PROSECUTE TERRORISM SUSPECTS, NOT THEIR LAWYERS:

Constitutional and Ethical Concerns Raised by Attacks on Lawyers

A REPORT BY THE CONSTITUTION PROJECT'S
LIBERTY AND SECURITY COMMITTEE

July 29, 2010

The Constitution Project
1200 18th Street, NW
Suite 1000
Washington, DC 20036
(202) 580-6920 (tel)
(202) 580-6929 (fax)
info@constitutionproject.org

www.constitutionproject.org

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Over the past several years, and increasingly in recent months, we have witnessed a series of verbal attacks and legislative proposals targeted at lawyers who represent, or have represented, terrorism suspects, whether before civilian criminal courts, military commissions, or in the context of habeas corpus proceedings in federal civilian courts. These campaigns against lawyers raise serious constitutional issues under the First, Fifth, and Sixth Amendments and the separation of powers, as well as significant concerns under the ethical rules governing lawyers and their relationships with their clients.

These attacks date back at least to 2007, when then-Deputy Assistant Secretary of Defense for Detainee Affairs Cully Stimson publicly criticized the role of Washington law firms in representing Guantánamo detainees, suggesting that U.S. corporations should sever their contacts with any firm involved in the detainee litigation.[1] More recently, whether in the form of advertisements targeting lawyers currently serving in the Obama Administration who have previously represented terrorism suspects,[2] or legislative proposals seeking to subject those currently representing Guantánamo detainees to investigation by the Department of Defense's Inspector General,[3] these attacks impose ethical and potentially unconstitutional obstacles to these lawyers' ability to effectively represent their clients. As troubling, they risk chilling the willingness of future lawyers to represent these (or other) unpopular defendants. Indeed, the language of section 1037 of the House version (H.R. 5136) of the National Defense Authorization Act for FY2011 ("NDAA") is so broad that it would *require* the Department of Defense Inspector General to launch a full-scale investigation of (and report to Congress on) the conduct of *any* current or former lawyer for a Guantánamo detainee. The provision requires only "reasonable suspicion" to believe that the lawyer has "interfered with the operations of the Department of Defense at Naval Station, Guantanamo Bay, Cuba, relating to [non-citizens detained at Guantánamo]," suspicion that might naturally attach to any individual who has provided legal services to a current or former detainee.

We, the undersigned members of the Constitution Project's Liberty and Security Committee, are deeply disturbed by this trend of attacks on lawyers. We recognize, of course, that all attorneys must comply with the law and the ethical rules governing the profession. However, those attorneys who step forward to represent unpopular clients and ensure that our nation can continue to provide fair trials and preserve our constitutional system should not therefore become the targets of those who oppose the alleged actions of their clients. The Supreme Court has long recognized that: "Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." *Procunier* v. *Martinez*, 416 U.S. 396, 419 (1974) (citing *Ex parte Hull*, 312 U.S. 546 (1941)). The

1. *See, e.g.*, Neil A. Lewis, *Official Attacks Top Law Firms Over Detainees*, N.Y. TIMES, Jan. 13, 2007, at A1. Fortunately, many people quickly spoke out in opposition to Stimson's criticism. Ultimately, the controversy led to Stimson's resignation from his position.

2. *See, e.g.*, Ari Shapiro, *'Al Qaeda 7' Controversy: Detainees and Politics*, NPR.ORG, Mar. 11, 2010, http://www.npr.org/templates/story/story.php?storyId=124546087.

3. *See* National Defense Authorization Act for Fiscal Year 2011, H.R. 5136, 111th Cong., 2d Sess. § 1037. *See generally* Ariane de Vogue & Devin Dwyer, *Congress Seeks Greater Scrutiny of Guantanamo Detainee Lawyers*, ABCNEWS.COM, May 27, 2010, http://abcnews.go.com/Politics/Media/lawmakers-seek-greater-scrutiny-guantanamo-detainee-lawyers/story?id=10750476&page=1.

statement that follows briefly surveys how these troubling developments may infringe constitutionally protected rights.

