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The Importance of an Independent Bar

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Last Saturday, I joined the International Bar Association. Why that day? Because I was planning my remarks for this conference and realized with a clarity that was somewhat surprising that it is no longer enough to be a member of one's local bar, or the American Bar Association, or the American Law Institute, or all of these.

Law, at least the law about which I care, is global. And lawyers throughout the world need to meet. Lawyers from varying legal systems need to examine both established and emerging legal issues. Lawyers must be as aware of new legal theories, procedures, and strategies as they are of technological innovations that enable them to improve the legal services that they provide. In short, you are doing exactly what needs to be done. I am proud to now be part of your efforts.

Law, at least the law about which I care, is global.

The world faces new and challenging issues. It seems that every scientific and technical advance that makes the world more efficient and productive has a downside. For example, the computers we use to do our writing, run our spreadsheets, receive and send our e-mails are essential to our day-to-day work. Yet, the very equipment that serves us well is a target for those who would do us harm. They may simply be spammers. Or they may be common criminals seeking to defraud us using old methods applied to new technology. Or they may be electronic terrorists desiring to destroy the very devices upon which we rely.

I became acutely aware of the irony that innovation almost always has minuses as well as pluses when I served on the National Institute of Justice's Less than Lethal Liability Panel. This was a group of lawyers, assisted often by doctors and scientists, that was tasked with advising NIJ on the possible liabilities that might be associated with adopting new technologies (often with military roots) for law enforcement.

We looked at a wide range of issues. One was whether pepper spray, now frequently carried by police officers, could cause asphyxiation on the part of sprayed individuals when they were restrained. Another was whether sticky foam could be used to quell riots without running (a) the risk that officers using the foam would be caught in it and (b) a risk of environmental harm. A third was whether rubber bullets were a safe and effective form of riot control. In each instance, the notion behind an innovation was that it avoided the use of lethal force—typically, the use of a firearm by a police officer. The question put to our panel was whether the probability that the innovation would save lives was outweighed by the risks that greater harm and hence liabilities would result from adopting the innovation.

The issues we addressed were not only relevant to law enforcement in the United States. They were issues that could and did arise in many jurisdic-

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tions around the world. Indeed, the nonlethal techniques we considered were often borrowed from the experience of another country. In many instances, our advice was that proposed innovations were unwise, illegal, or unconstitutional. While we never questioned the good intentions of proponents of new ideas, we never blinked the duty to speak the truth.

Our panel was defunded and no longer exists, but my experience with it is a reminder of the important role that lawyers serve in protecting and advancing the rule of law, and in seeing to it that governments receive wise counsel as they seek to advance the rule of law through innovation. As the world becomes more complex and therefore more dangerous, governments seek to limit individual rights in the name of crime control and/or national security. They sometimes claim the need to innovate, with liberty the cost of innovation. We must always keep in mind that individual rights once lost are not easily regained. The unique and important role of an independent bar in protecting and defending liberty is more, not less, important than ever before.

Attack on lawyers

It is from this perspective that I wish to express my concern as to recent attacks on the legal profession that have occurred here in the United States and elsewhere in the world. Attacks on the private bar often are accompanied by attacks on the independence of the judiciary, and these attacks are a frontal assault on the very notion of the rule of law.

Let us recall that attacks on lawyers are not new. Shakespeare put these words in the mouth of Dick the Butcher in *Henry VI*, part 2, act 4, scene 2: "The first thing we do, let's kill all the lawyers." As Daniel Kornstein explains in his book, *Kill All the Lawyers? Shakespeare's Legal Appeal* (1994), Shakespeare knew quite a bit about the law. This may be because he sought to appeal to the law students from the Inns of Court in London who attended plays, a third of which had at least one trial scene. Or it might be because Shakespeare had personal experience with a none-too-happy dispute over his inheritance. Whatever the reason, it appears that Shakespeare knew much about lawyers.

