# The Most Impertinent Question

## by Michael E. Tigar

Someone at a party asks you, "How can you represent a defendant you know is guilty, and then get them off?" Maybe adding, "... on a technicality?" You can give a little lecture on the constitutional right of counsel, or the government's heavy burden to prove guilt beyond a reasonable doubt by admissible and lawfully obtained evidence. You can repeat what Judge Onion said to a district attorney, "I see you quoted to the effect that my rulings on the constitutional issues were technicalities. I don't think of the Constitution as a technicality, and I hope you don't either." That won't placate your interlocutor, but it will blow enough smoke to let you escape to the hors d'oeuvres table or slip quietly away to your office to work on next week's capital trial.

Those answers will usually have to suffice, because we are forbidden in so many ways from telling our clients' secrets in order to justify our choices of causes and strategies. We are forbidden from expressing a personal belief in guilt or innocence. We risk crossing the lines of propriety when we say why we chose to accept a particular case, except of course to invoke the generalization that everyone is entitled to counsel and that this case raises issues that deserve to be well tried.

I am not saying that this rather formal justification of the right to counsel is trivial. The Ashcroft/Bush administration has rolled back the limitations on police and prosecutors. It claims to act in the name of fighting terrorism but really puts in place an entire reactionary agenda that is hostile to the fundamental principles of fairness in the Bill of Rights.

My point remains: If my taking a particular case requires me to make a public justification, then I put at risk the right of all hated clients to representation, for if I don't have such a good reason to take the next case, I have harmed that next client in the public's eye. I have represented many controversial clients, so I take a lot of criticism that I cannot really answer. That's the nature of what we do. This is so partly because the cases we do as lawyers are not about us. They are about our client's liberty or life, and our finest service may at times be to keep our mouths shut.

Over the years, I have represented so many controversial clients that I have become accustomed to provocative comments, slung from various points on the political spectrum. Within the recent past, I have commented publicly, though with some restraint, on Stephen Jones' public statements concerning his representation of Timothy McVeigh. I even wrote to the editors of LITIGATION, pointing out what I believed were factual and legal errors in Stephen Jones's essay on the McVeigh case and lamenting what I felt was Mr. Jones's self-congratulatory and rather incomplete version of events. The editors asked me to write an essay exploring ideas about taking on controversial cases and representing clients accused of horrible acts.

First, about Mr. Jones: In my view, he had no business relating what Timothy McVeigh told him. Mr. McVeigh charged Jones with ineffective assistance of counsel. Under the law, that charge gave Jones the license to rebut in a judicial proceeding. In doing so, he could disclose those parts of the lawyer-client relationship that bore upon the specific misconduct alleged against him. Mr. McVeigh's motion did not give Mr. Jones a license to open up the entire defense process to the public. It is particularly troubling to me that Mr. Jones began to make these disclosures when his client was still alive and had a chance to avoid the death penalty, and when Mr. Jones was at the same time promoting his book. Mr. Jones then expanded upon his recollections after his client was dead and could not refute him. Enough said on my opinion of Mr. Jones.

I find comments that begin "how could you possibly represent" to be offensive and (quite literally) impertinent, at least if lawyers make them. However, I will try to answer the underlying question, in a way that points up some problems that we all face, all of us brothers and sisters engaged in the

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HeinOnline -- 29 Litigation 9 2002-2003

daily struggle to get some justice from this lopsided system where we work.

When you represent a demonized client, you may yourself be demonized. That is the risk you assumed by becoming a lawyer. Your defense is to rely on the bar's and your own independence, and not to relate unsavory allegations about your client and your relationship with him or her.

This is not to say that you will never share your private thoughts. Clarence Darrow said to juries, "I am not bound to believe them right in order to take their case, and you are not bound to believe them right in order to acquit them." When Atticus Finch summed up, and talked about the unthinkable idea that a white woman could desire a black man, he was revealing something about his own cultural conditioning. When I stood beside Terry Nichols and called him my brother, I meant to say something about my view of the human condition.

I do believe that each of us must develop a personal set of ethical precepts, to guide us in the selection of clients, causes, and strategies. To say this is not trite: I have seen so many lawyers who turn inward after years at the bar and wonder whether all their effort has accomplished anything worthwhile. One day toward the end of his service on the Supreme Court, Justice William J. Brennan, Jr., and I were having lunch in his chambers. We were looking over transcripts of arguments that Edward Bennett Williams had made to the Court. Brennan was preparing his remarks for the dedication of the Williams Library at Georgetown.

"I look back at my own life," the Justice said, "and I ask myself what I really contributed to this world where we live." He was not joking; it was simply his own practical sense shining through. And of course the answer was and is that he contributed much. He was, as Justice Antonin Scalia said to some of us at Brennan's memorial service, "the most influential Justice of this century," and he then quickly added, "of course a lot of guys around here don't want to admit that."

I once was talking to a lawyer appointed to represent a 20-year-old man charged with capital murder for a drive-by shooting. In this jurisdiction, there is at least one charge of capital murder every week. This lawyer had looked at the discovery and interviewed the witnesses. He was convinced that he could attack the eyewitness identification of his client. We talked about strategy. Under the umbrella of privilege, he confided that he was convinced that his client had done the shooting.

