

PRINCIPLES IN PLAY

Speakers at Rule of Law Gathering Raise Concerns About U.S. Legal Policies on Terrorism

1. BY JAMES PODGERS

The outcome of the ongoing battle between the Bush administration and leading Republican senators over rules governing interrogations and trials of enemy combatants will have a very real effect on the ability of the United States to persuade developing countries to adopt democratic concepts of the rule of law, several speakers told a weekend gathering of international lawyers in Chicago.

The Bush administration's current policies on handling terror suspects threaten to undermine rule of law efforts, according to London lawyer Francis Neate, who is president of the International Bar Association.

"The United States has an idealistic idea of its legal principles, and a large part of the world bought into it, and now [the world is] buying out of it," Neate said at the rule of law symposium, which was co-sponsored by the IBA and the ABA.

Symposium keynote speaker Mary Robinson, former president of Ireland who later served as U.N. high commissioner for human rights, said, "The language of war has made it easier for some governments to introduce new repressive laws to extend security policies, suppress political dissent and stifle expression of opinion."

And Lord Peter Goldsmith, attorney general of the United Kingdom, said, "My argument to you today is that maintaining a commitment to the rule of law is a key element in winning the war of values and thus in defeating the forces of extremism, of chaos and of terror."

In summarizing the symposium, rapporteur Stephan Landsman said that, after the upheaval of World Wars I and II, society was at a "moral crossroads," and "the world turned to law to save itself," giving rise to a growing structure of international law and agreements such as the Geneva Conventions. The United States was a leading advocate of that system, he said, "which gave it the moral high ground that helped it win the Cold War."

But in recent years, the U.S. government has turned away from that system, "and the rule of law faltered, both here and around the world," said Landsman, a law professor at DePaul University in Chicago.

"And then came 9/11, and we are standing at another moral crossroads, when someone must step forward to point the direction," Landsman said. "Who will it be? There is no doubt that it must be lawyers."

(Similar concerns were expressed by U.S. Supreme Court Justice Anthony M. Kennedy in August when he addressed the ABA Annual Meeting. Kennedy warned that democratic rule-of-law principles may be losing ground, especially in developing regions

of the world.)

The symposium—the first gathering of its kind jointly sponsored by the two associations—brought together some 300 bar leaders from around the world to discuss how to advance the just rule of law in regions where it often has been an alien concept.

Organized bar leaders in the United States, the United Kingdom and elsewhere view rule of law initiatives as an important means to introduce stable legal systems in troubled regions and to address such concerns as terrorism, illegal trafficking of women and children, corruption, poverty, the environment and human rights violations. The symposium's agenda reflected those wide-ranging issues.

But for symposium attendees grappling with those issues, it still was difficult to ignore the implications of a legislative battle that has been unfolding on Capitol Hill over key elements of the U.S. government's terrorism policy.

On June 29, the Supreme Court ruled in *Hamdan v. Rumsfeld*, No. 05-184, that any tribunals created by the government to try suspected terrorists must meet the guidelines of the Geneva Conventions of 1949.

The Bush administration and a group of Senate Republicans had differed over legislation to carry out the Supreme Court's mandate, but on Thursday they reached a compromise. At the time of the conference, though, key differences separated their proposals.

The administration had urged Congress to adopt legislation that would allow military tribunals trying those identified as illegal enemy combatants to consider certain hearsay evidence and evidence obtained by coercion if it is found to be reliable. The measure also would have allowed government prosecutors to keep certain classified evidence from defendants.

In addition, the bill backed by the administration would have redefined U.S. compliance with the Geneva Conventions—which include provisions on treatment of prisoners of war—to provide for harsher interrogation of terrorism suspects.

The Armed Services Committee in the U.S. House had voted to support the bill, but the Senate Armed Services Committee voted 15-9 on Sept. 14—two days before the symposium got under way—to support an alternate bill. The alternate was spearheaded by a handful of key Republican senators who say it would leave the U.S. commitment to the Geneva Conventions intact and would impose more limits on the government's use of classified evidence and testimony obtained by coercion.

