



# Stanford Law Review

## MILITARY LAWYERING AND PROFESSIONAL INDEPENDENCE IN THE WAR ON TERROR: A RESPONSE TO DAVID LUBAN

Major General Charles J. Dunlap & Major Linell A.  
Letendre

# RESPONSE

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### INTRODUCTION

Have U.S. government lawyers, including military attorneys, designed policies with the “goal of separating . . . lawyers from their clients” at

Guantánamo?<sup>1</sup> Have these government lawyers “worked . . . hard to take out the adversary lawyers at Guantánamo?”<sup>2</sup> Are government policies unethically interfering with the responsibilities of defense counsel for the detainees? Are there special difficulties for *military* defense attorneys?

These are some of the ethics questions panelist Professor David Luban of the Georgetown University Law Center sought to address at a conference on the American legal profession sponsored by Stanford University in March of 2008.<sup>3</sup> The *Stanford Law Review* published his expanded views under the title *Lawfare and Legal Ethics in Guantánamo*.<sup>4</sup>

The purpose of this Response is to assess critically Professor Luban’s effort and, in key areas, dispute his inferences and conclusions. In particular, we hope to add the perspective of military lawyers to this important subject. In doing so, we will not, however, debate all of the substantive issues of law that Professor Luban’s Article touches upon. Thus, for example, we will not discuss the extent of habeas rights following the Supreme Court’s decision in *Boumediene v. Bush*<sup>5</sup> or the architecture of the Military Commissions Act of 2006.<sup>6</sup> Nor will this Article advocate for Guantánamo per se, as we share the almost universal agreement of a need for an alternative to the detention center.<sup>7</sup> Nor do we intend to be apologists for torture or any other illegality committed by anyone.

In discussing Professor Luban’s approach and misconceptions in Parts I and II, we note that his research is confined principally to detainees and their

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1. David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 1983 (2008).

2. *Id.* at 2020.

3. David Luban, Remarks, Panel on Ethics and Professional Independence in Modern Legal Practice, Stanford University Conference on The American Legal Profession: Current Controversies, Future Challenges (Mar. 14, 2008) (audio recording available at [http://www.law.stanford.edu/calendar/details/1579/The%20American%20Legal%20Profession%3A%20Current%20Controversies%2C%20Future%20Challenges/#related\\_information\\_and\\_recordings](http://www.law.stanford.edu/calendar/details/1579/The%20American%20Legal%20Profession%3A%20Current%20Controversies%2C%20Future%20Challenges/#related_information_and_recordings)).

4. Luban, *supra* note 1.

5. 128 S. Ct. 2229 (2008).

6. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

7. See, e.g., Walter Pincus, *With Other Nations Refusing Detainees’ Return, ‘We Are Stuck’ with Guantánamo, Gates Says*, WASH. POST, May 26, 2008, at A15 (discussing Secretary of Defense Robert Gates’s frustration at not being able to close Guantánamo in the absence of an alternative).

counsel. Accordingly, we will contend that a more complete approach, which impartially weighs all available facts and fairly considers alternative explanations, would produce a more efficacious dialogue for practitioners and academics alike. In short, we argue that an evenhanded approach that seeks out both sides of disputed issues is a better analytical vehicle than one that too readily ascribes nefariousness or incompetence to every act of the opposing side.

We will contend that the principal value of Professor Luban's Article, somewhat ironically, is not so much the issues he intended to explore, but rather the questions that his discussion raises—perhaps unintentionally—particularly with respect to defense counsel and their role. While we will identify many of these questions in Part III, we will not purport to resolve most of them. We will, however, in Part IV, categorically dispute Professor Luban's inference that Judge Advocates General (JAGs) face a possible role conflict between duties of a patriot and an advocate. We take a firm stand on the candid counsel of military lawyers.

We believe allegations of ethical impropriety like those Professor Luban makes are serious matters that deserve a more complete vetting than he provided. Simple justice requires that before even implying that men and women in the service of their country designed a policy to "take out the adversary lawyers at Guantánamo,"<sup>8</sup> one needs to assemble more than the collection of anecdotes and innuendos that Professor Luban provides.

## I. THE LUBAN APPROACH

### A. *Synopsis*

Professor Luban's approach is rather peripatetic. Initially, he dispassionately identifies his concerns as being those "government policies that have (intentionally or not) made it more difficult for lawyers to provide legal representation to Guantánamo prisoners."<sup>9</sup> The tenor of the rest of his text, however, quickly becomes more antagonistic when he quotes, with evident approval, a Guantánamo defense attorney's vastly more strident and serious charge that the practices "are *designed* to drive a wedge between lawyers and their clients."<sup>10</sup>

Notably, Professor Luban says that the "secondary aim [of his Article] is to shed some light on this segment of law practice and the lawyers who engage in

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8. *Id.* at 2020.

9. *Id.* at 1983.

10. *Id.* (quoting Telephone Interview with J. Wells Dixon (Dec. 6, 2007) (emphasis added)). Professor Luban also cites Joseph Margulies for this same quote. *Id.* (citing JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 204 (2006)).

it.”<sup>11</sup> He describes the “three relevant groups of lawyers” as being (1) “civilian habeas lawyers” who he says call themselves “DTA lawyers” in apparent reference to the Detainee Treatment Act;<sup>12</sup> (2) civilian defense attorneys representing those detainees accused of crimes before military commissions; and (3) uniformed military defense counsel of the several services’ JAG Corps.<sup>13</sup>

With respect to the DTA lawyers, he criticizes the mechanics of their access to detainees at Guantánamo,<sup>14</sup> charges the government with “sowing mistrust” of defense counsel among the detainees,<sup>15</sup> and accuses the government of “mak[ing] the lawyers appear as powerless as possible [in their clients’ eyes].”<sup>16</sup> He then addresses what he defines as “military commissions defense counsel”<sup>17</sup> but largely restricts his discussion to JAG officers. Among other issues, he examines supposed “[s]tructural problems in the Office of Military Counsel-Defense” and an alleged “conflict of interest” for JAGs because of their dual status of lawyer and officer.<sup>18</sup>

Professor Luban’s final section offers two hypotheses as to “why the United States government . . . has worked so hard to take out the adversary lawyers at Guantánamo.”<sup>19</sup> The first, his “lawfare hypothesis,” contends that the Bush Administration considers the lawyers representing detainees as waging lawfare against the government, “mak[ing] them the equivalent of enemy combatants” and thus explaining why the government would “tak[e] out” defense counsel.<sup>20</sup>

Professor Luban calls his second theory “The Torture Cover-up Hypothesis.”<sup>21</sup> His argument boils down to his belief that “[c]reating difficulties for defense lawyers helps to make plea bargains the only viable option for detainees.”<sup>22</sup> This would relieve the government of what he deems a need to rely upon evidence obtained by torture.<sup>23</sup>

Professor Luban concludes that whether his claimed “persistent harassment of Guantánamo lawyers is best explained by the lawfare theory or the torture

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11. Luban, *supra* note 1, at 1983.

12. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended in scattered sections of 10, 28, and 42 U.S.C.).

13. Luban, *supra* note 1, at 1988.

14. *Id.* at 1989.

15. *Id.* at 1992.

16. *Id.* at 1997.

17. *Id.* at 1999.

18. *Id.* at 2006, 2008-09.

19. *Id.* at 2020.

20. *Id.* at 2020-21.

21. *Id.* at 2021.

22. *Id.* at 2023.

23. *Id.*

cover-up theory,” or by some “more innocent theory . . . is unanswerable by those not privy to the government’s strategy.”<sup>24</sup>

### B. Audi Alteram Partem?

Professor Luban premises his arguments on what he terms “the due process maxim [of] *audi alteram partem*,” that is, the requisite need to “hear the other side.”<sup>25</sup> He alleges that “government policies . . . [make] it more difficult for lawyers to provide legal representation to Guantánamo prisoners.”<sup>26</sup> This situation, he contends, operates to deny “not only a principle of procedural justice in the law, but a broader principle of justice as well.”<sup>27</sup>

We find that his failure to adhere to this same maxim ironically transforms what might have been an objective work that would resonate across the legal community into simply another “amen chorus” for one set of antagonists. Put simply, Professor Luban relies almost exclusively upon the perspective of one side of the debate—namely Guantánamo detainees, their counsel, and those sympathetic to them.<sup>28</sup> In examining their contentions he gives no consideration to the presumptions of regularity the law normally accords the government.<sup>29</sup> Instead, he favors ascribing corrupt motives to any governmental act or omission that supposedly made it more difficult to represent Guantánamo detainees.<sup>30</sup>

Although the narratives of the accused terrorists and the lawyers who represent them are important, so too are the narratives of the government lawyers and others who represent the people of the United States and, in doing so, the thousands of Americans killed by terrorists in the United States, Iraq, and Afghanistan.<sup>31</sup> However unpopular the politics of the war may be, the

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24. *Id.* at 2025.