Shakespeare raised the most fundamental issues of lasting importance in his works—war and peace, justice and injustice, freedom and slavery, love and hate. He generally left it to the reader to resolve the issues. Many use the quote from *Henry VI* to claim that Shakespeare was antilawyer. But, this is not my reading. I believe that he knew from experience the essential role that lawyers play in protecting liberty.

One law journal that views the play as I do concisely summarized it as follows:

> This play was set in England in the mid-15th century. Young Henry VI was thought to be a weakling, and England was involved in an unsuccessful war with France and was going through some economic depression. Now, in this background, the Duke of York attempted to incite a rebellion in the laboring class in order to fulfill his own ambitions for obtaining the throne. He did not want to call attention to himself, so he did the planning and orchestration of this rebellion through Jack Cade, who was a warmonger and headstrong Kentishman. Jack Cade ultimately led his riotous followers through the streets of London, damaging and wrecking property, killing noblemen, and attempting to establish the duke as the rightful heir to the throne. Before the plan was executed, Cade and his followers, among whom was Dick the Butcher, met to discuss the plan of attack and how they should go about gaining the political control of England. It is during this meeting that the sentence involving "kill all the lawyers" occurs. The exact sentence in the play was, "The first thing we do, let's kill all the lawyers." We see, then, that this sentence was uttered by a riotous anarchist whose intent was to overthrow the lawful government of England. Shakespeare knew that lawyers were the primary guardians of individual liberty in democratic England. Shakespeare also knew that an anarchical uprising from within was doomed to fail unless the country's lawyers were killed.

(J. B. Hopkins, *The First Thing We Do, Let's Get Shakespeare Right!* 72 FLA. B.J. 9 (1998).)

Just as Shakespeare captured the importance of lawyers preserving liberty, Robert Bolt captured the importance of the rule of law in *A Man for All Seasons*, act 1, scene 7, when Sir Thomas More, Chancellor of England, speaks:

> And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then?

With this great literature and memorable phrases in mind, let us talk about the attacks, both implicit and explicit, on lawyers in the United States. Perhaps the most glaring and highly publicized example is the comment by Charles "Cully" Stimson, deputy assistant secretary of defense for detainee affairs, who called it "shocking" that major U.S. law firms represented Guantanamo Bay detainees free of charge. Stimson predicted that these

firms would likely suffer financially after their corporate clients learned of their pro bono work. Stimson resigned after his remarks ignited a firestorm of controversy and galvanized lawyers and legal organizations throughout the United States to protest what was perceived, accurately I believe, as an attack on the legal representation of individuals who face indefinite detention.

Stimson's remarks were not the only shot taken at lawyers volunteering to represent Guantanamo detainees. After he resigned, the *Washington Post* followed up on a *New York Times* story and on April 29, 2007, wrote an editorial that Shakespeare inspired. It was entitled "Ban All the Lawyers: Prisoners at Guantanamo don't really need them, or so says the Justice Department." The *Post* stated that "the Justice Department has asked the federal appeals court charged with handling all appeals of the detentions to limit lawyers to three visits with their clients; allow their correspondence with prisoners to be opened and read; and give government officials the power to deny the lawyers access to evidence." The *Post* opined that "[t]he military authorities at Guantanamo have developed a deep antagonism, tinged with paranoia, toward the lawyers—an attitude exemplified by the comments of former detention chief Cully Stimson, who suggested that the law firms sponsoring the pro bono work should be punished by their corporate clients." The military withdrew the request to limit lawyer-client meetings, but still seeks to restrict the representation at Guantanamo.

This hostility toward lawyers is not confined to those seeking to represent Guantanamo detainees. It was apparent in the way the United States litigated its case against Yassir Hamdi, the American citizen detained in a Navy brig in South Carolina as an enemy combatant. The government claimed the right to hold him for the duration of the war on terror, which might be endless. As striking as that single claim is, the government's initial litigation position was that the decision to hold him was virtually unreviewable by a court and that he had no right to see a lawyer—ever. The government argued to the Fourth Circuit Court of Appeals that "it is well-settled that the military has the authority to capture and detain individuals whom it has determined are enemy combatants in connection with hostilities in which the Nation is engaged, including enemy combatants claiming American citizenship. Such combatants, moreover, have no right of access to counsel to challenge their detention."