He did not ask me what he should do. He had answered that question for himself, thoughtfully and honorably. He knew that his client had the right to have the line between guilt and innocence, life and death, drawn fairly and in a proceeding worthy of the name "justice." But I am asking you, the reader: What should he do? Don't send me your answer, because your answer is nobody's business but yours. If your answer does not include giving this defendant a vigorous defense, there is no shame in that. Just don't ever pretend that you would do that and then fail to do it. Don't take that case.

My answer, if I should be in such a case, is this: In that state and in that county, the legal system's switch has two positions, so far as the prosecutors are concerned: death penalty and acquittal. Bargaining in that case would be seen as weakness. Maybe on the eve of trial, if you keep in the game, you will get a plea offer, but only by continuing to show strength and resolve. I regard the death penalty as abhorrent under all circumstances, and an even more odious thing for a first offender with a troubled background. So I would represent this young man, first to give him what the Constitution commands, and second because I am comfortable with that moral choice and with the influence that his acquittal might have on prosecutorial discretion in future cases.

By this point, you are with me on this journey, or against me, or willing to listen further to make up your mind. Good. When they asked me to write on this subject, the LITIGATION editors noted that among my clients was John Demjanjuk, accused of having been "Ivan the Terrible" of Treblinka death camp. I had a discussion in print with Monroe Freedman about the Demjanjuk case, published in an essay called "Defending" in the *Texas Law Review*, back in November 1995. So let's talk about John Demjanjuk. He was charged in 1977 with being Ivan the Terrible of Treblinka, the man who was personally responsible for killing hundreds of thousands of Gypsies, leftists, homosexuals, and Jews at the Treblinka death camp during the Nazi holocaust. Mr. Demjanjuk, born in the Ukraine, had been a soldier in the Soviet army and was captured early in the war. He was interned at several Nazi camps.

Had he become a willing servant of the Nazis? Was he Ivan? The U.S. government said yes. It sued to denaturalize him, and won. It worked with the Israeli government to extradite him to Israel, where he stood trial and was condemned to death for having been Ivan. I entered the case in 1992, when the U.S. Court of Appeals for the Sixth Circuit wanted to find out why crucial evidence that exonerated Mr. Demjanjuk of being Ivan had been withheld from U.S. courts. I tell the story in my book *Fighting Injustice*. Short answer: We won a judgment that the U.S. government had defrauded the courts by hiding evidence that someone else, not Mr. Demjanjuk, was Ivan the Terrible. *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1994).

Neither I nor any of his other lawyers need to justify our



HeinOnline -- 29 Litigation 10 2002-2003

representing Mr. Demjanjuk, beyond saying that he was and is entitled to counsel. But I have promised to open up my personal reasons, and I do so. The government's mendacity was exceeded only by its arrogance. This man came very close to being hanged in the yard outside his death cell, where he was in solitary confinement for seven years. The government has never so much as apologized, and to this day its representatives gloss over their misdeeds as though the federal courts had never spoken.

Mr. Demjanjuk and his family were left impoverished—emotionally and financially—by the years of litigation in the Ivan case. Can you imagine a closely knit family with a loved one in a solitary confinement death cell half a world away?

The Israeli courts did their part, to their credit. The Israel Supreme Court acquitted him. And when we tried to get him back into the United States after that acquittal, a Justice Department employee said publicly that he should be sent to Ukraine, tried there, and shot.

This did not happen. He came back, thanks to an order of the Sixth Circuit. The government, unrepentant, then filed a new denaturalization proceeding claiming that although he was not Ivan, he had served as a guard in other camps than Treblinka. They did this even though the Israeli Justice Ministry and Israeli courts had decided that such charges were not worth pursuing.

In the new civil denaturalization case, the court refused to appoint experts to help him. The government played discovery games, serving hundreds of thousands of pages of mostly irrelevant material in which was hidden yet more evidence that another Demjanjuk from the same village had in fact done the acts attributed to this Mr. Demjanjuk. This evidence, withheld until the eve of trial, was in Ukrainian. The government presented a so-called expert who had let the Justice Department ghostwrite his report and who could not even speak the language in which most of the expert report footnotes were written. There was not a single live witness who ever saw Mr. Demjanjuk do anything wrong—all the potential witnesses had died while the government was pursuing its phony "Ivan" case. So we had a "trial by archive," with evidence we could not fully confront.

The trial judge upheld the government's position, and the case is being appealed. The government even opposed a stay for this 81-year old man, demanding his immediate deportation before he could challenge the proceedings on appeal. Perhaps the courts will continue to agree with the government and perhaps not. I have reached my own views about the case, and I think I have investigated so thoroughly that my own decision to take the case was one that, in retrospect, I would make again.

Why did I represent him? I have taught and lectured in several countries on the lessons of the Nazi holocaust and the trials resulting from it. I saluted the prosecutions in France of Paul Touvier and Maurice Papon. I was glad that Klaus Barbie, the Gestapo "butcher of Lyon," was finally brought to trial, after the United States managed for years to keep him hidden and thus gave him impunity. I have applauded those who proved that the United States granted asylum and impunity to thousands of Nazi functionaries because it was in our "national interest" to do so.

