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Gideon at Guantánamo

ABSTRACT. The right to counsel maintains an uneasy relationship with the demands of trials for war crimes. Drawing on the author's personal experiences from defending a Guantánamo detainee, the Author explains how *Gideon* set a baseline for the right to counsel at Guantánamo. Whether constitutionally required or not, *Gideon* ultimately framed the way defense lawyers represented their clients. Against the expectations of political and military leaders, both civilian and military lawyers vigorously challenged the legality of the military trial system. At the same time, tensions arose because lawyers devoted to a particular cause (such as attacking the Guantánamo trial system) were asked at times to help legitimize the system, particularly when it came to decisions about whether to enter a plea to help legitimize the rickety trial system in operation at Guantánamo.

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The right to counsel maintains an uneasy relationship with the demands of trials for violations of the laws of war. The convenors of this Symposium asked me to share some personal reflections of how the right to counsel operated during the five years I was challenging President George W. Bush's military order setting up these trials at the naval base at Guantánamo Bay. The answer is: surprisingly well. While the position of the United States Government attempted at times to undercut *Gideon v. Wainwright*'s[1] right-to-counsel guarantees, the lawyers who adopted the Guantánamo detainees' defense took *Gideon* as an individual obligation to do their utmost for their clients—whatever the personal and professional cost.

When we think about *Gideon*'s effect, we should not simply look to the rules of the particular system, which may be slanted against the right to counsel. Instead, we should think about how attorneys have internalized the *Gideon* holding, making it something that counsel feel personally obliged to guarantee, even when the legal regime tries to undercut it. And we should also think about the latent tension in *Gideon*'s promise that ensues when "cause lawyers" (lawyers who sign up to advance a particular set of principles) carry out their work in the context of criminal cases. After all, doing what is best for one's client may often be antithetical to that attorney's overall cause—such as the lawyer who urges her client to plead to a very low sentence or turn over evidence against another detainee, knowing that the prosecutor wants that early victory to try to legitimize an otherwise rickety system.

On November 13, 2001, President Bush promulgated a military order[2] based loosely on President Roosevelt's World War II order for the trial of the Nazi saboteurs. Its defenders pointed out immediately that, while the order authorized trials in which detainees could face the death penalty, they would be real trials, with real defense counsel.[3] The architects of the military commissions, however, did not intend for it to work in quite this way.[4]

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1. 372 U.S. 335 (1963).

2. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Military Order].

3. *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the S. Comm. on the Judiciary*, 107th Cong. 8, 15 (2001) (statement of Michael Chertoff, Assistant Att'y Gen., Criminal Div.) ("The order specifies that all persons will have the right to an attorney . . . at government expense if the person can not afford one . . . . [T]he proceedings must allow a full and fair trial of the charges."); *id.* at 309, 313 (statement of John Ashcroft, Att'y Gen.) ("All persons being detained have the right to contact their lawyers and their families.").

4. *See, e.g.*, JONATHAN MAHLER, THE CHALLENGE: *HAMDAN V. RUMSFELD* AND THE FIGHT OVER PRESIDENTIAL POWER 40 (2008) ("[Chief Defense Counsel Colonel Will] Gunn knew that

My first inkling of the problem occurred when I tried to reach out to the recently appointed Chief Defense Counsel for the Guantánamo trials in the spring of 2003. Colonel Will Gunn was a brilliant JAG lawyer who had a sterling trajectory in the Air Force. Unlike a federal defender, neither Gunn nor his Office was listed in the phone book, and there was no public route to contact him. I ultimately obtained an email address for Gunn through a friend at the Pentagon. I reached Gunn and told him that while it was generally foolhardy to challenge a president in a time of war on a legal issue, I thought a challenge to the military order was viable. In particular, I believed that the military commissions violated separation-of-powers principles, the Uniform Code of Military Justice, and the Geneva Conventions. Gunn stopped me right there, and told me that I should not say another word to him, and instead should speak to two of his junior lawyers.

I only later learned the reason why: Gunn had been told by his civilian superiors that he did not have attorney-client privilege and that he was to report any items of interest to the General Counsel of the Department of Defense. Gunn, understandably upset with this arrangement, negotiated with the General Counsel to bring two junior JAG officers onto his staff who would have attorney-client privilege. Gunn arranged to have me meet these two, who turned out to be brilliant advocates in their own right: Lieutenant Commander Charles Swift and Lieutenant Commander Phil Sundel.

