

BROOKINGS

Statement on Justice Department Attorney Representation of Guantánamo Detainees March 8, 2010

The past several days have seen a shameful series of attacks on attorneys in the Department of Justice who, in previous legal practice, either represented Guantánamo detainees or advocated for changes to detention policy. As attorneys, former officials, and policy specialists who have worked on detention issues, we consider these attacks both unjust to the individuals in question and destructive of any attempt to build lasting mechanisms for counterterrorism adjudications.

The American tradition of zealous representation of unpopular clients is at least as old as John Adams's representation of the British soldiers charged in the Boston massacre. People come to serve in the Justice Department with a diverse array of prior private clients; that is one of the department's strengths.

The War on Terror raised any number of novel legal questions, which collectively created a significant role in judicial, executive and legislative forums alike for honorable advocacy on behalf of detainees. In several key cases, detainee advocates prevailed before the Supreme Court. To suggest that the Justice Department should not employ talented lawyers who have advocated on behalf of detainees maligns the patriotism of people who have taken honorable positions on contested questions and demands a uniformity of background and view in government service from which no administration would benefit.

Such attacks also undermine the Justice system more broadly. In terrorism detentions and trials alike, defense lawyers are playing, and will continue to play, a key role. Whether one believes in trial by military commission or in federal court, detainees will have access to counsel. Guantánamo detainees likewise have access to lawyers for purposes of habeas review, and the reach of that habeas corpus could eventually extend beyond this population. Good defense counsel is thus key to ensuring that military commissions, federal juries, and federal judges have access to the best arguments and most rigorous factual presentations before making crucial decisions that affect both national security and paramount liberty interests.

To delegitimize the role detainee counsel play is to demand adjudications and policymaking stripped of a full record. Whatever systems America develops to handle difficult detention questions will rely, at least some of the time, on an aggressive defense bar; those who take up that function do a service to the system.

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