As noted above, while lawyers must always comply with their legal and ethical obligations, and face appropriate existing sanctions when they fail to do so, the recent public targeting of lawyers raises constitutional concerns and risks interfering with lawyers' ability to fulfill their ethical obligations as officers of the courts. We urge Members of Congress and all policymakers to develop counter-terrorism initiatives that focus on the actual threats posed by terrorists, rather than policies and public pronouncements that attack lawyers for doing nothing more than what their ethics, the federal Constitution, and the rule of law require.

I. THE DETAINEES' RIGHT TO COUNSEL

The Sixth Amendment guarantees the right of the accused "in all criminal prosecutions . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. As the Supreme Court has repeatedly recognized, the right to counsel brings with it a right to the effective assistance of counsel. *See, e.g.*, *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984) ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results."). And although effective assistance is typically assessed based on the performance of defense counsel, the "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Id*. at 686. Put another way, where a detainee has a lawyer, if the government interferes with the ability of that lawyer to effectively represent his or her client in a criminal proceeding, this interference necessarily violates the Sixth Amendment.

The Supreme Court has never decided whether the Sixth Amendment's right to counsel (and to the effective assistance thereof) applies to defendants before military commissions.[4] In civil proceedings, such as habeas petitions filed by the Guantánamo detainees, although the Sixth Amendment does not apply, the federal courts have long recognized a right of *access* to counsel in civil cases, protected (in federal court) by the Fifth Amendment's Due Process Clause. *See, e.g.*, *Bourdon* v. *Loughren*, 386 F.3d 88, 95–98 (2d Cir. 2004) (explaining the relationship—and distinctions—between the right to effective assistance of counsel protected by the Sixth Amendment and the right of meaningful access to the courts protected by the Due Process Clause); *see also Hamdi* v. *Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality) (noting that Hamdi, a U.S. citizen detained as an enemy combatant, "unquestionably has the right to access to counsel in connection with the proceedings on remand"). Indeed, in immigration proceedings (which, like habeas petitions, are technically civil) courts have also recognized in various circumstances a due process-based right to *effective* assistance of counsel. *See, e.g.*, *Nelson* v. *Boeing Co.*, 446 F.3d 1118, 1120 (10th Cir. 2006) (McConnell, J.) (citing cases).

The upshot of these cases is three-fold: First, at least in the context of criminal prosecutions in federal civilian courts or military commissions, restrictions such as those contemplated by the House version of the NDAA for FY2011 would implicate the right to counsel. Second, in civil litigation such as habeas petitions, the Constitution mandates both that detainees have a right

4. The Sixth Amendment right to effective assistance of counsel clearly *does* apply to courts-martial. *See Denedo* v. *United States*, 66 M.J. 114, 126 (C.A.A.F. 2008), *affirmed*, 129 S. Ct. 2213 (2009). Rule 506(a) of the 2010 Rules for Military Commissions provides a right to counsel to defendants before military commissions, albeit without any corresponding right to the effective assistance thereof.

of access to counsel and that the government not abridge that right through interference or obstruction. *See, e.g.*, *Whalen* v. *County of Fulton*, 126 F.3d 400, 406 (2d Cir. 1997). Third, to the extent that the detainees have a right to *effective* assistance of counsel, measures that jeopardize the effectiveness of counsel's representation could raise due process concerns.[5]

II. THE LAWYERS' FIRST AMENDMENT RIGHTS

Separate from the detainees' rights, the attacks on lawyers also implicate the First Amendment rights of the lawyers. Although there is significant debate over the *scope* of the First Amendment rights of lawyers, it is well-established that, as Justice O'Connor wrote in 1995: "There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer." *Fla. Bar* v. *Went For It, Inc.*, 515 U.S. 618, 634 (1995). The Supreme Court has not sought to delineate those circumstances with precision, but the ability of counsel to bring constitutional claims before the federal courts on behalf of their clients seems to fall at the very heart of this principle. Indeed, the Court suggested as much in *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533 (2001), in which it struck down a federal statute that purported to bar legal services lawyers from raising certain constitutional challenges to federal welfare laws. As Justice Kennedy explained for the majority,

> An informed, independent judiciary presumes an informed, independent bar. Under [the statute here at issue] however, cases would be presented by [legal services] attorneys who could not advise the courts of serious questions of statutory validity. The disability is inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for proper resolution of the case. By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power. Congress cannot wrest the law from the Constitution which is its source.

