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## The Practice Of Law Is Under Indictment — Where Is The ABA?

by [Christopher Badeaux](#)

Like a lot of lawyers my age, I first decided to enter the practice of law after watching [L.A. Law](#). As a ten-year old, I was weighing a career as a stock broker (thank God that didn't work out), a pediatric neurosurgeon (something for which I'm neither qualified by intellect, ghoulishness, nor dexterity), or a politician (see "stock broker," above). And all of a sudden, there was [Susan Dey](#), in all of her post-anorexia glory. And she was practicing law! Sorta! To a ten year old Cajun kid, this was like running a string of caramel apples up the steps of a law school. I've never really looked back, and even after I found out how different (and how much alike) the practice of law is relative to Harry Hamlin's on-screen posturing, I have been, and remain, proud to be a member of the Bar.

Lawyers are three things, in an order to be determined by the lawyer listing them: We are advocates, counselors, and officers of the court. Properly understood, these things are sometimes in tension, and never in conflict. One of the things those courtroom dramas don't show much of is the counseling. This makes sense, because counseling is actually rather boring, rarely happens in courtrooms, and does not contain drama. It's about legal research, and time spent pounding your head against a keyboard or swinging a baseball bat while Bach (or, sad to say, Megadeth or Metallica) plays in the background, sorting thoughts, writing memos, and having painful conversations with the client. It's telling the client what he wants to hear and what he doesn't want to hear; what his options are, what the risks of those options are, and whether what he wants to do can legally be done.

It is the most important part of what lawyers do. It is how we are advocates and how we are officers of the court. We communicate the law to our clients, we make them see how the law fits the facts of their lives, and we help them operate in our world so they can operate in theirs. We cannot charge into

battle for our clients unless they understand the course of action to which they are committing us. We cannot help them stay within the bounds of the law if they do not know what those bounds are.

These aren't just words. They *mean* something. Just ask the [American Bar Association](#):

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

That quote comes from what are called the Model Rules of Professional Conduct. The ABA is on the one hand the most toothless of all bar associations — it lacks disciplinary power over its members (which is really the only kind of power a Bar has) and yet at the same time, despite becoming largely a wing of the Democratic Party, retains a fair patina of respect and prestige, such that its imprimatur determines whether a law school may send its graduates to bar exams, and its Model Rules have become the blueprint for ethics codes of State bars across the country. It exists to advance the practice of law, and to protect its integrity. (That's a shorter version of the overflowery language you'll find [here](#).)

This is all very important, because the Spanish government is on the verge of [indicting five American attorneys for practicing law](#), and the ABA is silent.

For those of you who don't get a kick out of watching attempts to undermine the process by which real human rights abuses are ferreted out and punished, I'd like to introduce you to Baltasar Garzón. Wikipedia has a fawning entry dedicated to him; I encourage you to read what infantile leftists have said about him when you have some time. Sr. Garzón's real, prior claim to fame is working to undermine the post-Pinochet settlement into which Chile entered when the old dictator *voluntarily* stepped down, a settlement that returned control of the government to civilian rule, placed the military in a subordinate role, and in return, made Pinochet into a Senator for life who was immune to prosecution. For anyone who believes this criminally unfair, it might be helpful to remember that the alternative to one man's freedom was the massacre of thousands or tens of thousands in what would have, at best, been a vicious civil war, and at worse, a slaughter. When Garzón indicted Pinochet — who made the mistake of believing other countries would respect Chile's end-run around bloodshed — he told dictators and tyrants (especially right-leaning ones) across the globe that they must hold on to power with their dying breaths, killing anyone who would depose them, at whatever cost, for fear of being tried by men who had no stake in any of the events that so aggrieved them.

Not content to interfere with a country's attempt at democratization, Judge Garzón has now elected to refer for a possible indictment five men — Alberto Gonzales, John Yoo, Jay Bybee, David Addington, William Haynes — as well as Douglas Feith for “providing the legal framework to justify the torture of prisoners at Guantánamo Bay,” in the words of the *New York Times*. Others can and will speak to the absurdity of indicting Americans, for whom an entire, ready, willing, and able criminal justice system stands ready; or of indicting American officials of an Administration that left office at its

constitutionally appointed time; or of a Spanish judge's power to weigh the lives and freedom of men not even within his jurisdiction. They will speak movingly of it, and they will speak of it better than I.

I'm going to talk about the obscenity of charging a lawyer with war crimes for doing research and writing.