25. *Id.* at 1984.

26. *Id.* at 1983.

27. *Id.* at 1984.

28. *See, e.g., id.* at 1981 n.\* (thanking individuals who spoke with him—all of whom are affiliated with the representation of Guantánamo detainees).

29. *See, e.g., United States v. Masusock*, 1 C.M.R. 32, 35 (C.M.A. 1951) (citing *Johnson v. United States*, 225 U.S. 405 (1912); *United States v. Pugh*, 99 U.S. 265 (1878)).

30. *See Luban, supra* note 1, at 1992, 1994, 1996 (providing various examples of government action and then presuming a malevolent motive). In addition, when judging alternative theories as to the reason for what he determines is “persistent harassment of Guantánamo lawyers” Luban chose “to focus on the more speculative torture cover-up theory” because, he claims, “it fits” with what he has deemed “the administration’s legal grand strategy of subordinating the model of criminal justice to the model of war.” *Id.* at 2025.

31. Nearly 3000 persons were murdered by terrorists in the 9/11 attacks and to date over 4500 military personnel have been killed in Iraq and Afghanistan. *See* Press Release, U.S. Dep’t of Def., Casualty Update, <http://www.defenselink.mil/news/casualty.pdf> (last visited May 28, 2008) (listing death toll in Iraq and Afghanistan); *Official 9/11 Death Toll Climbs by One*, CBSNEWS.COM, July 10, 2008, <http://www.cbsnews.com/stories/>

savagery of the illegalities inflicted upon the *victims* of terrorism is almost incomprehensible. Indeed, even vociferous Guantánamo opponent Dahlia Lithwick recently conceded that, although she roundly criticizes the behavior of some government authorities, “there is no moral equivalence between the actions of the Bush administration and those of the alleged ‘enemy combatants’ at Guantánamo.”<sup>32</sup>

## II. LUBAN’S MISCONCEPTIONS

The unique setting of the Guantánamo issues can help explain many of the circumstances Professor Luban finds nefarious. These issues arise in a “hybrid” environment of modern, globalized terrorism, where traditional criminal law converges with aspects of the international law of armed conflict.<sup>33</sup> Importantly, the scope and, especially, the *ongoing* nature of the threat pose unique challenges vital to understanding the government’s actions. As the late Supreme Court Justice William H. Rehnquist put it:

In wartime, reason and history both suggest that this balance shifts to some degree in favor of order—in favor of the government’s ability to deal with conditions that threaten the national well-being. It simply cannot be said, therefore, that in every conflict between individual liberty and governmental authority the former should prevail.<sup>34</sup>

Disregarding this wartime context, as well as the accepted maxim of American jurisprudence that prosecutorial actions are entitled to a presumption of regularity, undermines Professor Luban’s study and leads to a number of misconceptions.

### A. The “Leviathan” Myth

Professor Luban’s Article makes it clear that his sympathies lie with the defense counsel seeking justice for the accused terrorists and not with the government counsel who are also, presumably, seeking justice—but a justice that includes the victims. He identifies the defense counsel as standing heroically against the power of the state, the “Leviathan” in Hobbesian terms.<sup>35</sup>

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2008/07/10/national/main4250100.shtml (putting 9/11 death toll at 2975).

32. Dahlia Lithwick, *Getting Away with Torture*, NEWSWEEK, May 5, 2008, at 17.

33. For a recent discussion of this convergence, see Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008); see also STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS 390-94 (2005).

34. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 222-23 (1998).

35. Luban, *supra* note 1, at 1985. The term leviathan has many meanings. In Biblical times, a leviathan referred to a large sea monster, and in more modern times the word represents anything of immense size and power. See WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 812 (2d ed. 1986). A leviathan state was used by Hobbes to represent an all-controlling state in which one willingly sacrifices liberty in order to receive

Of course, as a practical matter, the prosecutors' resources are also limited; they realistically have no more call on the entire power of the state than do the admitted jihadist among the detainees upon the entire global terrorist movement.<sup>36</sup>

In truth, the pertinent comparison is the relative *legal* resources available to the respective litigants. In this regard, there is no question that the real leviathan is not the government's modest legal team, but the huge—and growing—legion of defense counsel. At the Stanford University conference, for example, one of the DTA attorneys announced that there were an astounding 700 lawyers representing the 255 Guantánamo detainees.<sup>37</sup> Moreover, as Professor Luban points out in his Article, many of these are drawn from “a distinguished roster” of America's leading law firms—entities with access to vast resources.<sup>38</sup>

Besides the 700 DTA lawyers, there is a growing cadre of military and well-funded civilian lawyers preparing to defend those detainees who may be tried by military commissions. In April 2008, the American Civil Liberties Union (ACLU) announced that it would provide top civilian defense attorneys for alleged terrorists at Guantánamo and that former Attorney General Janet Reno endorsed the \$8.5 million effort.<sup>39</sup> It also appears that the plan is cosponsored by the National Association of Criminal Defense Lawyers (NACDL).<sup>40</sup> Backing both the DTA lawyers and the commission defense counsel are armies of law students anxious to help with the defense.<sup>41</sup>

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security. *See generally* THOMAS HOBBS, *THE LEVIATHAN* (George Routledge & Sons 1886) (1651). Through his use of leviathan, we believe Professor Luban invokes the multiple meanings of the term. *See* Luban, *supra* note 1, at 1985-86; *see also* David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1731-32 (1993) (showcasing size of prosecution resources compared with the limited resources of defense attorneys).

36. Luban seems to concede as much when he states that he has “no doubt . . . that in the vast majority of criminal prosecutions ‘The State’ is no Leviathan.” Luban, *supra* note 1, at 1985.

37. *See* Panel on Ethics and Professional Independence in Modern Legal Practice, *supra* note 3 (comment of audience member); *see also* Press Release, U.S. Dep't of Def., Detainee Transfer Announced (Sept. 2, 2008), *available at* <http://www.defenselink.mil/releases/release.aspx?releaseid=12174> (estimating 255 detainees in Guantánamo).

38. Luban, *supra* note 1, at 1982 n.4.

39. Carol Rosenberg, *ACLU Recruiting Top Legal Talent to Defend Detainees*, MIAMI HERALD, Apr. 5, 2008, at 3A. Indeed, it appears that the ACLU has asked the U.S. Treasury Department for a permit to pay this “A Team” of lawyers \$250-an-hour for legal fees. Carol Rosenberg, *ACLU, Treasury in Dispute over Paying Captives' Lawyers*, MIAMI HERALD, July 9, 2008, at A3.

40. *See* William Glaberson & Neil A. Lewis, *2 Groups to Help Defend Detainees at Guantanamo*, N.Y. TIMES, Apr. 4, 2008, at A16.

41. *See, e.g.*, Press Release, Office of Commc'ns at Seton Hall Univ. School of Law, Seton Hall Law Students Uncover Proof that Guantánamo Interrogations Routinely Videotaped (Feb. 14, 2008), *available at* [http://law.shu.edu/administration/public\\_relations/press\\_releases/2008/guantanamo\\_interrogations\\_videotaped.htm](http://law.shu.edu/administration/public_relations/press_releases/2008/guantanamo_interrogations_videotaped.htm); Press Release, Univ. of Va. Sch. of Law, Students Participate in Campaign for Habeas Rights for Detainees (Apr. 25, 2007), *available at* [http://www.law.virginia.edu/html/news/2007\\_spr/habeas.htm](http://www.law.virginia.edu/html/news/2007_spr/habeas.htm); Ian

Against this formidable array of legal talent stand a few dozen military and civilian lawyers and support staff representing the interests of the United States and, in doing so, the interests of the victims.<sup>42</sup> Prior to the Supreme Court's decision in *Boumediene*, the number of government attorneys in both the Department of Defense (DOD) and the Department of Justice (DOJ) totaled a mere ninety-one,<sup>43</sup> and this figure included defense attorneys, prosecutors, appellate counsel, judges, and convening-authority attorneys working on administrative issues associated with the commissions.<sup>44</sup> Of these, only thirty-one DOD attorneys were dedicated to the prosecution of military commissions.<sup>45</sup>

Even more telling for the leviathan myth is the fact that the government dedicated twenty-nine attorneys to the defense of detainees.<sup>46</sup> With just twenty detainees charged with crimes,<sup>47</sup> this resulted in the government supplying 1.45 defense attorneys *per* detainee facing a military commission.<sup>48</sup> This ratio

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Weinstein, *Fordham Law Students Help Guantanamo Detainees*, LAWCLINIC.TV (June 2, 2006), [http://www.lawclinic.tv/lawclinetv/2006/06/1\\_2.html](http://www.lawclinic.tv/lawclinetv/2006/06/1_2.html).

