

MEMORANDUM

TO: Beverly Hills Bar Association
FROM: Kenneth G. Petrulis
DATE: January 10, 2005
RE: Bar Brief Article re Cuba: Another Red State?

The primary focus of our trip to Cuba was legal research and discussion. While we expected excitement on the trip, we did not expect it to come from the professional portion of our agenda. However, we underestimated the effect that 18 attorneys from varied disciplines could have on the representatives of the Cuban legal system that we met. In each session we challenged our hosts to compare the benefits of our system to theirs. One interchange, however, crystalized one of the most vital elements of the Rule of Law, the right of judicial review.

We were invited to meet with representatives of the Cuban Bar Association. We were told, whether it was true or not, that one of the panel members with whom we would meet was a member of the Cuban Supreme Court; a second panel member was a representative of the Bar Association who would explain Cuban law to us; and the third was another representative of the Bar Association whose function wasn't clearly defined for us but whom we quickly assumed was a party functionary who meant to see that the right information was conveyed to us. Initially, we were given a lecture on Cuban law and the Cuban Constitution which we learned was not dissimilar from the United States Constitution. It derived from the constitution of the former Soviet Union. We were told how the Cuban legislature in its great wisdom would never pass an unjust law. There would be much study to insure that laws were not only just, but met the needs of the population. It was explained to us that just as in the United States there were courts, right to counsel, etc. all designed to carry out this fair and just legal system. It did not take us long to focus on a critical missing element. What happens if one of the rights guaranteed

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to an individual under your constitution was in conflict with a law passed by the Cuban legislature or with the manner in which the law was enforced by El Presidente? This parry was deflected several times: "Justice will prevail", "You are entitled to an attorney", and "Our laws are fair". Finally, when it was apparent that our advance would continue, we heard the answer: "We have no right of independent judicial review". We all relaxed into our seats. This was really the issue.

In 1803 in an incredible turn of events, Chief Justice John J. Marshall, presiding over the case of *Marbury v. Madison*,. in the face of all logic and having no visible means of support, declared the right of independent judicial review. A judge, sitting in a court with no army to back him up, could tell the President, the commander-in-chief of the armies, and the legislature elected by the people that they were wrong and that they were expected to obey the order of the Court though nowhere in our constitution did it say that.

Over the years the willingness of the United States as a people to listen to the judicial process with its vigorous debates and independent fact-finding role have brought this country both moral and economic greatness. While many would attribute our success in these areas to "traditional values" and to natural and strategic resources, it is clear that our values and economic structure are the result of our legal system not vice versa. Traditional values had no problem with slavery, child labor, denial of the right to vote and economic rights for women, segregation and discrimination, and predatory economic practices resulting in unfair competition and unsafe products and unsafe working conditions.

How disquieting to be reminded upon our return to the United States that

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the right of judicial review by an independent judiciary is under attack here at home. Chief Justice Rehnquist has commented recently upon the increasing attacks on the judiciary including attempts to restrict the jurisdiction of the Federal Courts and threats made to judges who render unpopular decisions with the warning that this will happen to other judges should they dare to follow in the offender's footsteps. The principal of an independent judiciary is being lost in a sea of intolerance.

Sitting there in Cuba it was easy to see the need for an independent judiciary. We were conditioned to see the dictator in Cuba and receptive to the thought that a dictator unchecked by an independent judiciary would and had caused the ruin of his country. Does it make a difference that in the United States we have an elected President and elected Legislature as opposed to an arbitrary dictator? Certainly we shouldn't equate the two. There is, however, still an analogy to be made.

While we have a history and institutions which diffuse the possibility of an absolute dictatorship, we must still recognize the dangers of a lesser form of tyranny. Under the Rule of Law, the Executive, the Legislature and the Judiciary each have their role to play. Studies have shown that role players very quickly assume the qualities of the role to be played. The Executive is an administrator and enforcer. A good administrator assumes qualities consistent with these roles. The job of a Legislator is to respond to the needs of a constituency for a set of fair and just rules. The Judge is to make fair and independent findings of fact and law. Unlike the Executive or the Legislator, the Judge is called upon to be independent of outside influences and to not only apply the law fairly to the facts as determined but also, when laws conflict, to choose between the laws. Consider how differently twelve good and true people might act if on one day they were thrust into the Executive role and called upon to enforce laws, on the next day they were

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called upon to listen to their constituency and enact the laws, and yet on the third day were asked to set aside the demands of any constituency, whether political, philosophical or religious and, instead, being pledged to listen only to the facts and law given to them and were called upon to make the most honest decision they could. It is not only the identity of the individuals, but the roles they are called upon to play that make the process of the Rule of Law what it is. As Pogo once said "We have met the enemy and he is us."

KGP/ct

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