A Cry for Human Rights and the Law: A Review of Unpopular Cases for Lawyers

A Washington Advocate's Perspective

Stephen Rickard
Acting Director
Washington Office, Open Society Institute

August 7, 2004

I am very honored to appear as a member of this panel. In fact, I'm not sure how I managed to rate appearing with this distinguished group. So, I will simply try to return the favor of being invited here today by being relatively brief so that we can *all* have more time to hear from our other speakers.

As far back as I can trace my family history, which is not quite 200 years, a Rickard really had only two professional options. You could mine copper or you could be a Methodist minister. So I'm not sure what it says about the changing nature of our society that although my father is a Methodist pastor, all four of his children are lawyers. The truth is that all of us considered a career in the law a powerful way to live out the admonition of the book of James that "Faith without works is dead." That and the fact that it seemed like a better option than hard rock mining.

For the first six years of my legal career I was a litigator with White & Case where I had the good fortune to know many talented lawyers like a former Chair of the Litigation section, Paul Bschorr. But for the last 15 years I have worked in Washington in a number of different capacities – in the Senate as an aide to Pat Moynihan, in the State Department, as Washington Director for Amnesty International USA and, now, at the Open Society Institute. Thus, for me, the phrase in this panel's title "unpopular cases" translates to "unpopular causes," "unpopular laws" and "unpopular legal institutions," like the International Criminal Court.

Most of what I will have to say on this subject will probably seem mundane or even cliched to an audience as sophisticated and well-informed as this. But I console myself with Justice Holmes' observation that sometimes the vindication of the obvious is more important than the elucidation of the obscure – especially when the obvious is being challenged.[1]

And much that should be – and once was – considered obvious is being challenged today. There is, as this panel's title suggests, a "crying need" for lawyers to continue to take up unpopular causes. In these difficult days, when our nation is threatened and when the specter of weapons of mass destruction is very real, it must still be the role of the lawyer in our society to speak law to power. To restate emphatically what was once obvious – that law and not expediency must guide our conduct; that we defend the rule of law because it defends us, not because it's the "nice" thing to do; that law-abiding nations have a profound self-interest in reinforcing international law, not weakening it. We need to continue to proclaim that certain rights are, as the Founders said, "inalienable;" as President Bush said in his 2002 State of the Union Address, "non-negotiable;" and as the treaties we have solemnly ratified say, are "non-derogable."

In the last 15 years, I have been involved in a number of unpopular causes. For instance, I and many others within the human rights community argued that there needed to be some minimal controls placed on using torturers as intelligence informants.

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[1] As quoted by Sidney Hook in Daniel Bell, "Thinking Aloud: Sidney Hook at Sixty," New Leader, March 4, 1963.

But these and similar notions about human rights – which were never very popular in some circles – became much less so after 9/11. While the World Trade Center was still smoldering I watched former Secretary of State James Baker explain on national television that the reason the attack had succeeded was because liberals had imposed restrictions on who we could use as informants. It would be several more days before I accepted the reality that my best man had in fact died in the collapse of the South Tower of the World Trade Center. But I was already being told, in effect, that it was my fault.

Those were shocking days and perhaps Secretary Baker would not repeat that charge today. After all, the CIA regulations imposed on recruiting informants were imposed after one of *them* was implicated in the murder of an American citizen and the torture and death of another's spouse. They did not even prohibit such informants, but merely required officers in the field to justify them and obtain clearance from Langley. But it was clear, in the ringing phrase of Cofer Black, the head of the CIA Counter-Terrorism Center, that "there was before 9/11 and there was after 9/11 … After 9/11 the gloves come off."[2] That has been true in our treatment of terrorism suspects; it has also been true at times in the attitude toward those who dissented from such treatment.

We should remember, however, that public opinion polling showed that in early 1942 a substantial majority of Americans also supported interning Japanese-Americans. The passions of the moment were such that among those who advocated the internment was the Attorney General of California, Earl Warren – the mistake that he famously spent the rest of his life trying to make up for.

There is another distinguished panel speaking later today on the subject of the President's power to detain and prosecute prisoners in the war on terrorism, so I will not address that issue. But I will address the astonishing disappearance of the rule of law and fidelity to treaty obligations that has accompanied the *interrogation* of those prisoners. I could not be more pleased that eight former Presidents of the American Bar Association have joined with a wide range of distinguished lawyers to denounce the manner in which certain U.S. government lawyers strained to find legal justifications for cruel, inhumane and illegal interrogation of detainees.

We should at the same time, however, note that we are also learning more about those lawyers who did object – often vigorously – including by many accounts a large number of attorneys serving our nation in uniform. We should celebrate the efforts of those JAG lawyers defending the rights of prisoners at Guantanamo with an obvious commitment to zealously representing their clients and an equally obvious disregard for their own professional advancement.

Finally, we are also learning more about the efforts of the Legal Advisor of the Department of State, William Taft, who, we now know, objected vigorously to a number of the current Administration's actions. This appears to be something of a family tradition, as Senator Robert Taft appears in the pages of Profiles in Courage because he publicly objected that the

[2] Quoted in "US Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities," Washington Post, December 26, 2002, A:1.

Nuremberg and Tokyo trials were not sufficiently fair. Surely that is one of the most unpopular positions any politician has taken in recent memory – and sadly it is much more than virtually any currently serving official has been willing to say about the trials at Guantanamo.