42. See, e.g., Carol Rosenberg, *9/11 Families Hope Trials Bring Justice*, MIAMI HERALD, June 5, 2008, at 1A (discussing victims' families welcoming the arraignment of 9/11 coconspirators at a military commission as part of their "thirst for justice"); see also U.S. DEP'T OF JUSTICE, NAT'L SEC. DIV., MISSION AND FUNCTIONS, [http://www.usdoj.gov/nsd/mission\\_functions.htm](http://www.usdoj.gov/nsd/mission_functions.htm) (last visited Oct. 28, 2008) (stating function of "ensur[ing] rights of victims and their families are honored and respected").

43. At the time of *Boumediene*, "[t]he Justice Department had four lawyers devoted to handling about 250 Guantánamo Bay habeas cases." Joe Palazzolo, *DOJ Seeks Lawyers for Gitmo Cases*, LEGAL TIMES, July 7, 2008, at 1 (noting also that DOJ intends to expand its number of attorneys to a total of fifty given the Court's decision in *Boumediene* which "cleared the way for detainees to challenge their" detention through habeas petitions). As of July 1, 2008, DOD had eighty-seven attorneys dedicated to the entire commissions process—thirty-one prosecutors, twenty-nine defense counsel, thirteen judges, and fourteen attorneys who work for the convening authority. E-mail from the Office of Military Commissions, to Lieutenant Colonel Adam Oler (July 9, 2008, 09:39:00 EST) [hereinafter July 9 E-mail from OMC] (on file with authors).

44. See July 9 E-mail from OMC, *supra* note 43. Since the *Boumediene* decision, the number of government attorneys working the military commissions has increased to seventy prosecutors and sixty-four defense attorneys as of October 2008. E-mail from the Office of Military Commissions, to Lieutenant Colonel Adam Oler (Oct. 17, 2008, 14:27:00 EST) [hereinafter October 17 E-mail from OMC] (on file with authors). The numbers of defense counsel include only the government attorneys—not pro bono or other civilian attorneys involved in the representation of detainees. *Id.*

45. July 9 E-mail from OMC, *supra* note 43.

46. *Id.*

47. As of July 1, 2008, twenty detainees had charges pending against them. See U.S. Dep't of Def., Office of Military Comm'ns, Commission Cases, <http://www.defenselink.mil/news/commissions.html> (last visited Oct. 28, 2008) (showing charge sheets of all charged detainees).

48. With the increase in DOD defense attorneys in October 2008, see October 17 E-mail from OMC, *supra* note 44, and the addition of two charged detainees, see U.S. Dep't of Def., *supra* note 47 (showing new charges against detainees Ghani and Obaidullah), the government attorney per detainee ratio has now surged to almost three attorneys *per* detainee (2.91).

is in stark contrast to the 104 dedicated defense attorneys in the Air Force at large<sup>49</sup> who represent, on average over the last fifteen years, 936 American Airmen in courts-martial each year<sup>50</sup> at a rate of approximately one defense attorney per nine Airmen. Those figures do not include the thousands of other clients these same defense counsel represent for lower-level administrative actions such as discharges from the military or nonjudicial punishment actions.<sup>51</sup> It appears the only “Leviathan” resources being dedicated by the government are actually *in the defense of detainees*.

Furthermore, the enormous outpouring of largely pro bono legal resources for 270 detainees is especially striking<sup>52</sup>—and leviathan in scale—when compared to those committed to poor Americans. We believe everyone deserves adequate representation whether a Guantánamo detainee or an American criminal defendant. Yet, in contrast to Guantánamo detainees, each year thousands of indigent Americans accused of serious crimes are inadequately represented.<sup>53</sup> Studies show “four out of five low income persons with legal needs have no access to lawyers.”<sup>54</sup> It would appear that representing detainees is almost in vogue.<sup>55</sup>

Although the *Washington Post* editorialized—accurately and appropriately—that the detainee lawyers were “upholding the highest ethical traditions of the bar by taking on the most unpopular of defendants,”<sup>56</sup> it does not necessarily follow that actually *defending* detainees is, per se, unpopular. Further, it appears that the representation of detainees has not had a negative impact on the defense attorneys’ practice. As one defense counsel put it: “I had always worried that we would get some input from clients that was less than supportive . . . [b]ut we must have gotten 10 e-mails, phone calls, personal

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49. Memorandum from Rebecca Vernon, U.S. Air Force Judge Advocate Prof'l Dev. Div. (AF/JAX), to The Judge Advocate General, Headquarters U.S. Air Force (HQ USAF/JA) (Oct. 14, 2008) (on file with authors).

50. Courts-martial statistics as of September 30, 2008 from Air Force Legal Operations Agency, Military Justice Division (AFLOA/JAJM) (on file with authors).

51. *Id.* Nonjudicial punishments include administrative actions imposed under the authority of Article 15 of the Uniform Code of Military Justice. See 10 U.S.C. § 815 (2000).

52. One prestigious Boston law firm “ha[s] provided 35,448 billable hours of legal help, worth an estimated \$17 million” to six terrorist suspects since 2004. Farah Stockman, *Detainee Fight Gets Bigger, Costlier for Long-Battling Boston Law Firm*, BOSTON GLOBE, June 25, 2008, at 1A.

53. See, e.g., Stephen B. Bright, *Turning Celebrated Principles Into Reality*, THE CHAMPION, Jan.–Feb. 2003, at 6, available at <http://www.nacdl.org/public.nsf/championarticles/A0301p6?OpenDocument>; PA. INTEREST ON LAWYERS TRUST ACCOUNT BD., PRO BONO INITIATIVE OF THE SUPREME COURT OF PENNSYLVANIA, <http://www.paiolta.org/News/probonofolder.htm#WhatIsSupreme> (last visited May 26, 2008) (citing studies showing crisis of unmet civil legal needs of poor).

54. PA. INTEREST ON LAWYERS TRUST ACCOUNT BD., *supra* note 53.

55. See, e.g., Stockman, *supra* note 52 (quoting Clive Stafford Smith as saying the Boston firm dedicating huge pro bono resources for detainees “got involved long before it became fashionable”).

56. Editorial, *Unveiled Threats*, WASH. POST, Jan. 12, 2007, at A18.

contacts from Fortune 500 companies that said the opposite. One big client said, “That makes me want to send you more work—not less.”<sup>57</sup>

Indeed, the popularity of defending detainees goes to the heart of the role of the defense counsel in the advocacy system, and raises questions about the limits of zealous representation.<sup>58</sup>

### B. *Despicable Scheming or Reasonable Precaution?*

In Professor Luban’s leviathan analogy, he paints the security guards and procedures as the state’s weapons designed to thwart due process for detainees.<sup>59</sup> However, there is another side. For example, in describing the everyday challenges of the young U.S. troops guarding the detainees, the deputy commander at Guantánamo related an effort at intimidation—which he maintained is typical—that was aimed at one of his female guards.<sup>60</sup>

Specifically, the detainee told the woman: “I am going to rape you. I am going to rape you. And when I get out of here I am going to kill you and your family.”<sup>61</sup> Such threats, misogynistic and otherwise, cannot be considered idle. In May 2008, a jihadist website celebrated the fact that a former Guantánamo detainee became a suicide bomber, killing six innocents in Iraq.<sup>62</sup>

Given the risks involved, it is no surprise that government policies and practices illustrate a cautious approach. Professor Luban states “no one . . . is in a position to know” the culpability of the detainees.<sup>63</sup> In fact, Colonel Morris Davis, the former-prosecutor-turned-defense-witness and harsh Guantánamo critic, recently conceded that with respect to “seventy-five or eighty [detainees]” he believed there was “reliable evidence to prove they had violated the law of war in the past.”<sup>64</sup> Moreover, some detainees make no issue of their

57. Paul Shukovsky, *Firm’s Unlikely Client: Bin Laden’s Ex-Driver*, SEATTLE POST-INTELLIGENCER, May 27, 2008, at A1.

58. See *infra* Part III.

59. Luban, *supra* note 1, at 1989-92.

60. Brigadier General Gregory J. Zanetti, Deputy Commander, Joint Task Force Guantanamo, Department of Defense Roundtable: Joint Task Force Guantanamo 7 (Apr. 3, 2008) (transcript available at [http://www.defenselink.mil/dodcmsshare/BloggerAssets/2008-04/04030816420120080403\\_BrigGenZanetti\\_transcript.pdf](http://www.defenselink.mil/dodcmsshare/BloggerAssets/2008-04/04030816420120080403_BrigGenZanetti_transcript.pdf)).