Id. at 545.

Like the statute invalidated in *Velazquez*, any legislative measure that restricts or chills the ability of detainee lawyers zealously to advocate on behalf of their clients inhibits constitutionally protected expression. *See id*. at 548; *cf*. *Holder* v. *Humanitarian Law Project*, No. 08-1498, 2010 WL 2471055, at *13 (U.S. June 21, 2010) (suggesting that the "hypothetical" of barring the filing of an *amicus* brief in support of a foreign terrorist organization might support an overbreadth claim under the First Amendment by preventing constitutionally protected advocacy).[6] Thus, measures like section 1037 of the NDAA, which

5. This analysis assumes that the Guantánamo detainees are protected by the Fifth Amendment's Due Process Clause, at least in the context of habeas petitions brought under *Boumediene* v. *Bush*, 553 U.S. 723 (2008) (holding that the Suspension Clause provides the Guantánamo detainees with a constitutional right of access to the courts for their habeas petitions). Some courts, however, have questioned whether *other* constitutional protections may be invoked by non-citizens held outside U.S. territory. *See Kiyemba* v. *Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated on remand*, 605 F.3d 1046 (D.C. Cir. 2010).

6. To be clear, lawyers are not immune from federal laws that restrict access to the assets and resources of groups that have been properly designated by the federal government to be involved in certain proscribed activities. *See, e.g.*, *KindHearts for Charitable Humanitarian Dev., Inc.* v. *Geithner*, 647 F. Supp. 2d 857, 912–14 (N.D. Ohio 2009) (finding no constitutional problem with blocking orders that prohibited plaintiffs from using their own funds to

mandate a Defense Department Inspector General investigation of any lawyer who "interfere[s] with the operations of the Department of Defense at Naval Station, Guantanamo Bay, Cuba," would exert potentially unconstitutional pressure on such lawyers to avoid raising particular claims or arguments in proceedings on behalf of their clients. That is precisely the type of restriction that *Velazquez* forbids.

III. SEPARATION OF POWERS CONCERNS

Separate from the constitutional rights of the litigants or their counsel, *Velazquez* also suggested that interference with the ability of lawyers to bring constitutional challenges before the federal courts might also implicate the separation of powers by undermining the independent role of the federal judiciary. As Justice Kennedy explained,

> The restriction imposed by the statute here threatens severe impairment of the judicial function. [The statute] sifts out cases presenting constitutional challenges in order to insulate the Government's laws from judicial inquiry. . . . A scheme so inconsistent with accepted separation-of-powers principles is an insufficient basis to sustain or uphold the restriction on speech.

Velazquez, 531 U.S. at 546. In other words, the limitation on the legal services lawyers' ability to bring certain claims before the courts violated fundamental separation-of-powers principles by interfering with the constitutional role of the courts. *See id*. at 548 ("The attempted restriction is designed to insulate the Government's interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner. We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge.").

This line of reasoning makes perfect sense; in our adversary system the courts necessarily rely upon the parties' counsel to create the factual record, identify and fairly present the legal issues, and zealously argue the application of the law to the facts. As such, uninhibited adversarial lawyering is an essential prerequisite for good judicial decisionmaking—good and unencumbered lawyers make the judges (and their decisions) better.

Of course, *Velazquez* does not establish that any and all interference with attorney speech violates the First Amendment and the separation of powers. But *Velazquez* crystallizes the proposition that governmental interference with the ability of counsel zealously to represent their clients goes well beyond the rights of the clients, but also raises serious First Amendment and separation-of-powers concerns, as well.