Hamdan v. Rumsfeld began that way, with a quiet meeting between two Navy JAG lawyers and me. The meeting had to occur at my Georgetown University office because the chief defense counsel for the military

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the Defense Department wanted defense lawyers who would be 'loyal to the military commissions process,' not 'Johnnie Cochran types,' as Haynes, the Pentagon's general counsel, had put it to him."); *id.* at 41-42 ("For [some military commission defense lawyers, learning that JAGs assigned as defense counsel had been removed] was the first glimpse of the highly politicized process they were about to wade into, not to mention the all-powerful role the administration would play in it. Not only was the Defense Department writing the rules and running the prosecutions, it was vetting the defense attorneys."); *id.* at 45 ("Among other shortcomings, defendants would not necessarily be able to see the evidence against them, hearsay would be permitted, and the appeals process consisted of a four-member review panel handpicked by the defense secretary. More fundamentally, the Defense Department—in effect, the prosecution—was not only defining the crimes worthy of trial by commission but doing so only after hundreds of suspects were already in custody and had been repeatedly interrogated. That was ex post facto law; crimes could be retrofitted to suit the prisoner."); *see also* Marie Brenner, *Taking on Guantánamo*, VANITY FAIR, Mar. 2007, http://www.vanityfair.com/politics/features/2007/03/guantanamo200703 ("From the start, [defense counsel Lieutenant Commander Charles] Swift sensed that something was wrong. When he and [defense counsel Lieutenant Commander Phil] Sundel met with William 'Jim' Haynes, the Pentagon general counsel greeted them with an odd remark: 'If you never try a case, you will have served your country.'").

commissions shared the same office floor as the chief prosecutor, and shared even the same handwritten security log that tracked visitors coming in and out of the office. In that first meeting, it became clear that the architects of the military commissions had made a serious mistake: they had assumed that uniformed military lawyers would not vigorously challenge the President in a time of war on behalf of an accused terrorist. Within mere minutes, Sundel was grilling me about footnotes in my *Yale Law Journal* article,[5] and Swift was explaining—in simple, eloquent, and powerful words—just how important fidelity to the Geneva Conventions is from the standpoint of someone who wears the uniform.

We of course had no client at that time, but we were getting prepared to have one. The Administration had said that the commissions were finally going to be launched. We spent that summer learning everything we could about the Geneva Conventions, domestic military law, and the way the federal courts had treated war powers. And then, rather unexpectedly, our relatively academic exercise turned practical: the Supreme Court granted certiorari in *Rasul v. Bush*.[6]

The question presented in *Rasul* was whether the hundreds of detainees at Guantánamo had access to the Great Writ. Immediately, I saw deep problems. If the Supreme Court answered the question in the broadest possible way for the government, it would mean that defendants in military commissions would be relegated to the essentially nonexistent judicial review set out in President Bush's military order.[7] But if the Court adopted the Guantánamo detainees' position in the lawsuit, that would also be problematic, since that set of detainees had tried to distinguish the handful of military commission defendants from the hundreds of detainees in the general population who were not facing a military trial. In an attempt to create a compromise position, the detainees in *Rasul* had even gone so far to suggest that the former category, the military commission defendants, may not even have habeas rights. I wrote up a legal memo outlining the dangers and gave it to Swift and Sundel. They called me to say it was now time to get Gunn back into the conversation.

At that point, there were five lawyers plus Gunn assigned to the Office of the Chief Defense Counsel. I came to their office and gave a two-hour presentation discussing the major war powers cases. I explained that our brief

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5. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002).

6. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 540 U.S. 1003 (2003). The case was decided under the name *Rasul v. Bush*, 542 U.S. 466 (2004).

7. *See* Military Order, *supra* note 2.

could take a rather different middle road—not saying that access to the Great Writ was necessarily appropriate for the hundreds of individuals in detention at Guantánamo, but saying that it definitely was available to someone facing a massive criminal sanction (including, quite possibly, the death penalty). And I pointed out that the detainees in *Rasul* had already taken their own problematic compromise position in an attempt to distinguish the key *Johnson v. Eisentrager*[8] precedent, in which the Court had said the writ of habeas corpus was not available to certain individuals tried by military commission in World War II. The detainees in *Rasul* had suggested that those facing military commissions after the September 11 attacks were already receiving process and therefore may not have access to the Great Writ.