Much of the debate that took place within the Administration had to do with the meaning of "torture," and, in particular, so-called "stress and duress" interrogation, or "torture lite." How much duress is too much? It is sometimes said in the law that a problem or accident was "reasonably foreseeable." But in this case, the problem of how to define "cruel, inhuman or degrading" treatment was not foreseeable – it was foreseen. And it was foreseen by the previous Bush Administration when it sought the advice and consent of the Senate to ratify both the Covenant on Civil and Political Rights and the Convention Against Torture. It was foreseen and resolved. The United States would interpret the phrase "cruel, inhuman and degrading" to mean the cruel, inhumane and unusual treatment prohibited by the United States Constitution. I was in the Senate at the time, working for Senator Moynihan, a member of the Foreign Relations Committee, when Legal Advisor Abe Sofaer and Deputy Assistant Attorney General Mark Richards assured the Senate that the United States would turn to the "200 years of case law" available to interpret this phrase. They also assured the Senate that U.S. law and international law on this point were nearly identical if not completely so.

So I continue to be incredulous that any lawyer in or out of government could argue that sleep deprivation, exposure to extremes of temperature or binding prisoners in painful positions for a prolonged period could possibly be legal under the Torture Convention. There is, as Sofaer and Richards told the Senate, a large volume of Supreme Court case law making it clear that such techniques are unconstitutional. For example, more than 70 years ago the Supreme Court unequivocally rejected "sleep deprivation" as unconstitutional, citing an ABA study as a matter of fact which explicitly called it "torture." What makes this even more astonishing is that the current Administration filed an *amicus* brief in Hope v. Pelzer on behalf of prisoners in which the Bush Justice Department argued that leaving a prisoner shackled in an awkward position in the hot sun was an obvious violation of the Constitution – so obvious that prison guards engaging in such conduct must have been aware that it was illegal. The Bush Administration argued that such conduct was so flagrantly illegal that prisoners subjected to it should be able to sue the guards individually. And the Supreme Court agreed, calling such techniques inherently cruel.

But after 9/11 it became terribly inconvenient to remember what Judge Sofaer told the Senate or what the Bush Justice Department had told the Supreme Court in Hope v. Pelzer. Department of Defense General Counsel William Haynes went so far as to lecture human rights advocates that we were doing a terrible disservice to torture victims worldwide by implying that anything taking place in U.S. detention centers amounted to torture and to assure Senator Leahy in writing that U.S. interrogation techniques were consistent with the Constitution.

The only possible argument that I can imagine for this position is that every single Supreme Court decision in this area is inapplicable because they were not decided in a national security context and that US constitutional law in this area is completely different than the international norms applicable to "cruel, inhumane and degrading" conduct. This is, of course, the precise antithesis of what the prior Administration told the Senate – an inconvenient fact, but

one that lawyers are paid to point out to their clients and obligated by professional canons to acknowledge.

I am sure that the lawyers who told their government clients that terrorism suspects could be legally abused thought that they were making America safer. Surely that's what Earl Warren thought in 1942. But when a discussion of this type takes place, I cannot resist quoting the fictionalized exchange between Sir Thomas More and his son-in-law in Robert Bolt's A Man For All Seasons. When his son-in-law says that he would be willing to cut down every law in England to get after the Devil, More replies: "And when the last law was down, and the devil turned round on you – where would you hide …the laws all being flat?"

Every society subjected to the viciousness and, of course, gross illegality of terrorism is tempted by the siren song of torture. A law-abiding society tries to dance along the edge of the cliff – to use some coercion, but not too much; to allow abuse, but with doctors and lawyers on hand. Some people in this country – who ought to know better – have even proposed going back to the practice employed in the Middle Ages of legalized torture conducted under Court supervision.

But history shows us that when a nation tries to dance along the edge of that cliff it inevitably falls off, no matter how long its tradition of respecting the rule of law. The United Kingdom tried to use some cruelty-- but not too much-- in Northern Ireland; and it fell off the cliff. We tried to dance along the cliff, and now we have fallen off spectacularly.

The Department of Justice and other lawyers in the government who were burning the midnight oil looking for ways to explain away the illegality of the Administration's interrogation techniques needn't have looked to a fictionalized character like Bolt's Thomas More for guidance. There is a far more relevant, contemporary and powerful example close at hand. After some years of declining to grapple with the illegality of what was euphemistically called "moderate physical force," the Israeli Supreme Court took up the question of "stress and duress" just two years before the 9/11 attacks. The case before the Court was almost literally a "ticking time bomb" case – the hypothetical so beloved by torture apologists. A terrorist cell had a bomb-making operation. The cell had already exploded one of their bombs. People had died. Israeli authorities needed to find and break-up the bomb factory. Yet a *unanimous* Israeli Supreme Court ruled that "stress and duress" interrogation was illegal. The United States faces a real threat, but surely it is no worse than the threat faced by Israel. The Court's opinion is worth quoting at length and I will close with its words:

> The rules pertaining to investigations are important to a democratic state. They reflect its character. An illegal investigation harms the suspect's dignity. It equally harms society's fabric….
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> [F]rom the legal perspective, the road before us is smooth. We are, however, part of Israeli society…. We are not isolated in an ivory tower…. Our apprehension is that this decision will hamper the ability to properly deal with terrorists and terrorism…. We are,

however, judges. Our brethren require us to act according to the law. This is equally the standard we set for ourselves.

Thank you.