61. *Id.*

62. Mike Mount, *Pentagon: Ex-Detainees Returning to Fight*, CNN.COM, May 7, 2008, <http://www.cnn.com/2008/WORLD/meast/05/07/gitmo.bomber/>. By one estimate, “[a]t least 5 to 10 percent of . . . released [detainees] re-enter the fight and put American soldiers’ and civilians’ lives at risk.” Kyndra Rotunda, *Supreme Court Ruling Puts Soldiers at Great Risk*, CHI. TRIB., June 20, 2008, at 23.

63. Luban, *supra* note 1, at 1985.

64. Interview by Amy Goodman, Democracy Now!, with Colonel Morris Davis, Former Chief Prosecutor, Office of Military Commissions (July 16, 2008) (transcript available at [http://www.democracynow.org/2008/7/16/fmr\\_chief\\_guantanamo\\_prosecutor\\_says\\_military](http://www.democracynow.org/2008/7/16/fmr_chief_guantanamo_prosecutor_says_military)); see also *infra* note 85 and accompanying text (discussing pronouncements of Khalid Sheikh Mohammed).

guilt or their disposition to continue to commit hostile acts. Consider this statement of Ali Hamza al Bahlul at a military commission hearing: “I’m telling you now. I will never deny any actions I did alongside bin Laden fighting you and your allies the Jews,” he said. “We will continue our jihad and nothing’s going to stop us.”<sup>65</sup>

Although Professor Luban asserts that the Guantánamo security procedures complicate representation of the detainees, he does not compare the rules applicable to Guantánamo with those of federal maximum-security prisons that operate on U.S. soil.<sup>66</sup> Such penitentiaries typically have limitations on attorney access,<sup>67</sup> and require prisoners to abide by “special administrative measures” that have withstood judicial attack.<sup>68</sup> Indeed, the international meaning and extent of access to counsel for persons accused of terrorism is not necessarily conterminous with that found in American domestic criminal courts.<sup>69</sup>

Against such standards it is not at all demonstrated that the reported experiences with Guantánamo are illegal, unethical, or—significantly—extraordinary. For example, security regulations at Guantánamo forbid defense attorneys from “bring[ing] comfort items” or articles of clothing to detainees but lawyers may provide detainees with food as long as “the client eats it before

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65. Michelle Shephard, *Another Detainee Boycotts Trial*, THESTAR.COM, May 8, 2008, <http://www.thestar.com/comment/columnists/article/42277>.

66. In fact, prison conditions at Guantánamo compare quite favorably to those at U.S. prisons. See Morris D. Davis, Op-Ed., *The Guantánamo I Know*, N.Y. TIMES, June 26, 2007, at A21. For example, conservative estimates indicate over 25,000 inmates in U.S. penitentiaries spend twenty-three hours a day in isolated cells with just one hour spent—alone—in an outdoor, concrete, recreation pen. See Laura Sullivan, *In U.S. Prisons, Thousands Spend Years in Isolation*, NPR.ORG, June 26, 2006, <http://www.npr.org/templates/story/story.php?storyId=5582144>. By contrast, detainees in Camps 5 and 6 of Guantánamo receive a minimum of two hours of outdoor recreation time each day next to three to five other detainees. Mark H. Buzby, Op-Ed., *Guantanamo is a Model Prison (Really)*, WALL ST. J., June 4, 2008, at A19. For more compliant detainees in Camp 4, this recreation time increases to twelve hours of daily recreation plus a “communal, barracks-style [living] environment.” *Id.* In contrast to U.S. prisons, there have been no reported allegations of prison rape in Guantánamo by either inmates or prison staff. See Jamie Fellner, *Prisoner Abuse: How Different are U.S. Prisons?*, HRW.ORG, May 14, 2004, <http://hrw.org/english/docs/2004/05/14/usdom8583.htm> (comparing abuse by American soldiers at Abu Ghraib prison with familiar acts of abuse in U.S. prisons); see also *US: Federal Statistics Show Widespread Prison Rape*, HRW.ORG, Dec. 16, 2007, <http://hrw.org/english/docs/2007/12/16/usdom17560.htm>.

67. See, e.g., 28 C.F.R. §§ 543.13-14 (2008); FED. BUREAU OF PRISONS, U.S. PENITENTIARY, FLORENCE, COLO., VISITING PROCEDURES para. 6 (Mar. 5, 2008), available at [http://www.bop.gov/locations/institutions/flm/FLM\\_visit\\_hours.pdf](http://www.bop.gov/locations/institutions/flm/FLM_visit_hours.pdf).

68. See e.g., *United States v. Hashmi*, No. 06 Cr. 442 (LAP), 2008 WL 216936, at \*6 (S.D.N.Y. Jan. 16, 2008).

69. See generally Sara Rodriguez, *Gideon’s Strumpet: The International Right to Counsel for Persons Accused of Terrorism* (2007) (unpublished LL.M. paper, University of Houston), available at [http://works.bepress.com/sara\\_rodriguez/1/](http://works.bepress.com/sara_rodriguez/1/).

the end of the interview.”<sup>70</sup> In contrast, the Bureau of Prisons at the maximum-security penitentiary in Florence, Colorado, forbids attorneys from bringing *anything* to the client except for legal paperwork.<sup>71</sup> In fact, all visits with these prisoners are “non-contact” visits and attorneys must specifically request a booth with a slot to pass documents in advance.<sup>72</sup>

Moreover, precedent exists supporting the need to apply certain security measures.<sup>73</sup> Professor Luban mentions the case of Lynne Stewart, the attorney for Omar Abdel Rahman, but grossly understates the seriousness of her 1996 conviction for various terrorism-related activities.<sup>74</sup> Stewart did not merely violate prison rules; she actually, in plain terms, used her access to her client to help the radical “pass secret messages to his followers urging violent terrorist attacks.”<sup>75</sup>

Even the judge, who was otherwise sympathetic to Stewart, pointed out that her culpability included “an irreducible core of very severe criminal conduct.”<sup>76</sup> Additionally, in a letter to the sentencing judge, Stewart admitted she “was careless, overemotional and politically naive in her representation of a terrorist client.”<sup>77</sup> Obviously, such behavior obliges the government to put in place reasonable precautions even though doing so may create difficulties for other defense counsel.

### C. *Intrinsic Tribulations of Defense Counsel or Product of “Designed” Policy?*

Professor Luban attributes the Guantánamo detainees’ mistrust for both defense counsel and DTA lawyers to government interference.<sup>78</sup> In doing so, he overlooks the challenges *all* defense attorneys typically face. For example, as well-known defense attorney Mickey Sherman explains, criminal defendants often mistrust their public defenders because they are perceived as part of the state that also provides the police, the prosecutors, and judges.<sup>79</sup> Even a private defense counsel, he says, is “often looked upon by the client as just one more cog in the big horrible machine that is grinding the life and happiness out of

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70. Luban, *supra* note 1, at 1997.

71. FED. BUREAU OF PRISONS, *supra* note 67, at para. 24(D).

72. *Id.* paras. 6, 24(D).

73. In fact, the use of special access measures imposing limitations on communications between terrorist suspects and his attorneys were upheld in *Hashmi*, 2008 WL 216936, at \*8.

74. Luban, *supra* note 1, at 2019.

75. David Glovin, *N.Y. Attorney Lynne Stewart Convicted of Aiding Terrorist Group*, BLOOMBERG.COM, Feb. 10, 2005, <http://www.bloomberg.com/apps/news?pid=10000103&sid=aWPO.6oKgMsw>.

76. Julia Preston, *Sheik’s Lawyer, Facing 30 Years, Gets 28 Months, to Dismay of U.S.*, N.Y. TIMES, Oct. 17, 2006, at A1 (quoting trial judge).

77. Julia Preston, *Lawyer in Terror Case Apologizes for Violating Special Prison Rules*, N.Y. TIMES, Sept. 29, 2006, at B1.