I had always thought that was backwards. Someone who is facing the death penalty or life imprisonment should have more process than someone facing detention, particularly given the government's security needs in the latter situation. I concluded the meeting by urging the Office in the strongest terms to file an amicus brief, for the failure to do so could mean that the Court would decide the question in the worst possible way for military commission defendants and would prevent federal courts from considering the legality of President Bush's military order. When Gunn asked how they could get this through the Pentagon brass and who would pay, I had a ready answer: I would write the brief, the lawyers would hire me as their pro bono attorney for free, and we would alert the Pentagon that we were filing a brief before we did so.

This course of action was inspired by a similar set of events in World War II.[9] After the Nazi saboteurs landed on our shores and were captured, President Roosevelt's military commission system appointed Colonel Kenneth Royall for their defense. Royall was expected to roll over, but he instead decided to launch a full-scale attack on the legality of the system. President Roosevelt's executive order not only created a military commission to try the saboteurs, but also denied the saboteurs access to the federal courts.[10] Rather than simply accept the judgment of his commander-in-chief, Royall wrote to the President to seek authority to challenge the constitutionality of the military commission order and proclamation in civilian court.[11]

The President did not approve the request. He instead instructed his

8. 339 U.S. 763 (1950).

9. *See* MAHLER, *supra* note 4, at 38 (2008) ("Swift gravitated instantly to the story of the defense lawyer assigned to defend the [Nazi] saboteurs, an Army Colonel in the legal affairs department of the War Department named Kenneth Royall.").

10. *See* A. Christopher Bryant & Carl Tobias, Quirin *Revisited*, 2003 WIS. L. REV. 309, 320.

11. *Id.* at 321.

secretary to tell Royall to use his best judgment in deciding how to proceed.[12] And so Royall did, filing a habeas corpus petition in federal court, which prompted an irate President Roosevelt to tell his Attorney General that "I won't hand [the saboteurs] over to any United States marshal armed with a writ of habeas corpus."[13] Royall pressed his claim all the way to the Supreme Court.[14] Royall's aggressive advocacy might have enraged one president, but Royall later became another's Secretary of War[15]—with no one criticizing him for having done his job. (Similarly, after the Civil War, in the last big military commission case, *Ex parte Milligan*,[16] a lawyer named James Garfield challenged those commissions as unconstitutional. Garfield won his case, and was later elected President of the United States.[17])

Naïve me. I had thought this precedent would be enough to protect the brave military lawyers who chose to carry on this tradition by challenging detentions at Guantánamo. (As a law professor, I had tenure; there was nothing brave about my involvement.) It was only years later that I learned that Gunn had made a decision the night before he authorized the filing of the amicus brief—that he would retire from the service and leave the military altogether so as to insulate himself from career reprisal in his remaining months on the job. And so the brief was filed, and the Air Force lost one of its most distinguished attorneys.[18] It became instantly clear to the world what I had already known—that these military lawyers were going to act like true criminal defense counsel, in precisely the way that *Gideon* envisioned.

Half a year later, the Supreme Court in *Rasul* decided that, as a statutory matter, the detainees at Guantánamo had access to the Writ.[19] This led the Pentagon to start to develop rules for more frequent attorney-client contacts. But it also led the Pentagon to do something else: it finally pushed forward plans to designate six people eligible for military trial. Swift had let the chief prosecutor know that he was interested in defending one of the cases. (Yes, the

12. *Id.*

13. *Id.* (quoting FRANCIS BIDDLE, IN BRIEF AUTHORITY 331 (1962)).

14. *Ex parte* Quirin, 317 U.S. 1 (1942).

15. *Profile of Kenneth C. Royall*, HARRY S. TRUMAN LIBRARY & MUSEUM, http://www.trumanlibrary.org/profile/viewpro.php?pid=188 (last visited Feb. 6, 2013).

16. 71 U.S. 2 (1866).

17. Allan Peskin, *James A. Garfield: Supreme Court Counsel*, *in* AMERICA'S LAWYER-PRESIDENTS: FROM LAW OFFICE TO OVAL OFFICE 164, 167 (Norman Gross ed., 2009).

18. Years later, Gunn would return to government service as General Counsel of the Department of Veterans Affairs, where he continues to serve with distinction.

19. Rasul v. Bush, 542 U.S. 466, 484 (2004).

chief prosecutor in this system appointed the defense counsel.)

