

FROM THE PRESIDENT

LISA M. WAYNE

A Second-Class System of Justice

Ten years after President Bush's creation of the military commissions system at Guantánamo Bay, only six cases have been completed and the legitimacy of the system remains in question.¹ Compare this to the more than 400 terrorism-related trials completed in the traditional criminal justice system.² Yet the battle over the proper venue in which to try and detain suspected terrorists continues. Recently, there have been efforts in Congress to require mandatory military custody and military commissions trials for certain terrorism suspects based on suspicion of terrorism activity alone.³ These proposals are moving well beyond Guantánamo and are cause for grave concern by the criminal defense bar.

The debate in Washington is full of political rhetoric and is seriously lacking in fact and law. The efforts to overmilitarize our counterterrorism efforts are a direct result of the fact that the United States is in a state of war — so the theory goes — and therefore we must utilize the military in order to keep our country safe. However, supporters of this view fail to recognize the important role the criminal justice system has played in protecting our national security. There has been no evidence that the federal criminal process is incapable of ensuring effective law enforcement and justice for the accused. It is time that members of Congress recognize the abilities of the men and women of the criminal justice system rather than second guess them.



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It is also time that we stop trying to “balance” civil liberties and constitutional protections against national security. As members of the criminal defense bar know best, it is by enhancing these safeguards that we strengthen national security. The finest example of this is giving *Miranda* warnings and providing suspects with access to a lawyer. We have seen time and again how affording suspects this constitutionally based right can help gather intelligence and swiftly bring terrorism suspects to justice — take for example the Christmas Day and Times Square bombers.

In spite of the successes of federal courts, there is still a push in Congress to strictly require trial by military commission. NACDL opposes these measures.⁴ Despite efforts to revise the system in 2009, the Guantánamo military commissions remain constitutionally suspect and are lacking in fundamental due process protections. The Military Commissions Act of 2009 and the 2010 Manual for Military Commissions permit the use of hearsay evidence, coerced confessions, and evidence derived from statements made by the defendant as the result of harmful interrogation techniques. Similarly, the validity of the crimes charged before the commissions, namely material support of terrorism and conspiracy, remain subject to legal challenge as they have not traditionally been considered war crimes. These issues would not arise in the traditional federal court system.⁵

Aside from the formal differences between the two systems, there are important structural differences — transparency and public access. While the commission proceedings are ostensibly open to the public, the remote location and restricted access to Guantánamo Bay, Cuba, greatly limit public access to the proceedings. Likewise, access to rumored domestic viewing sites is currently restricted to select media and victims' families, and are, so far, off limits to non-government organizations and the general public.⁵

While the Obama administration “remains committed to closing Guantánamo,”⁶ congressional bans signed into law by President Obama guarantee that the detention facility will remain open at least for the foreseeable future. Current legislation prohibits the use of funds to transfer any Guantánamo detainee to the United States, even for the purpose of prosecution,⁷ and requires the administration to meet onerous certification requirements before it can transfer any detainee to his home country or to a foreign country.⁸ Recent proposals seek, for the first time since 9/11, to codify a system of indefinite detention without charge for existing Guantánamo detainees and future captures — including U.S. citizens.⁹

As the debate regarding the proper venue in which to try and

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done, and that we are stronger and more effective in our efforts both locally and nationally if we work in unison with a collaborative front. We will always be stronger in greater numbers, and your support is more important than ever.

NACDL can learn a lot from its state counterparts about how to be a broad-based representative of criminal defense lawyers and an effective voice on national criminal justice issues. In order for us to be effective in this effort, your state-level experience and expertise are essential to our broader activities. Much like you, NACDL staff time and finances have their limits, and we understand the innate competing interests that may occur from time to time as a result of the Affiliate structure. However, the affiliation structure is aimed at nurturing each other's fight — working together to reach our common goals. It is a system in which responsibility is shared and the outcome serves the interests of both parties. It also opens a door to our affiliate organizations to become increasingly active and involved in NACDL's national agenda.