78. Luban, *supra* note 1, at Part II.B.

79. See MICKEY SHERMAN, HOW CAN YOU DEFEND THOSE PEOPLE? 6 (2008).

him.”<sup>80</sup>

Furthermore, the refusal of many detainees to work with defense counsel may not be the product of some government “design,” but rather part of a plan to undermine the commissions themselves. For example, one defense counsel conceded that older detainees were using “peer pressure” to induce others not to cooperate with their lawyers.<sup>81</sup> The message, he says, is “[d]on’t trust the Americans, don’t trust the attorney, don’t tell them anything, don’t cooperate, boycott.”<sup>82</sup>

Inexplicably, Professor Luban seems to make contradictory assertions concerning “mistrust” in the attorney-client relationship stemming from the amount of information a client has about his defense counsel. On one hand, he quotes a defense counsel’s complaint that the detainee’s isolation provided no way for her client to “check [her] out” as even, she says, a death-row inmate would be able to do in the United States.<sup>83</sup> Professor Luban attributes this limitation on a client’s access to information as additional evidence of building mistrust in the attorney-client relationship. Yet, on the other hand, he asserts that Guantánamo interrogators sought to disrupt an attorney’s relationship with a detainee by telling the detainee that his lawyer is Jewish.<sup>84</sup>

Unresolved, it seems, is the underlying issue: to what extent must—or should—defense counsel disclose information about themselves to clients? In any event, the bigotry and extremism of many detainees would seem to present more challenges to attorney-client relations in certain instances than any allegedly disruptive governmental action. For example, detainee Khalid Sheikh Mohammed made no secret of his anti-Semitism when he proudly announced at a hearing that he “decapitated with [his] blessed right hand the head of the American Jew, Daniel Pearl.”<sup>85</sup>

Despite the supposedly “disruptive” government policies, at least one defense counsel developed what he relates as “a really personal bond” with his detainee-client.<sup>86</sup> Professor Luban assumes that such an intense personal

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80. *Id.* at 66.

81. Michael Melia, *Guantanamo Detainees Spread Word to Boycott Trials*, FED. NEWS RADIO, May 9, 2008, <http://federalnewsradio.com/?nid=82&sid=1401268>.

82. *Id.*; see also Carol Rosenberg, *Bin Laden’s Driver 4th to Boycott Military Trials*, MIAMIHERALD.COM, Apr. 30, 2008, <http://www.miamiherald.com/news/5min/story/514880.html>.

83. Luban, *supra* note 1, at 1993. Lieutenant Colonel Yvonne Bradley stated:

There was no cultural reason why Binyam didn’t trust me. He’s lived in the West. But I had a harder time getting him to trust me than I ever had with other clients, including inmates on death row. Even the death row inmates can check you out to see who you are. But at Guantánamo, he has no resources to check anything out.

*Id.*

84. *Id.* at 1994.

85. Mike Mount, *Khalid Sheikh Mohammed: I Beheaded American Reporter*, CNN.COM, Mar. 16, 2007, <http://www.cnn.com/2007/US/03/15/guantanamo.mohammed/index.html>.

86. Luban, *supra* note 1, at 2025.

relationship is something “surely very important.”<sup>87</sup> While we would agree that solid, professional relations facilitate the defense function, a “really personal bond” is not necessarily required<sup>88</sup> or desirable. Legendary defense attorney Robert S. Bennett warns that “you must never become so close to your clients that you lose your independence, objectivity, or ability to do what is right,” adding that if a defense counsel acquires “a personal interest, [her] objectivity will be clouded, [and her] advice will be slanted.”<sup>89</sup>

Thus, Professor Luban’s argument that defense counsel ought to be able to provide the same inducements—“comfort items”<sup>90</sup>—as interrogators is misplaced. We believe that the manipulative techniques an intelligence officer employs on a subject are hardly the type a defense counsel ought to ape. An interrogator unapologetically tries to induce cooperation with bribes if necessary. Wholly apart from obvious security issues, we believe that gifts and similar inducements are inappropriate vehicles for building an attorney-client relationship, and have real potential to warp the detainee’s understanding of the appropriate role of defense counsel.

In reality, contrary to the assertions in Professor Luban’s Article, objective and ethical defense counsel are very much in the government’s interest because they can help prevent the distortion of the proceedings. For example, terrorist training materials seized prior to 9/11 advise detainees “to ‘insist on proving that torture was inflicted’ and to ‘complain of mistreatment while in prison.’”<sup>91</sup> Just as ethical defense counsel raise allegations of torture when appropriate, they also refuse to be party to fraudulent claims of the same.

Similarly, it is also in the government’s interest to have defense counsel represent detainees, as the alternative—having detainees represent themselves—is manifestly unwelcome. As one commentator noted:

[T]he terrorist, who by nature eagerly seeks to spread his message of fear and intimidation, enjoys too much the privilege of self-representation. Proceeding *pro se* for this type of creature, as seen in the [Zacarias] Moussaoui trial, offers the same almost pornographic opportunity for self-promotion and victimization, making the public trial a spectacle and highlighting the disrespect that terrorists have for institutions of justice.<sup>92</sup>

Furthermore, the notion that the government is trying to “take out” defense counsel so that there can be some kind of “torture cover-up” seems nonsensical.

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87. *Id.*

88. See, e.g., ARYEH NEIER, *DEFENDING MY ENEMY* (1979) (describing own defense of Nazis despite family members’ deaths in Holocaust).

89. Robert S. Bennett, *Ethics, Zealous Advocacy, and the Criminal Defense Attorney*, *CARDOZO LIFE*, Winter 2001, at 27, available at <http://www.cardozo.yu.edu/life/winter2001/pdf/bennett.pdf>.

90. Luban, *supra* note 1, at 1997.

91. Donna Miles, *Al Qaeda Manual Drives Detainee Behavior at Guantanamo Bay*, *AM. FORCES PRESS SERVICE*, June 29, 2005, <http://www.defenselink.mil/news/newsarticle.aspx?id=16270>.

92. Rodriguez, *supra* note 69, at 126.

Even were the government disposed to do so, there is so much scrutiny of that issue from so many sources,<sup>93</sup> it is hard to conceive that presenting difficulties to defense counsel could possibly staunch the critique and inquiry into issues of detainee abuse.

*D. Conflict of Interest or Misapprehension of Applicable Rules?*

Professor Luban makes much of the conflict of interest that allegedly exists due to the structure of the Office of Military Counsel-Defense (OMC-D). He notes with sympathy Lieutenant Colonel Yvonne Bradley's complaints about sharing office space and administrative staff with other defense counsel as well as her inability to discuss issues in her case without revealing client confidences.<sup>94</sup> Although Bradley apparently "obtained an opinion from an expert" on her state's professional rules that identified a "disqualifying" imputed conflict,<sup>95</sup> much more needs to be analyzed before concluding such a conflict exists in fact.

Despite Professor Luban's treatment of this as an issue of first impression, the ABA's Standing Committee on Ethics and Professional Responsibility has repeatedly analyzed the ethical propriety of shared workspace and supervisory attorneys in a military legal environment.<sup>96</sup> On each occasion, the committee has concluded that "representation of opposing sides" in the same criminal matter—i.e., prosecution and defense—"in the same military office and sharing common secretarial and filing facilities should be avoided."<sup>97</sup> But at the same time, the ABA recognized that some situations may not allow for separate

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93. See, e.g., AMNESTY INT'L, GUANTÁNAMO AND BEYOND: THE CONTINUING PURSUIT OF UNCHECKED EXECUTIVE POWER (2005), available at <http://www.amnesty.org/en/library/asset/AMR51/083/2005/en/dom-AMR510832005en.pdf>; ARMY REGULATION 15-6, INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTANAMO BAY, CUBA DETENTION FACILITY (2005), available at <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>; OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF DEF., REVIEW OF DoD-DIRECTED INVESTIGATIONS OF DETAINEE ABUSE (2006), available at <http://www.fas.org/irp/agency/dod/abuse.pdf>; Carrie Johnson & Josh White, *Audit Finds FBI Reports of Detainee Abuse Ignored*, WASH. POST, May 21, 2008, at A01.

94. See Luban, *supra* note 1, at 2007. Professor Luban asserts—without any citation to support his claim—that due to expense and inconvenience, JAG defense counsel are seldom brought from another base to represent defendants if a conflict exists with the on-base defense counsel. *Id.* at 2008. Nothing could be further from reality. On the contrary, funding for defense counsel to travel is readily available. For the first two-thirds of this fiscal year alone, the Air Force's defense attorneys traveled over 3500 days at a cost of \$605,000 to represent clients around the world. E-mail from the Office of the Trial Defense Division of the Air Force Legal Operations Agency (AFLOA/JAJD), to Maj. Linell Letendre (May 30, 2008, 11:56:05 PDT) (on file with authors).

95. Luban, *supra* note 1, at 2008.

96. See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1474 (1982); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 343 (1977); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1235 (1972).

97. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1474 (1982).

facilities, in which case both prosecution and defense attorneys could share office space.<sup>98</sup>

Here, although military commission defense counsel within the same office may represent clients with differing interests, they are not on opposing sides of the same matter, and they clearly have separate facilities, budgets, and supervisors from the prosecutors. Further, the “burden” of sharing resources with other defense attorneys in no way lessens an individual attorney’s responsibilities to safeguard client confidences.<sup>99</sup>

While the imputed conflict rules may differ between the military<sup>100</sup> and Bradley’s licensing state,<sup>101</sup> this does not prevent a JAG from following both sets of professional responsibility rules given the state’s choice-of-law provision.<sup>102</sup> Notwithstanding Professor Luban’s summary dismissal of its applicability,<sup>103</sup> this provision allows “rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur” to apply.<sup>104</sup> Given that a military lawyer is practicing before a military tribunal, a reasonable attorney would defer to the military service’s rule on imputed conflict, in which case no ethical dilemma exists and the structure of OMC-D places no restrictions on zealous representation.