The prosecutor said that Swift could represent Salim Hamdan, Osama Bin Laden's alleged driver, but only for the purpose of negotiating a plea.[20] In his first meeting with the prosecutor after being assigned the case, Swift learned that the prosecutor could not make a binding deal but that he would likely offer Mr. Hamdan a twenty-year sentence in exchange for a guilty plea and full cooperation.[21] But the prosecutor could not tell Swift what Mr. Hamdan's alleged offense was, because Mr. Hamdan had not yet been charged.[22] Swift was told to get on a plane to Guantánamo to negotiate a plea.

Swift telephoned me to explain the situation, and I immediately started typing out an authorization from Mr. Hamdan to let us file a civil suit on his behalf. The authorization form was necessary because we needed proof to show the federal courts that we were acting at Mr. Hamdan's behest. We knew Swift had to take that piece of paper with him, because there was a good chance Mr. Hamdan was rational, and that he therefore would not plead to an unspecified charge. And we knew that if Mr. Hamdan refused to plead, it very well could mean that Swift would never see Mr. Hamdan again since the scope of his representation was only to negotiate a plea.

Swift ultimately got that proof, and the lawsuit began—with the enormous help of a bevy of lawyers from Perkins Coie, a Seattle-based team that ultimately vindicated every promise that *Gideon* anticipated for criminal defendants. But the lawsuit was unusual from the start. For months, I had been trying to obtain permission to go to Guantánamo but got nowhere with the government. Officials said that I had no need to meet Mr. Hamdan, and that I could instead argue the legal theories challenging the commissions, which were not dependent on Mr. Hamdan's individual case. And there was something to that: I did argue Mr. Hamdan's case in federal district court,

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20. *See Detainees: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 27 (2005) (Statement of Lieutenant Commander Charles D. Swift) ("At the onset of my representation [of Mr. Hamdan] I was deeply troubled by the fact that to ensure that Mr. Hamdan would plead guilty as planned, the Chief Prosecutor's request came with a critical condition that the Defense Counsel was for the limited purpose of 'negotiating a guilty plea' to an unspecified offense and that Mr. Hamdan's access to counsel was conditioned on his willingness to negotiate such a plea.").

21. *See* MAHLER, *supra* note 4, at 85 ("Their first meeting about the Hamdan case was brief. Lang [the chief prosecutor] told Swift he wasn't authorized to make a binding deal, but that he was thinking twenty years for full cooperation, including testifying at the military commissions of other detainees.").

22. *See id.* at 90 ("'What do they say I've done?' Hamdan asked. 'They haven't charged you yet,' Swift answered. 'They sent me here to negotiate a guilty plea.' 'How can I plead guilty if I don't know what I've done?' Hamdan asked.").

twice, without even meeting him once. But ultimately, it was his case, and not mine. I told the government that I wanted a letter documenting its belief that I could not visit my client. It was only then that I was permitted to go meet Mr. Hamdan.

Representing someone who is locked up a thousand miles from you, on a remote island, when you do not speak the language and do not understand the culture, is not easy. It is even harder when the rules for the criminal trial are in constant flux.[23] There were many days when I felt the only thing keeping Mr. Hamdan alive was not the prospect of success in his court case, but rather the acts of human kindness shown to him by my co-counsel, Swift. The conventional story about *Gideon* tends to forget this piece of it: beyond the legal advocacy is something much more profound—the ability for even the most vilified in our society to have someone dedicated to them who has nothing but their interests at heart. And yet, this creates other complications. Lawyers like me who join a case to advance a particular principle may disagree with other positions that the individual client may want or need to take down the road, but we must vigorously make those arguments, too.[24] This is a natural outgrowth of the fact that lawyers represent clients, not causes. And it accounts for one of the greatest differences between a law professor and a practicing lawyer: the former is free to take positions motivated only by the truth, but the latter must fulfill her role in the adversarial system and defend a client's views to the best of her ability, even when she disagrees with some or all of them.

At that time, the right to counsel at Guantánamo was more of a paper tiger than anything else, at least when it came to the civilian bar. There were very few lawyers, and almost no law firms outside of Perkins Coie, willing to take on the defense of the military commission defendants. But after Mr. Hamdan won his case in federal district court, with Judge Robertson striking down the commissions,[25] more and more lawyers and firms became interested in the challenge. This, too, is evidence of *Gideon*'s influence on individual lawyers, as

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23. Other analysts have argued that the Protective Order imposed on Guantánamo counsel severely limited their ability to communicate with their clients and protect their interests. *See, e.g.*, Mark Denbeaux & Christa Boyd-Nafstad, *The Attorney-Client Relationship in Guantanamo Bay*, 30 FORDHAM INT'L L.J. 491 (2007); Matthew Ivey, *Challenges Presented to Military Lawyers Representing Detainees in the War on Terrorism*, 66 N.Y.U. ANN. SURV. AM. L. 211, 231-33 (2010).