In opposing Supreme Court review, the solicitor general wrote that "[t]here is no obligation under the laws and customs of war for the military to charge captured combatants with any offense and, indeed, the vast majority of combatants seized during war are detained as a simple war measure without charges. Similarly, there is no general right to counsel under the laws and customs of war for those who are detained as enemy combatants."

Hamdi was captured on the battlefield, which made his case less sympathetic than that of Jose Padilla who was captured at O'Hare airport when he returned from abroad to the United States. But, the government's position was the same. It could detain him indefinitely and deny him access to counsel. Of course, the same position applies to you, to me, and to all.

Ultimately, of course, the United States Supreme Court held that citizens detained as enemy combatants are entitled to some due process and have a right to consult counsel in order to challenge their detentions. But, those detained at Guantanamo who are not citizens have no right to counsel unless they are actually prosecuted. They get a yearly hearing into their status before a Combatant Status Review Tribunal, but they are not entitled to counsel at the hearing. Because of the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, there can be review of the tribunal's decision to hold an individual as an enemy combatant in the United States Court of Appeals for the District of Columbia. But that review will be of a decision rendered without the detainee having a chance to see all evidence considered by the tribunal or to benefit from the guiding hand of counsel.

The government has strained to keep lawyers away from Guantanamo as much as possible because it knows that their presence means challenges to unfair proceedings, to secret evidence, and to prolonged detentions. Lawyers have volunteered to represent the detainees, but their ability to do so is greatly restricted by the congressional elimination of both habeas corpus and the right of detainees to bring actions challenging their detentions or the conditions of their detentions.

No one above rule of law

I have always thought that the rule of law meant that no one was above it and no one was below it. President Nixon had to turn over tape recordings to a grand jury. President Clinton was sanctioned for being untruthful in legal proceedings and compelled to respond to a civil lawsuit while in office. They were not above the law. But, the detainees in Guantanamo are below any standard of due process and basic justice expected from the United States. They get what the government chooses to give them, and that is possible detention for life based on hearings in which they have no lawyer.

Those who are prosecuted do get a lawyer, but they are prosecuted under special rules that do not follow either the procedures of a federal civilian trial or a court-martial. When the Supreme Court invalidated military commissions as violating the Code of Military Justice and the 1949 Geneva Conventions in *Hamdan v. Rumsfeld*, it noted among other things that Common Article III of the

Conventions prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

I am no expert on the Conventions, but this part of Common Article III seems to me intended to assure that those prosecuted by a signatory are tried in regular courts, not courts that are specially constituted, and according to regular procedures, not specially designed to make it easier to convict. Compliance with Common Article III would require prosecution in a federal civilian court or a court-martial, or a military commission applying court-martial rules insofar as practicable as provided in the Code of Military Justice. But, the Military Commissions Act permits prosecutions using procedures that are not standard, and that only apply in Guantanamo. These prosecutions are in specially constituted, not regular, courts, and use specially constituted, not regular, procedures.

Congress can by statute abrogate all or part of a treaty, but when it chooses to override provisions settled since 1949 it must realize that other countries may reciprocate. Other countries may seize Americans, detain them as enemy combatants, deny them lawyers, and prosecute them in special courts with special rules. This does not promote the rule of law in America or in the world. It undermines it.

Lawyers understand this. The military and civilian lawyers who have represented the detainees have been remarkable. They invalidated the military commissions, at least temporarily, in the *Hamdan* case. They established a right of the detainees to file habeas corpus petitions, at least temporarily, in *Rasul v. Bush*. They fought for the right of detainees to represent themselves and succeeded in enshrining that right in the Military Commissions Act.