IV. ETHICAL CONCERNS

Finally, although as members of the Constitution Project's Liberty and Security Committee we have focused our primary attention on the constitutional concerns noted above, it bears emphasizing that interference with the lawyers representing terrorism suspects could also raise significant (and potentially unwaivable) conflicts of interest with regard to the ability of private

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pay their counsel). However, these cases do not address interference with the attorney-client relationship, but instead turn on the absence of a constitutional right to *compensation* for counsel in civil cases. *See, e.g.*, *id*. at 914; *see also Al-Haramain Islamic Found., Inc.* v. *U.S. Dep't of the Treasury*, 585 F. Supp. 2d 1233, 1271 (D. Or. 2008).

lawyers to represent terrorism suspects. The lawyers' own needs to protect themselves and their professional standing may conflict with their duties to zealously represent their clients, rendering it impossible for the lawyers to fulfill their ethical obligations to maintain professional independence. Furthermore, such conflicts seriously risk compromising the mutual trust necessary to the attorney-client relationship, without which it becomes virtually impossible to provide effective assistance of counsel. After all, a lawyer trying to avoid becoming the target of a Defense Department investigation might be less willing to raise arguments and pursue lines of inquiry in defending his or her client. While as noted above, lawyers must always comply with the law and legal ethics requirements, decades of case law establish the proposition that the investigation of a lawyer—or even the threat of an investigation—by the same authority prosecuting the client, and for conduct the same as or related to the client's alleged offenses, could create substantial conflicts under existing legal ethics standards.

In ordinary criminal cases, such conflicts require at least judicial inquiry, and ultimately disqualification absent the client's knowing and intelligent waiver of the conflict. *See, e.g.*, *Briguglio* v. *United States*, 675 F.2d 81, 82 (3d Cir. 1982); *United States* v. *Salinas*, 618 F.2d 1092, 1093 (5th Cir. 1980); *United States* v. *White*, 706 F.2d 506, 507-08 (5th Cir. 1983); *Moss* v. *United States*, 323 F.3d 445, 472 (6th Cir. 2003); *Mannhalt* v. *Reed*, 847 F.2d 576, 581 (9th Cir. 1988). This assumes, of course, that such a conflict is even subject to waiver. And while there is no corresponding body of precedent concerning potential ethical conflicts in the context of military commissions or detainee habeas petitions, it is difficult to see why similar concerns would not be present there, as well.

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It is axiomatic that "the safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States* v. *Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting). The very point of such protections is to ensure that the powerful machinery of our legal system is used against those who have broken the law, and not just those who are unpopular. Our adversary system of justice is one of our most powerful defenses against the tyranny of the majority that so alarmed the Founders of our nation, several of whom, including John Adams, made their reputations as lawyers defending unpopular clients. A critical part of this safeguard is the right to zealous and vigorous representation, which itself helps to ensure the fairness of the underlying proceedings. Legislative attempts, verbal attacks, and other efforts to interfere with that representation do more than just implicate the rights of the clients and their counsel; they risk undermining the legitimacy of the entire judicial process. And the legitimacy of the judicial process is—and must be—one of the most effective weapons against terrorism.

Therefore, we urge Congress to refrain from legislation targeting lawyers representing terrorism suspects, and we call upon all policymakers to focus on the actual threats posed by terrorists, rather than policies and public pronouncements that attack lawyers for doing nothing more than what their ethics, the federal Constitution, and the rule of law require.

MEMBERS OF THE CONSTITUTION PROJECT'S LIBERTY AND SECURITY COMMITTEE*

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John W. Whitehead, President, The Rutherford Institute

REPORTER:

Stephen I. Vladeck, Professor, American University Washington College of Law; Supreme Court Fellow, The Constitution Project

CONSTITUTION PROJECT STAFF:

Sharon Bradford Franklin, Senior Counsel, Rule of Law Program

Laura M. Olson, Senior Counsel, Rule of Law Program

[*] *Affiliations listed for identification purposes only*