24. *See, e.g.*, Pamela Karlan, *Contingent Fees and Criminal Cases*, 93 COLUM. L. REV. 595, 619-20 (1993) (describing the unique problems faced by criminal defense counsel in representation agreements).

25. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 172 (D.D.C. 2004).

lawyers and law firms flocked to the defense of the "worst of the worst,"[26] despite significant criticism from government circles.[27]

Indeed, when one Department of Defense official openly questioned the decision of major law firms to take up the detainees' defense, the response from journalists, bar associations, and even conservative academics was resounding[28]: The law firms engaged in pro bono representation of Guantánamo detainees were not to be criticized, but celebrated as "act[ing] in the best traditions of the profession."[29] In condemning the Department of Defense official's radio interview, Professor Charles Fried (who previously served as President Reagan's Solicitor General) wrote:

> It is the pride of a nation built on the rule of law that it affords to every man a zealous advocate to defend his rights in court, and of a liberal profession in such a nation that not only is the representation of the dishonorable honorable (and any lawyer is free to represent any person he chooses), *but that it is the duty of the profession to make sure that every man has that representation.*[30]

As a testament to the resonance of *Gideon*'s trumpet among members of the private legal profession, by the time Mr. Hamdan's case reached the Supreme Court, I was coordinating the efforts of over thirty different law firms from across the globe as they wrote amicus briefs in the case.

And we won. The Supreme Court declared that the military commissions violated the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions.[31]

We won, however, because the government let us. At the end of the day, they let me and Swift do our respective jobs. While there were no doubt any

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26. *See, e.g.*, Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1695 (2009) ("From the moment Guantánamo opened as an interrogation center for terrorist suspects, the Bush Administration described the prisoners as 'the worst of the worst,' as unfathomably dangerous, and as trained and hardened killers." (quoting then-Secretary of Defense Donald Rumsfeld)).

27. *See, e.g.*, David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 1981-83 (2008) (describing a January 2007 radio interview with Deputy Assistant Secretary of Defense for Detainee Affairs Charles Stimson in which Stimson seemed to suggest that "corporate CEOs [should] pressure lawyers into abandoning their [Guantánamo] clients").

28. *See id.* at 1982.

29. Charles Fried, Op-Ed., *Mr. Stimson and the American Way*, WALL ST. J., Jan. 16, 2007, http://online.wsj.com/article/SB116892102246577373.html.

30. *Id.* (emphasis added).

31. Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

number of attempts to interfere with the right to counsel, in the end *Gideon*'s promise was kept—even on an island where constitutional guarantees did not clearly apply. The ethos of the bar, reflected in *Gideon*, prevailed.

But there is a limit to what lawyers can do. While things worked out relatively well for Mr. Hamdan (as he was ultimately sentenced to a very short amount of time in prison, and even that short sentence was finally overturned completely[32]), many others remained detained with no material change. Even then, however, counting the legal victories is only one way to measure the benefit of *Gideon*-like protections. For it was not simply Mr. Hamdan, but many detainees, who received acts of kindness from their lawyers, acts that in some cases have probably kept them alive.

At the same time, these lawyers' role was complicated. Many of them began their representations because of a commitment to "the cause"—though what that cause actually was no doubt differed among various lawyers. For some, the cause might have been general opposition to the Bush Administration's policy choices in the War on Terror.[33] For others, the cause was the vindication of human rights and international law principles.[34] For still others, the cause was the same one that they pursued passionately in their day jobs as criminal defense lawyers: zealous advocacy for persons accused before the law.[35] And, as

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32. Hamdan v. United States, 696 F.3d 1238 (D.C. Cir. 2012).

33. *See* Laurel E. Fletcher, Alexis Kelly & Zulaikha Aziz, *Defending the Rule of Law: Reconceptualizing Guantánamo Habeas Attorneys*, 44 CONN. L. REV. 617, 621 (2012) ("Potentially motivating factors for Guantánamo habeas attorneys abound. For example, there may be some habeas attorneys who pursued their clients' habeas claims purely out of a belief that every detainee was entitled to vigorous advocacy, regardless of whether he was a fighter for al Qaeda or the Taliban. Others may have taken up representation out of a political commitment to expose the ways in which the government's War on Terror promoted anti-Islamic sentiment.").