With that being said, I hope to point out to some of you, and remind others of the benefits NACDL offers your organization, which can assist you locally on an administrative level, but also help bolster your resources and increase the effectiveness of your organization. While this is not an exhaustive list, it does point out the core benefits we offer to assist you locally:

- ❖ Free access for executive directors to Member's Only resources on NACDL's website
- ❖ Posting your local Affiliate News in *The Champion* (including general organizational news and awards)
- ❖ Ability to promote your local CLEs on NACDL's CLE Calendar in *The Champion* and online
- ❖ Free Annual Subscription to *The Champion* magazine for your executive director
- ❖ Assistance locating and contacting national speakers for your local seminars
- ❖ Subscription to NACDL's E-News

- ❖ Access to the advocacy resources of the State Criminal Justice Network

- ❖ Access to NACDL's Online Briefs & Motions Bank

- ❖ Significant discounts for your statewide members to attend NACDL Seminars when we are in your state or in your region

- ❖ Receive annually, two free NACDL memberships to auction off at your fundraisers

- ❖ Receive annually, one free NACDL seminar to auction off at your fundraisers

- ❖ Ability to increase your statewide membership by collaborating with our national staff on joint membership recruitment projects

- ❖ Ability to make a bid for NACDL to host a conference in your state

Most importantly, and perhaps the single greatest benefit of Affiliation, is that you have a dedicated national staff that is always willing and eager to hear from you. Whether it involves assistance, questions, feedback, concerns, or suggestions, you should always know that we are all here to help in any way we can, and I encourage you to contact me at any time.

Finally, please keep in mind that the most current Affiliate information can always be found on our website at www.nacdl.org/affiliates.

TACDL Installs New Leadership

At its recent 38th annual meeting, the Tennessee Association of Criminal Defense Lawyers (TACDL) installed Stephen Ross Johnson of Knoxville as its new President. TACDL's new executive committee consists of: J. Robin McKinney, Jr of Nashville — President-Elect; Mike Whalen of Knoxville — Treasurer; Samuel L. Perkins of Memphis — Secretary; and Laura C. Dykes of Nashville — Past President. For more information, please contact TACDL Executive Director Suanne Bone at 615-329-1338 or email suannebone@tacdl.com.

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detain terrorism suspects continues, NACDL will continue to oppose the Guantánamo military commissions and the use of indefinite detention without charge, and will continue to support efforts to preserve the use of traditional federal courts and U.S. courts-martial to try terrorism suspects.¹⁰ This month marks the 10th anniversary of the Guantánamo military commissions. Given their profound constitutional deficiencies and perceived illegitimacy, the administration and Congress should reflect on their continued viability. Now is the time to end the use of the flawed commissions system, not solidify its place as a parallel, second-class system of justice.

Notes

1. See <http://www.mc.mil/CASES/MilitaryCommissions.aspx>.

2. Letter from Ronald Weich, Assistant Att'y Gen., U.S. Dep't of Just., to Sen. Patrick Leahy and Sen. Jeff Sessions, Chairman and Ranking Member of S. Judiciary Comm. (March 26, 2010), available at <http://www.justice.gov/cjs/docs/terrorism-crimes-letter.pdf>.

3. S. 1253, 112th Congress § 1032 (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1253rs/pdf/BILLS-112s1253rs.pdf>; S. Amdt. 753 to H.R. 2112, 112th Congress (2011), available at <http://www.gpo.gov/fdsys/pkg/CREC-2011-10-17/pdf/CREC-2011-10-17-pt1-PgS6606.pdf#page=4>.

4. See NACDL Board Resolution of Aug. 6, 2011 (<http://www.nacdl.org/About.aspx?id=21157>).

5. Carol Rosenberg, *Pentagon to Beam War Crimes Trials to U.S. Soil*, MIAMI HERALD (Sept. 25, 2011), available at <http://www.miamiherald.com/2011/09/25/2424442/report-pentagon-to-beam-war-crimes.html>.

6. Jeh Johnson, General Counsel, U.S. Dep't of Defense, Address at the Heritage Foundation (Oct. 18, 2001), available at <http://media.miamiherald.com/smedia/2011/10/18/16/22/119Nv5.S0.56.pdf>.

7. Ike Skelton National Defense Authorization Act for Fiscal Year 2011 § 1032, Pub. L. No. 111-383 (2011), available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr6523enr/pdf/BILLS-111hr6523enr.pdf>.

8. *Id.* at § 1033.

9. S. 1253 § 1031, *supra* note 1.

10. See NACDL Board Resolution of Aug. 6, 2011 and Feb. 28, 2009 (<http://www.nacdl.org/About.aspx?id=21157>; <http://www.nacdl.org/About.aspx?id=19624>).