### III. THE LIMITS OF ZEALOUS REPRESENTATION

Underlying Professor Luban’s objections to the policies he claims cause difficulties for defense counsel is his distaste for the advocacy system. Apparently because of his examination of cases unrelated to Guantánamo, he became a “skeptic of the . . . system” generally.<sup>105</sup> In his view, it allows litigants “to win legal battles by eliminating or hobbling the advocates on the other side rather than by offering better arguments.”<sup>106</sup> Incongruously, he excludes criminal defenders from his critique, presuming that “zealous advocacy” from them—alone apparently—provides an “important safeguard” of rights.<sup>107</sup>

Not only does Professor Luban not address the role of prosecutors in defending victims’ rights, he also seems to think that there are no limits to defense counsel’s representational activities. He cites with approval Lord

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98. *Id.*

99. ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1235 (1972).

100. AIR FORCE RULES OF PROF’L CONDUCT R. 1.10 (2005); *see also* United States v. Reynolds, 24 M.J. 261, 264 (C.M.A. 1987).

101. PA. RULES OF PROF’L CONDUCT R. 1.10, 204 PA. CODE § 81.4 (2006).

102. *Id.* R. 8.5.

103. *See* Luban, *supra* note 1, at 2009 & n.124.

104. PA. RULES OF PROF’L CONDUCT R. 8.5 cmt. 5, 204 PA. CODE § 81.4 (2006).

105. Luban, *supra* note 1, at 1985.

106. *Id.* at 1984.

107. *Id.* at 1985.

Henry Brougham's infamous speech in the 1820 Trial of Queen Caroline, where Brougham characterized the role of defense counsel as "[t]o save [the] client by all means and expedients, and at all hazards and costs to other persons . . . [without regard to] the destruction which he may bring upon others."<sup>108</sup>

#### A. *Misreading the Advocacy System*

We believe that Professor Luban misreads the nature of the advocacy system, particularly in the criminal justice context. Energetic, even fierce, debate and argument, which is part and parcel of the advocacy system, is a quintessentially American quality that serves the nation well.<sup>109</sup>

This said, it is hardly the unbridled process that Professor Luban imagines. Federal prosecutors, as the Supreme Court put it in the oft-quoted case of *Berger v. United States*, are unlike other litigants in that their role is not to "win," per se, but to ensure "that justice shall be done."<sup>110</sup> This prohibits them from "strick[ing] foul [blows]," and they must "refrain from improper methods calculated to produce a wrongful conviction."<sup>111</sup> At the same time, so that the "guilt[y] shall not escape . . . [they] may prosecute with earnestness and vigor—indeed, [they] should do so."<sup>112</sup>

At its heart, the competitiveness of the advocacy system drives the parties to heighten their focus, marshal their resources, and concentrate their presentations to be efficient and effective. From that crucible comes the clarity of truth.

#### B. *Zealous Representation—Bounded by Ethical Rules*

Concerning defense counsel, Professor Luban is wrong to suggest that a literal reading of Lord Brougham's speech reflects contemporary standards. Today, no ethical defense counsel is free to save his client "by all means."<sup>113</sup> As famed criminal defense attorney Alan Dershowitz says, "My job is to advocate zealously, *within the rules*."<sup>114</sup> Former Justice Sandra Day O'Connor recently enunciated this responsibility even more unequivocally:

The hardest thing you must accept as an ethical, moral lawyer is that it is not your job to win for your clients at all costs. You are an officer of the court;

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108. *Id.* at 2004 (quoting 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., London, J. Robins & Co. Albion Press 1821)).

109. See HOWARD FINEMAN, THE THIRTEEN AMERICAN ARGUMENTS 5-19 (2008).

110. *Berger v. United States*, 295 U.S. 78, 88 (1935).

111. *Id.*

112. *Id.*

113. Luban, *supra* note 1, at 2004 (quoting 2 TRIAL OF QUEEN CAROLINE, *supra* note 109) (citing Lord Henry Brougham's speech with approval).

114. ALAN M. DERSHOWITZ, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE 335 (2002) (emphasis added).

that means that one of the costs you must never pay is to put the law to one side.<sup>115</sup>

Clearly, violating the law is beyond the permissible scope of a lawyer's function, regardless of the side for which he or she is advocating. Consequently, Professor Luban's characterization of the case of Lieutenant Commander Matthew Diaz, a former government counsel, as "a major breakthrough"<sup>116</sup> for the defense sends exactly the wrong message.

Diaz was convicted of passing classified information identifying detainees to a civilian defense attorney who, appropriately, reported the illegality to federal authorities promptly.<sup>117</sup> Although he has been feted by some, his own defense counsel admitted "that what [Diaz] did was stupid, imprudent, and sneaky, if you want, about the way he sent it off."<sup>118</sup> Importantly, the counsel conceded that "it was Diaz's obligation as a lawyer and an American to abide by the Constitution [even] when he felt the government did not."<sup>119</sup>

While Professor Luban focuses his arguments on the government's behavior, in doing so he raises some intriguing questions as to the responsibility of defense counsel in tribunals such as the military commissions. Are there, for example, limits to zealous representation?

### 1. *Limits on promotion of partisan interests*

Few would debate the principle that zealous representation must always center on the best interests of the particular client represented and not on the aggrandizement of the counsel or the counsel's causes. More specifically, the lawyer must act solely in the interest of his or her client and not necessarily in pursuit of other interests the attorney may wish to address.<sup>120</sup> As a result, the promotion of a partisan interest could prove problematic. Is this occurring? Consider, for example, that a detainee defense counsel said he took the case because he wanted to "'participate in an effort to rein in' President Bush."<sup>121</sup>

115. Sandra Day O'Connor, *On Being Ethical Lawyers*, Address Before the Members of the J. Reuben Clark Law Society (Feb. 15, 2008), in J. REUBEN CLARK LAW SOCIETY, CLARK MEMORANDUM, Spring 2008, at 5, available at [http://www.jrcls.org/publications/clark\\_memo/SubSections/Spring2008/CMS08\\_OConnor.pdf](http://www.jrcls.org/publications/clark_memo/SubSections/Spring2008/CMS08_OConnor.pdf).

116. Luban, *supra* note 1, at 1989.

117. Andrew Scutro, *JAG Gets 6 Months, Dismissal in Gitmo Case*, NAVYTIMES.COM, May 21, 2007, [http://www.navytimes.com/news/2007/05/navy\\_diaz\\_sentence\\_070518w/](http://www.navytimes.com/news/2007/05/navy_diaz_sentence_070518w/).

118. *Id.*

119. *Id.*

120. *See, e.g.,* Mazon v. Krafchick, 44 P.3d 1168, 1172 (Wash. 2006) (en banc) (declaring that "decisions about how to pursue a case must be based on the client's best interests, not the attorneys"); *see also* Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1416 (explaining that military regulations prohibit a "lawyer's personal interests" from interfering with the representation of the judge advocate's client).

121. Shukovsky, *supra* note 57.

According to the *New York Times*, the ACLU and NACDL expressed a similar theme. Specifically, “[t]hey . . . made clear that the lawyers provided by the groups were expecting to use the detainees’ cases to expose what they see as flaws in the Bush administration’s war-crimes system.”<sup>122</sup> As the *Times* observed:

In some cases there has been friction between the civilian and the military lawyers. One lawyer who is involved in the military defense effort said . . . there could be tensions over the extent to which legal efforts focus on defending individual detainees and how much they focus on challenging the entire military commission system.<sup>123</sup>

Defense counsel advocating larger agendas could face knotty ethical questions. The challenge and critique of lawyers balancing their personal beliefs with ethical obligations to clients is not new to the public-interest field.<sup>124</sup> In criminal defense practice especially, the interest of the client must predominate.<sup>125</sup> In our view, this can be done zealously and within the law.

## 2. *Limits on extrajudicial defenses*

There are other issues as well, such as the extent to which a case should be “litigated” in the media. Consider, for example, a lecture given by Clive Smith—a detainee counsel whom Professor Luban cites favorably—wherein he expressed the view that American law is “80 percent [about] humiliating the prosecutors in the newspaper and about 3 percent law.”<sup>126</sup> Is this a reflection of appropriate zealous advocacy or something else?