34. *See, e.g.*, Ahmad, *supra* note 26, at 1739-40 ("[W]e believed the commission to be a purely political apparatus, devoid of legal legitimacy, and yet, rather than boycott the proceedings, we participated in them. Moreover, despite our keen awareness that the system was built upon a rights-free edifice, we insisted on making rights-based arguments in the commission, as opposed to accepting the rights-free system presented to us. Thus, we argued that the Constitution, and in particular, Fifth Amendment due process protections, extended to Omar, as did substantive and procedural protections of the Geneva Conventions; we argued that Omar had rights as a child, under international treaty obligations as well as customary international law; and we argued that human rights law applied, and could not be displaced by international humanitarian law.").

35. *See* Luban, *supra* note 27, at 2000 ("But the[] primary role [of JAGs] as criminal litigators and military advisors converge to make JAGs staunch and faithful rule of law devotees, possibly to an extent greater than many civilian lawyers. This may explain the striking, gut-level revulsion that Gitmo JAGs have so often expressed toward the opaque and often lawless military commissions."); *see also id.* at 2005 ("Defense counsel think about the world

in all cause lawyering situations, the cause chosen played more than a small role in the way lawyers chose which arguments to make, and not to make, in court.[36]

Regardless of the content of each lawyer's cause, a common theme among members of the Guantánamo bar was the inevitable tension between that larger cause and the representation of individual detainees. If a lawyer could advance her individual client's interests at the expense of the cause (even by encouraging that client to provide evidence against another detainee, for example[37]), that was what the job called for. This cause/client conflict is not unique to the Guantánamo context, but Guantánamo did provide a concrete example of what my colleague David Luban calls the "'double agent problem,' because it originates in the fact that the lawyer is an agent for both the client and the cause."[38] This "double agent problem" brings cause lawyers face to face with several traditional commands of professional responsibility, including the duty to represent the interests of their clients,[39] the duty to zealously represent their clients,[40] and the duty to avoid conflicts that will "materially" limit their representation of clients.[41]

The cause might have pulled Guantánamo's lawyers in one direction, but the rules of ethics—and the commands of *Gideon*—tended to pull back. These ethical concerns were particularly strong in Guantánamo representations because many members of the Guantánamo bar signed up for individual representations based on a commitment to a cause without ever having the opportunity to meet

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differently. They never understood that, and they never understood what zealous representation meant. They thought that our defenses would be entirely factual. They couldn't conceive that U.S. lawyers would attack rules issued by the president. They were stunned by the amicus brief, but to us it made perfect sense because that is what a zealous defense is. To me what was stunning is that they always cite *Quirin*, which got to the Supreme Court only because a military defense counsel was doing everything he could to challenge the process." (quoting Lieutenant Commander Charles Swift) (citation omitted)).

36. *See* Fletcher et al., *supra* note 33, at 628-36 (discussing the early legal strategy of Guantánamo lawyers). That the "cause" can affect lawyers' tactical and strategic decisions in representing clients is by no means unique to the representation of Guantánamo detainees. Indeed, the practical effect of cause lawyering in such areas as environmental law, human rights, and criminal defense has been well documented by legal scholars. *See, e.g.*, Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L & CRIMINOLOGY 1195, 1223-24 (2005).

37. For a discussion of the ethics of a cause lawyer's refusal to represent a client who decides to turn state's evidence, see Etienne, *supra* note 36, at 1257-58.

38. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 319 (1988).

39. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2012).

40. *See, e.g.*, *id.*

41. *See, e.g.*, *id.* R. 1.7(a)(2).

their clients.[42] While this potential cause/client conflict did not taint the lawyers' representations, it did mean that they often found themselves adopting the role of the traditional criminal defense lawyer, and sometimes even making arguments that were at odds with their belief in a particular cause. That, too, is what *Gideon* envisions for our ordinary criminal system.

None of this is to say that *Gideon* is constitutionally compelled at Guantánamo. But if we want to have war trials to hold up as models for the world, and that reflect American justice, it will be very hard to do so unless we adhere to the same playbook that has made the American justice system the envy of the world.

42. *See, e.g.*, Luban, *supra* note 27, at 1989-92 (discussing both the natural and government-created boundaries to client access at Guantánamo).