I represented Demjanjuk because that case reeks of the same hypocrisy that was evident then, and that, in my judgment, besmirches so many prosecutorial efforts these days. The department of government that calls itself justice trumpets the prosecution of "terrorism" with rhetorical flourish. At the same time, the same department derails the efforts to bring to justice such terrorists as Augusto Pinochet of Chile. It makes the public claim, in court papers, that former Secretary of State and National Security Advisor Henry Kissinger is immune from liability for ordering the kidnap/murder of a Chilean general. This same department, and at the same time, denies prisoners basic rights of access to courts and counsel. I am a lawyer in each of these cases as well, and my decision to become involved in them rests upon the same kind of self-inquiry of which I speak here.

I represented Demjanjuk because I agree with Jerome Frank that government is not what it says but what it does. As I said in my latest book, the only kind of justice worthy of the name is social justice. I accept moral responsibility for the cases I choose to take and strive to see my life's work in some kind of consistent pattern. Governments have that same obligation of honest self-examination, more than any individual, because governments must govern impartially as a condition of governing at all.

In November 2002 Judah Best gave a talk entitled, "Would You Rather Do Direct Examination or Cross-Examination?" As I was writing this essay, I thought about his provocative title. The correct answer is "yes"—I would rather do direct and cross-examination, in a public trial before a judge sworn to be impartial and jurors fairly selected. "Rather than what?" you may ask. Rather than a secret military tribunal, rather than a secret immigration hearing with secret evidence, rather than all the compromises of the adversary system that are proposed every time this country's leaders get so scared that they lose confidence in constitutional government.

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President Jefferson wanted military custody for Burr's associates, Lincoln wanted military custody for suspected rebel sympathizers, Japanese Americans were rounded up without a trial, and so on. All these departures were seen in hindsight to have been both unlawful and unnecessary.

We uphold the right to counsel and all those trial rights not simply because constitutional government is a matter of our fighting faith. We uphold them because they work. Direct examination makes the story clear, one question at a time, each question and answer meeting the test of admissibility. Cross-examination tests the story told on direct. When government—or anybody with power—is free to hide behind truncated procedures, error abounds.

Justice Richard Goldstone reminded an audience at Yale of how the Nuremburg tribunal came to be. The United States insisted that a full, public, and fair trial of the Nazi leaders would serve a valuable didactic purpose. Judgments in historic cases, fairly tried, are safe from criticism from all but captious

*(Please turn to page 66)*



HeinOnline -- 29 Litigation 11 2002-2003

# Impertinent Question

*(Continued from page 11)*

critics. Judgments in secret tribunals are inherently suspect.

Does this mean that I am or you are obliged to represent anybody at all? No, or at least not unless appointed by a court, in which case you may not decline the appointment for personal reasons. Given a choice, and by way of example, I do not think I would represent a Nazi. I cannot think of a case in which I would wish to do so. I have studied the Klaus Barbie trial with some care, because prominent French anti-imperialist lawyer Jacques Vergés did represent the Nazi butcher Barbie, until discharged from the case by his client. Vergés's theory was that he could use the case to expose the hypocrisy of the French legal system in prosecuting Barbie while ignoring the human rights abuses that France had committed in its colonial rule of Algeria, Indochina, and elsewhere. Given the French courts' interpretation of the French Penal Code "crimes against humanity" provisions, this was a false hope from the outset. So even such a hope as Vergés entertained would not lead me to represent a Nazi.

I do not despise those who did represent Barbie, or Maurice Papon, or Paul Touvier. Those cases played an important role in our understanding of Nazism. The *Barbie* case helped to disclose the United States's role in hiding Nazi butchers from just prosecution. The *Papon* case helped show us all how easy it is for intelligent and educated people to become complicit in terrible crimes.

Once you make the choice to take any case, however, the task is set: Figure out how to win. In LITIGATION, Fall 1999, I wrote about how you would choose a level of generalization at which you, the client, and the tribunal can meet. These days, we are seeing many cases in which the U.S. government seeks to substitute antiterrorist rhetoric for thought. If you are in a case like that, remind the judge of the ways in which the government has overstepped its lawful bounds and has been grossly inept or downright untruthful in this very type of case. You and the judge will, so you argue, have a shared responsibility to see that the rules are observed and the lines properly drawn.

In so many cases during the past three and one-half decades of trials, I have had to clear away the gnarled tangle of prejudicial evidence and focus upon the question that seemed to me and my client important: What is the evidence that this client did a deed we all agree was or would have been horrific, and by what means has this adversary brought this client before you? In *Fighting Injustice*, I wrote:

> When we think of crimes against humanity, we must remember that governments and governmental groups are the most dangerous criminals. They have the most power to inflict harm, and are the most likely to be recidivists. State-sponsored terrorism is the most dangerous brand, especially when it masquerades as justice.

To end where I began, we are responsible for the impact of what we do as lawyers. We need to accept that responsibility and to think about what it means.



HeinOnline -- 29 Litigation 12 2002-2003