Professor Luban also lauds—as others have done—the actions of Major Dan Mori, the defense counsel for Australian David Hicks, who was convicted by a military commission of providing material support to terrorism. Mori had traveled to Australia, purportedly on official orders, and appeared in uniform at various events.<sup>127</sup> He specifically criticized certain Australian government

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122. See Glaberson & Lewis, *supra* note 40.

123. *Id.*

124. See, e.g., Kevin C. McMunigal, *Of Causes and Clients: Two Tales of Roe v. Wade*, 47 HASTINGS L.J. 779, 781 (1996) (criticizing Sarah Weddington’s representation of “Roe” for placing her personal desires to litigate the landmark abortion case above her client’s interests). The issues surrounding “cause lawyering” have also been raised in the academic context. See Bruce A. Green, Reply, *The Market for Bad Legal Scholarship: William H. Simon’s Experiment in Professional Regulation*, 60 STAN. L. REV. 1605, 1648-70 (2008); William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555, 1558-76 (2008).

125. See generally MODEL RULES OF PROF’L CONDUCT R. 1.7 cmt. 10 (2002).

126. Clive Stafford Smith, *Getting Rid of Human Rights? From Death Row to Guantanamo*, Lecture at Glasgow Graduate School of Law (Mar. 31, 2004) (video available at <http://www.ggs.l.strath.ac.uk/staffordsmith/lecture.htm>) (discussing a non-Guantánamo case).

127. See E-mail from Colonel Morris Davis, Chief Prosecutor, Office of Military Comm’ns, to Judge Susan Crawford (Mar. 13, 2007, 10:25:59 EST) [hereinafter E-mail from

officials,<sup>128</sup> and “delivered . . . blistering public comments” for the purpose of “pressuring the Australian government”—an activity Professor Luban characterizes as “zealous advocacy.”<sup>129</sup> Significantly, Major Mori’s trip preceded the Australian election, and the David Hicks issue “work[ed] against” the Prime Minister.<sup>130</sup> In fact, he was defeated.

The resolution of this case is interesting. Despite all of Major Mori’s vituperative statements, his client admitted his criminality to the military commission (with Major Mori at his side). In a plea bargain, Hicks recanted his allegations of abuse, and agreed that he had “never been illegally treated” during “the entire period of [his] detention by the United States at Guantanamo Bay, Cuba.”<sup>131</sup> At the hearing Major Mori also said his client “wants to apologize to Australia and to the United States.”<sup>132</sup>

Major Mori’s actions raised concerns<sup>133</sup> in light of Article 88 of the Uniform Code of Military Justice,<sup>134</sup> as well as DOD regulations prohibiting military personnel from participating in demonstrations in foreign countries.<sup>135</sup> It is not, however, necessary to assess the propriety of Major Mori’s activities in Australia to observe that no definition of “zealous advocacy” explicitly *obliges* any lawyer—military or civilian—to pressure a foreign government through public, *ex parte* activities.<sup>136</sup>

Col. Morris Davis], *available at* <http://graphics.nytimes.com/packages/pdf/world/070313DavisEmailtoCA1.pdf>. Colonel Davis stated that “DoDD 1325.6 prohibits service members from participating in demonstrations while on duty, in uniform, or in a foreign country” without any exceptions for judge advocates. *Id.* He referenced a photograph that “shows MAJ Mori at a demonstration in Adelaide, Australia, last August doing all three: in uniform (minus hat), on orders (I believe), and in a foreign country.” *Id.*

128. *See A-Gs Demand Immediate Action on Hicks Trial*, ABC NEWS ONLINE, Nov. 10, 2006, <http://www.abc.net.au/news/newsitems/200611/s1785856.htm>.

129. Luban, *supra* note 1 at 2015-16. During his “lecture tour” in Australia, Major Mori proclaimed the innocence of his client and the illegality of the military tribunals and denounced the treatment of Hicks. Richard Phillips, *Australia: Thousands Hear US Military Lawyer for David Hicks*, WORLD SOCIALIST WEB SITE, Sept. 5, 2006, <http://www.wsws.org/articles/2006/sep2006/tour-s05.shtml>.

130. Mark Davis et al., *Qantas Sale Adds to Voter Turbulence*, SYDNEY MORNING HERALD, Mar. 13, 2007, *available at* <http://www.smh.com.au/news/national/qantas-sale-adds-to-voter-turbulence/2007/03/12/1173548109818.html>.

131. William Glaberson, *Some Bumps at Start of War Tribunals at Guantánamo*, N.Y. TIMES, Apr. 1, 2007, at A26.

132. *Id.*

133. *See* E-mail from Col. Morris Davis, *supra* note 127.

134. Article 88 of the Uniform Code of Military Justice (UCMJ) prohibits officers from “us[ing] contemptuous words against” certain officials. 10 U.S.C. § 888 (2000). There has been only one reported case involving Article 88. *See United States v. Howe*, 37 C.M.R. 429 (C.M.A. 1967).

135. U.S. DEP’T OF DEFENSE, DIRECTIVE NO. 1325.6, GUIDELINES FOR HANDLING DISSIDENT AND PROTEST ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES para. 3.5.6 (1996), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/132506p.pdf>.

136. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (1983) (“A lawyer is not bound, however, to press for every advantage that might be realized for a client.”).

The broader ethical issue is the extent to which accepted jurisprudential parameters of “zealous representation” sanction extrajudicial activities meant to bring political pressure on governments. Is doing so fair and just? Does political pressuring offend *audi alteram partem* by introducing an extrajudicial factor that is not, per se, related to the “better arguments” principle Professor Luban endorses?<sup>137</sup>

All of this is especially important for JAG defense counsel because a military officer may have a unique ability to influence the body politic. Polls show that the public is more confident in military leaders than any other group, including the Supreme Court.<sup>138</sup> One might rightly conclude that trading on military status upsets the proper operation of the advocacy process, which ought to focus on issues at bar as opposed to the status of the advocate.

Further, endorsing the notion of a military officer putting pressure on a government seems to fly in the face of what Chief Justice Burger described as a “200-year tradition of keeping the military separate from political affairs, a tradition that in [his] view is a constitutional corollary to the express provision for civilian control of the military in Art. II, § 2, of the Constitution.”<sup>139</sup> Importantly, the courts also have long held that the government has a valid interest in preventing *military* personnel overseas from engaging in activities aimed at the political affairs of another nation “no matter what political interest [is] being pressed.”<sup>140</sup>

Should the profession countenance, in the name of “zealous advocacy,” a defense counsel exploiting military status for the purpose of pressuring *any* government—foreign or domestic? Suppose, for example, the purpose was to decriminalize her client’s hate crime or legitimize crimes against a child—should that be allowed as “zealous advocacy”? These questions underline that while pressuring governments on behalf of Guantánamo detainees may be popular today, if the process is enshrined as an accepted facet of “zealous representation,” then unintended consequences may arise, especially for military lawyers.

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137. Luban, *supra* note 1, at 1984.

138. See *The Harris Poll #22: Big Drop in Confidence in Leaders of Major Institutions*, HARRISINTERACTIVE, Feb. 28, 2008, available at [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=876](http://www.harrisinteractive.com/harris_poll/index.asp?PID=876) (including subheading “Leaders of the Military Only One of 16 Categories to Improve Since Last Year”). This sentiment seemed to hold true abroad as well, for when Major Mori traveled across Australia in uniform advocating for his client “[h]e was regularly hailed as a ‘hero’ and ‘role model’ who should ‘run for US president.’” Phillips, *supra* note 129.

139. Greer v. Spock, 424 U.S. 828, 841 (1976) (Burger, C.J., concurring); cf. Admiral Michael G. Mullen, *From the Chairman: Military Must Stay Apolitical*, 50 JOINT FORCE Q., 3d Quarter 2008, at 2 (“Political opinions have no place in the cockpit or camp or conference room. We do not wear our politics on our sleeves.”).

140. See, e.g., Culver v. Sec’y of the Air Force, 559 F.2d 622, 628 (D.C. Cir. 1977).

## IV. THE MILITARY LAWYER

Military lawyers and their role in the advocacy system perplex Professor Luban. He seems fixated on the idea that there is somehow an inconsistency between patriotism and the representation of Guantánamo detainees as a defense counsel. As he puts it: “How can a military officer separate the duty of a patriot from that of an advocate? How can a military officer follow a duty that risks throwing his country into confusion?”<sup>141</sup>

Actually, the answer to the first question is simple: there is no need to separate the duty of a patriot from that of an advocate.<sup>142</sup> We believe defense counsel in virtually every instance—military *and* civilian—are patriots, carrying out a vital function in a democracy built upon the rule of law. There is no need for separation.