The administration had maintained that its legislative proposals seek to clarify what types of interrogations are permissible under the Geneva Conventions. But administration officials also had warned that anti-terrorism efforts would be undermined without legislation that gives the CIA a legal basis for using “alternative interrogation practices” in questioning suspected terrorists.

Robinson said the U.S. government's declaration of war on terrorism carries significant

legal overtones.

"The United States has, often inadvertently, given other governments an opening to take their own measures which run counter to the rule of law and undermine efforts to strengthen democratic forms of government," Robinson said. "The language of war has made it easier for some governments to introduce new repressive laws to extend security policies, suppress political dissent and stifle expression of opinion of many who have no link to terrorism and are not associated with political violence."

The language of the fight against terrorism "has also led to Orwellian euphemisms," Robinson said, "so that 'coercive interrogation' is used instead of torture or cruel and inhuman treatment. Kidnapping becomes 'extraordinary rendition.' "

Weighing in on the legislative battles on Capitol Hill, Robinson told the rule of law symposium: "What is needed now is legislation that reaffirms the United States' adherence to the Geneva Conventions, the U.N. Convention Against Torture and the McCain Amendment, which establishes an absolute ban on cruel, inhuman and degrading treatment of all detainees in U.S. custody or control by any U.S. personnel."

Goldsmith also addressed the interplay between rule of law concerns and efforts to fight terrorism. In a carefully measured speech reflecting his position in the British government, he nevertheless drew some clear distinctions between the views of his government and the Bush administration on legal responses to the terrorist threat.

The challenge for governments, Goldsmith said, is to find a balance between the need to fight terrorism and the desire to preserve fundamental legal principles.

"I cannot agree with those civil libertarians who believe that 9/11 changed nothing and therefore no changes to our traditional ways of safeguarding fundamental values can be allowed," he said. "But equally I do not share the view of those who assert that 9/11 changed everything and therefore any changes are worth making if they might increase our security, whatever the impact on the fundamental values and liberties on which our societies are based."

Among the principles that should not be compromised, Goldsmith said, are prohibitions against torture and the right to a fair trial. Accordingly, the British government's view is that "the prohibition on torture is simply nonnegotiable," he said, and "we have rejected reducing the burden of proof for terrorism offenses and allowing secret evidence in terrorist trials."

Alluding to the debate in the U.S. government over the possibility of reinterpreting standards under the Geneva Conventions, "I must be careful what I say," Goldsmith told the symposium audience. "I will only say this today: That this is an international standard of very considerable importance, and its content must be the same for all nations."

Goldsmith, who played a key role in the British government's request in 2003 that British detainees be released from the U.S. detention facility at Guantanamo Bay, Cuba, reasserted his position that the camp should be closed. "It is a symbol which the

long American tradition of justice and liberty deserves to have removed at the earliest moment," he said.

No Bush administration officials involved in setting legal policy on terrorism attended the two-day symposium.

IBA President Neate and ABA President Karen J. Mathis emphasized that the symposium is one step in a long-term process to achieve greater rule of law in the world. And they both said rule of law advocates must evaluate and improve their own systems as part of this larger effort.

Neate cautioned against developed nations taking a "colonial" approach to rule of law initiatives around the world.

"We must show proper respect for cultures other than our own and a willingness to learn from them," Neate said. "An approach that says, 'This is how we do it,' simply isn't enough."

Mathis of Denver noted in an interview that one purpose of the symposium "was to point out that, at times of crisis, many nations have lost the path to following the rule of law." Along with other systems, "the U.S. has to look at where it hasn't hit the mark and examine that."

Sounding an optimistic tone in her closing remarks at the symposium, Mathis said what comes out of the gathering "can change a lot of things on this little planet."

(A report on the symposium will appear in the November issue of the *ABA Journal*.)