In short, these lawyers fought for the rights of the "worst of the worst," as some administration officials described the detainees. They demonstrated fidelity to the rule of law, the Constitution of the United States, and fundamental principles of international law. Their success undoubtedly contributes to the government's desire to limit what they can do in the future—i.e., to assure that they cannot bring habeas actions or other suits on behalf of detainees.

I regret deeply what has happened in Guantanamo. After all, governments need fear lawyers and judges only when they fear the truth. This is true here and it is true throughout the world.

Consider the case of Karina Moskalenko, the Russian lawyer who has represented chess champion Garry Kasparov and imprisoned tycoon Mikhail Khodorkovsky, among others. According to the *Washington Post*'s June 3 story about her (Finn, *Russia's Champion of Hopeless Cases Is Targeted for Disbarment*, WASH. POST, June 3, 2007, at A16), "Moskalenko, 53, is known as a formidable legal foe of the Russian state, invariably losing in the country's courts but winning numerous cases at the European Court in Strasbourg, where her clients include the families of tortured, disappeared or murdered Chechens." The *Post* reports that the Russian Prosecutor's General's Office is seeking to have her disbarred. Why? Supposedly because she did not adequately represent Khodorkovsky. Will anyone believe that Russia is concerned that the tycoon it has imprisoned and continues to investigate is not being adequately represented? It is hardly likely given the fact that, according to the *Post* story, "Khodorkovsky's attorneys have long been subject to official harassment, including arrests, searches of their persons and offices, and seizure of defense materials."

The Russian explanation of the move to disbar a leading human rights lawyer is as unpersuasive as our Department of Defense attempt to explain its efforts to limit lawyer-client visitations as protecting lawyers from wasting their time.

While Russia seeks to disbar Moskalenko, the president of Pakistan persists in removing the chief justice of the Pakistan Supreme Court. The response of the public might well have taken President Musharraf by surprise. Crowds have protested. Lawyers have spoken out and have been publicly beaten by police seeking to silence them. Press accounts indicate that President Musharraf attempted to pressure the chief justice to resign for alleged abuses of office and invited cameramen to a meeting where he expected the resignation to occur. Apparently the chief justice was expected to rule on cases that might make it more difficult for Musharraf to be elected for another five-year term by a lame-duck parliament (which occurred after this speech was given). The chief justice, Iftikhar Mohammed Chaudry, refused to resign. His standing up to the president apparently inspired not only the lawyers in Pakistan but a large portion of the general public as well to demand his reinstatement and beyond that to call for genuine elections.

The efforts of the lawyers, military and civilian, to protect the rights of Guantanamo detainees, the courageous efforts of Karina Moskalenko to make legal rights meaningful in Russia, the refusal of Chief Justice Chaudry to compromise the independence of his Supreme Court, and the willingness of lawyers to take to the streets to support him are all part of a fight to preserve and protect the rule of law. It is a fight that inspires us and makes us proud to be part of their profession. These lawyers and judges remind us that preserving the rule of law is something never to be taken for granted. It often is a challenge requiring self-sacrifice and risk-taking.

If there is any good that comes from the efforts of gov-

ernments to deny detainees lawyers, it is a reminder of the importance of an independent bar. It is striking how little one finds in American judicial opinions about this subject. If we look to the north, however, we find a strong judicial recognition of the role of an independent bar. The Supreme Court of Canada wrote eloquently in *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 at 335-36:

> The independence of the Bar from the state in all of its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally.

In another Canadian case, *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at pp. 187-88: Justice McIntyre wrote:

> I would observe that in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state. In the performance of what may be called his or her private function, that is, in advising on legal matters and in representing clients before the courts and other tribunals, the lawyer is accorded great powers not permitted to other professionals. . . . . By any standard, these powers and duties are vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community.

I believe this implicitly. It is why I am pleased to stand before you as a newly minted member of the International Bar Association ready to work shoulder to shoulder with you to preserve and protect the rule of law and to seek to extend its reach to embrace every person wherever he or she may be found. ■