at once within the reach of the executive and not within reach of the judiciary, and thus they have just the kind of X / not-X structure—the United States / not the United States—that is needed for constructing an extra-legal universe. The architect will need assistants: if one group is too constrained by laws (as the military usually is), there are others less constrained (the CIA), and still others who have no known legal constraints whatsoever (Blackwater[7]).

The construction of a parallel universe requires that the architect have ample room in which to move. Open-ended spatial zones such the geographical ones just described can also be brought into being by rocking back and forth between two legal categories. Are the terrorists criminals (which would obligate us to

pursue them as individuals using criminal law) or state enemies (to be confronted through war)? No need for the architect to choose: he maximizes his freedom by initiating war against two states while designating the villains "non-state actors" ineligible for the protections of the laws of war. We thus fight a not-war war. Small crevices in time also open into new spaces: a seven-day delay in notifying someone whose house has been searched is a window into many previously unenterable rooms; "unlimited detention" without charge of any person named by an executive officer as a terrorist suspect provides unexplored continents of executive maneuverability. Even the weather in this new extra-legal universe will have puzzling features. Would any sensible person complain if it were reported (as it frequently was) that prisoners were being subjected to "air conditioning"? But if a person is subjected to prolonged sleep deprivation, the brain looses its capacity to regulate core body temperature; applications of cold water or cold air, coupled with other techniques, can become lethal.

Written on the eve of the 2008 election, Chapter 3 explains why, even in imagining the best possible outcome—the election of a president who stops torture, closes Guantánamo, gets our soldiers out of Iraq, shifts the trials of detainees to federal courts—the rule of law will not be restored until those officials who licensed torture are prosecuted. A country that tortures when it has a president who believes he is permitted to torture and then abstains from torture when it has a president who recognizes that torture is unconditionally prohibited continues to be a country living under the rule of men, rather than the rule of law; for it is allowing its moral fate to be determined by the personal beliefs of its rulers.

Righting a wrong is especially difficult if the wrong has been initiated by a president. Any occupant of the White House has tremendous charisma, and therefore a tremendous capacity to miseducate. Under the Bush-Cheney administration, some people came to believe that the rules about torture were flexible, conditional, revisable. They were wrong.

That damaging act of miseducation has now almost been corrected. But we have also been miseducated into believing that *the prosecution* of the officials who sanctioned torture is an option, rather than, as is actually the case, a requirement.[8] Both the Geneva Conventions and the Convention Against Torture make prosecution obligatory. When we hear voices coming from inside and from outside the country[9] urging that the United States *must* prosecute, we may mistakenly hear the "must" as expressing the passionate belief of the speaker. It instead reports the legal status of the requirement: like the prohibition on torture, the obligation to prosecute is absolute.

My earlier book, *Who Defended the Country?*, described the inability of the Pentagon to track and bring down Flight 77 even with 55 minutes of warning. It compared this failure with the success of the ordinary citizens on Flight 93 who, in 23 minutes, deliberated, then voted, then acted to bring down their plane before it reached Washington. *Rule of Law, Misrule of Men*, too, is about the population's