As to the second question, our conclusion is equally uncomplicated: no construct of *any* defense attorney’s legal or ethical duty can require the instigation of anarchy or otherwise put the country at risk. Justice Jackson, in *Terminiello v. Chicago*, famously observed that the Constitution is not “a suicide pact,” and noted that “[t]he choice is not between order and liberty. It is between liberty with order and anarchy without either.”<sup>143</sup> We are convinced that the United States is not going to be thrown into confusion by any military officer acting within the bounds of law and ethics. It is true that this country has suffered civil disorder from time to time as a result of court rulings, but in the end, justice and order prevailed.<sup>144</sup> Guantánamo will be no different, regardless of the outcome of particular cases.

Understanding the role of JAGs requires an appreciation that they practice within a unique culture described by the Supreme Court in *Parker v. Levy* as “by necessity, a specialized society separate from civilian society. . . . [This society has] developed laws and traditions of its own during its long history.”<sup>145</sup> As officers, JAGs have special responsibilities. According to the

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141. Luban, *supra* note 1, at 2004.

142. See, e.g., Major David J.R. Frakt, Letter to the Editor, *How We Are Defending the Detainees*, WASH. POST, June 11, 2008, at A18 (disputing vehemently an editorial comment in the *Washington Post* that military “defense counsels may feel some divided loyalty or some pressure . . . to give less than our fullest effort”); see also Kramer & Schmitt, *supra* note 120, at 1416 (“No cogent basis exists to suggest the obligation [of representation and loyalty to one’s client] diminishes when representing detainees. On the contrary, it would constitute professional misconduct for a judge advocate performing such duties to place interests other than his client’s at the forefront. It would similarly comprise professional misconduct for those in the defense attorney’s chain of command to attempt to limit his or her zealous representation.”).

143. 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

144. See Daniel B. Wood, *L.A.’s Darkest Days*, CHRISTIAN SCI. MONITOR, Apr. 29, 2002, at 1 (noting that the riots in Los Angeles that followed the 1992 acquittal of the police allegedly involved in the beating of Rodney King ruined 10,000 businesses, killed fifty-five people, and caused damage estimated at more than \$1 billion).

145. 417 U.S. 733, 743 (1974).

Court in *Parker*, “officer[s] hold[] a particular position of responsibility and command” that is occasioned by the “special trust and confidence in [their] patriotism, valor, fidelity and abilities” expressed in the President’s commissioning documents.<sup>146</sup> Moreover, as members of the armed forces, they are parties to the proverbial “unlimited liability contract” that obliges officers “to go into harm’s way, perhaps even die, in the course of their duty.”<sup>147</sup>

Unfortunately, Professor Luban derides military lawyers, without citation or consideration of the hundreds of JAGs who have served in Iraq and Afghanistan, as “not always [being] what other military personnel recognize as warriors.”<sup>148</sup> Such gross mischaracterization not only discounts the ultimate sacrifice made by JAG Corps members in Iraq<sup>149</sup> but also overlooks one of the fundamental traits required of a JAG—valor.<sup>150</sup>

While the very nature of their military status clearly requires JAGs to have the physical courage normally associated with valor,<sup>151</sup> JAGs must also possess the *moral* courage to stand up for what is right, even in the face of obstacles. For JAGs, candid counsel goes beyond our ethical obligation of communicating candid advice to our clients;<sup>152</sup> it is, quite simply, part of our mission.<sup>153</sup> Valor requires JAGs to act affirmatively on issues, report and handle misconduct, deliver bad news, and, where appropriate, disagree with one’s superior. Quite notably, the ability of JAGs to deliver candid and independent counsel is preserved by statute.<sup>154</sup>

Professor Luban himself cites numerous examples of JAGs demonstrating candid counsel by “be[ing] among those most resistant to pushing the envelope in detainee treatment.”<sup>155</sup> Indeed, the senior-most uniformed military lawyers were among the first to demand that detainees receive defense counsel for

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146. *Id.* (quoting *Orloff v. Willoughby*, 345 U.S. 83, 91 (1953)).

147. George M. Clifford III, *Duty at All Costs*, 60 NAVAL WAR C. REV. 103, 113 (2007), available at <http://www.nwc.navy.mil/press/review/documents/nwcrw07.pdf>.

148. Luban, *supra* note 1, at 2000.

149. *See, e.g.*, Bill Graham, *Locals Mourn Army Major*, KAN. CITY STAR, Jan. 12, 2006, at B1; James V. Grimaldi, *Army’s JAG Corps Deals with Reality of War in Iraq*, WASH. POST, Nov. 17, 2003, at E1.

150. *See, e.g.*, U.S. AIR FORCE, JAG CORPS VALUES AND VISION 10-11 (2006), available at <http://www.afjag.af.mil/shared/media/document/AFD-080502-052.pdf>.

151. *See* Chris Vadnais, *Pacific Area Legal Teams Train to Deploy*, A.F. LINK, Dec. 12, 2007, available at <http://www.af.mil/news/story.asp?id=123079127>.

152. MODEL RULES OF PROF’L CONDUCT R. 2.1 (2007).

153. *See, e.g.*, U.S. AIR FORCE, *supra* note 150 (citing Air Force JAG Corps Mission Statement). Other services’ missions have some variation of providing accurate, proactive advice to commanders and warfighters. *See* JAG CORPS SPECIAL ASSISTANT FOR TRANSFORMATION, U.S. NAVY, JAG CORPS 2020, at 7 (2005) (stating the U.S. Navy JAG Corps’ mission statement); E-mail from the Office of the Judge Advocate General of the Army, to Maj. Linell Letendre (November 4, 2008, 11:22:00 EST) (stating the U.S. Army JAG Corps’ mission statement which requires “proactive legal support”).

154. 10 U.S.C. § 8037(f) (2000).

155. Luban, *supra* note 1, at 2001.

military commissions.<sup>156</sup> Providing candid counsel is, quite simply, part of the JAG ethos. To quote Professor Luban, the thought that military attorneys experience “role-conflict” between patriotism and advocacy is “purely academic.”<sup>157</sup>

### CONCLUSION

There is absolutely no question that the proceedings at Guantánamo present myriad difficulties for government and defense counsel alike. The complexities and novelty of the legal issues, the ongoing conflict, the difficulty of “cross-cultural” communications,<sup>158</sup> as well as the remoteness of the detention facility, not only for Americans, but also the distance from the situs of the detainees’ capture and alleged offenses, all combine to present challenges to *everyone* concerned.

Such problems are, however, wholly separate from the allegation that the government, including military lawyers, somehow unethically made it a “goal” to “design” policies aimed at improperly interfering with defense counsels’ representation. In this respect, Professor Luban fails to prove his case.

Indeed, Professor Luban’s own logic falters from the thesis he propounds at the beginning of the Article to what he claims at the end. He initially goes to great pains to express an “important caveat” to make clear that he is “not suggesting an orchestrated conspiracy of lawyer harassment,”<sup>159</sup> but then proceeds to not just “suggest” such a conspiracy but actually to *accuse* the government of just that. Specifically, by the end of the Article he states, as if it were a proven fact, that the “United States government . . . has worked . . . hard to take out the adversary lawyers at Guantánamo.”<sup>160</sup> To Professor Luban, the question is not *if* that is true, only *why it is* true. Without any explanation he seems to forget the “important caveat” he set forth originally.

Perhaps the most powerful reason for the government not to engage in the practices Professor Luban argues that it commits is a quite pragmatic one: those practices would undermine the legitimacy that the government seeks for the military commissions. As Professor David Glazier of Loyola Law School in Los Angeles noted, “[w]ithout a credible defense effort, any convictions will

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156. See CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 139 (2007); see also JANE MAYER, THE DARK SIDE 232-33 (2008) (showcasing how then-Major General Jack Rives, the Judge Advocate General for the Air Force, opposed the politically appointed DOD General Counsel and warned that the Justice Department’s “radical and idiosyncratic interpretation of the law ‘puts the interrogators and the chain of command at risk of criminal accusations abroad’”).

157. Luban, *supra* note 1, at 2004 (“To the Guantánamo defenders with whom I’ve spoken, worries such as these are purely academic.”).

158. Professor Luban cites “frequent cross-cultural misunderstandings to resolve” as an issue for defense counsel. *Id.* at 1992.

159. *Id.* at 1986.

160. *Id.* at 2020.

simply fail to stand up to scrutiny in the court of world public opinion.”<sup>161</sup> In short, the government’s legal, ethical, and moral imperatives are served by credible and zealous defense counsel, *not*, as Professor Luban thinks, by “taking out”<sup>162</sup> the defense effort.

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161. *More Gitmo Detainees Likely to Snub Trials*, MSNBC.COM, Apr. 13, 2008, <http://www.msnbc.msn.com/id/24094614/>.

162. Luban, *supra* note 1, at 2021.