Attorneys who work for the government — city, county, parish, State, Federal — are, aside from lower pay and the invective hurled at them by a broader range of society than the rest of us experience, no different from other attorneys. In their roles as counselors, they must advise their employer — the state — of the implications of its acts (whether current, past, or planned) so that the state may know its legal options going forward. The nature of writing a memorandum for a President or governor is no different than writing for a corporation or individual. It goes like this:

The client — President or CEO — asks for the lawyer's opinion on a subject. Just for giggles, let's say the subject is *Can the Executive use extraordinary force on unlawful combatants captured during military conflict in order to extract information that could or would be useful to prevent mass-murder of American civilians? If so, (1) what is "extraordinary force" and (2) under what circumstances may it be used?* It could just as easily be *I wish to hire the following contractors, but the city for whom I'm working requires that a certain percentage of my work be done by minority contractors. Can I resolve this conflict by having minority contractors do a certain dollar amount of work, or must they do a certain amount of substantive work?* In each case, the client has posed a question with a suspicion of the answer, a hope for an answer, but undeniably a need for the answer. The lawyer's job, as counselor, is to answer that question honestly and to the best of his abilities objectively and accurately. Again, that is the core of his job.

His job is assuredly *not* to cry, *Stop! Your question is beyond all bounds! I will have no part in it!* A lawyer may not scheme with his client to help the client commit a crime. He may outline to a client what is legal and what is not. His job is to research the law, take the facts as known, apply the law to the facts, and then reach conclusions so that his client can act.

Lawyers advise. Clients act. In other words, a lawyer's advice can only be part of the act *if the client wills it* — that is, the attorney's liability is entirely out of his own hands. A soldier must disobey an order to commit a war crime because he *acts*; a lawyer is under no obligation to throw aside his laptop for fear that his boss will decide to ignore, or, worse, follow the arguments made in his memorandum.

It's a critical distinction, and one at the heart of why this obscenity should take the forefront in the collective mind of every State Bar association, and certainly in that of the otherwise toothless ABA. Here, it can make a difference, and should.

The Spanish government is about to charge five men with crimes against humanity for performing their duties as lawyers in the American legal tradition. Regardless of one's position on the merits of the arguments, analysis, or memoranda created by the Bush administration officials at issue, the vast majority of the complaint appears to take issue with five of the six in their roles as counselors for the government (Mr. Feith was not employed as an attorney in the Bush administration). If the American Bar Association exists for anything, it exists to see to it that our elected leadership treats this as the insult that it is, as the direct assault on the practice of American law that it is. Its close association

with the Democratic Party — whether its leadership likes to admit it or not — puts it in a perfect place to lobby the current President (a Democrat and lawyer), Secretary of State (a Democrat and lawyer), and Congressional leadership (Democrats and a lot of lawyers) to put aside partisan wrangling and protect American attorneys' abilities to give good-faith opinions to their clients without fear of imprisonment.

Or so you'd think. I emailed the ABA's listed [contacts](#) on international law and, after a preface I've largely replicated above, asked this:

My question is this: Will (or has) the ABA take a position on this aspect of the Spanish investigation? There seem to be clear implications for the practice of law if a practitioner may be indicted for providing research and writing to a client, on the grounds of universal jurisdiction for crimes against humanity.

I sent that email Tuesday morning, and haven't received a response. Frankly, I don't expect one.

This is the most direct assault on the American system of law I can imagine that does not involve an actual invasion, and the ABA is silent. Why?

An easy answer — one hopes the wrong one — suggests itself. Scroll down the list of sections on that Contact page. You'll see the usual silliness that happens when liberal arts majors with a modicum of power find they have time on their hands and political axes to grind. Enemy Combatants, FEMA, Gay Marriage, Gay Rights, Judicial Independence, Guantanamo Bay Detention Facility, Patriot Act, Universal Health Care — these are things that at best tangentially have anything to do with the practice of law and the advancement of the law, and have a great deal to do with the political preferences of people who believed everything the Bush Administration did was a war crime.

But I'd hope — as a former ABA member — that it's a better organization than that. I'd hope it's the sort of organization that can wipe the sneer of Bushitler off its lips as it rejoices at seeing old political foes weakly challenged, and instead sees the dire threat to each and every practitioner in this country.

Because this isn't just about government lawyers and Guantánamo Bay. This is about counsel for Exxon-Mobil, who presumably provides the “legal framework justifying” XOM's continued contribution to global warming, such as it is. (Don't believe me? Climate change as crime against humanity isn't [a novel idea](#).) Or counsel for a [biotech company](#) that creates genetically engineered crops. And woe the day that abortion foes gain an upper hand and indict Planned Parenthood's counsel.

Imagine a new Kyoto Protocol comes down and a U.S. President and Senate send it along its way with a single proviso: Each State shall decide separately whether to adopt the protocol. A governor asks his legal counsel whether he may reject it. Should the attorney be tried for a crime against humanity for his boss's decision?

What if the governor decides to lift a death penalty moratorium the governor put in place, on his attorneys' legal conclusions about the legality of so doing? Should those men and women be [haled to the Hague](#)?

In this country, our system of law implicitly relies on attorneys giving their legal opinion without fear of imprisonment or bodily harm for so doing — so implicitly that even typing that sentence seems absurd. Right now, today, men in a country across the Atlantic, who have no connection to the practice of law here, who are subject to no Bar's discipline, who were elected by no man or woman of this country, are deciding whether to criminalize the practice of law.

If there was ever a time for the American Bar Association to reassert itself as the *American Bar Association*, that time is now.




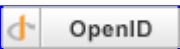

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