

INFORMAL OPINION

BY JOSHUA L. DRATEL

Reflections on 9/11 And the Law

The most profound and pronounced effect of 9/11 is that many of the principles previously regarded as fundamental in the operation of the criminal justice system are now in significant retreat, if not abandoned altogether.

Certainly these principles were not uniformly honored prior to 9/11, but they were at least recognized as controlling. Yet what were previously episodic and isolated departures have now become policy.

For example, before 9/11 it would have been unthinkable that a criminal defendant arrested in the United States could be whisked from the jailhouse to military custody and held without trial or process for years. It would have been unthinkable that torture — and that is what waterboarding has been since the United States tried Japanese war criminals for using it after World War II — could be tolerated, or that evidence obtained as a result could conceivably be admissible in a criminal prosecution.

Now we have a written Department of Justice policy that instructs law enforcement when it can dispense with *Miranda* warnings. Now we have a defendant in a federal criminal prosecution who was held for months after his apprehension before being presented in court to obtain counsel and face charges — and the only alternative that has merited attention is that he should have been remanded to military custody in the first instance.

The jury system used to embody the supreme confidence in the community to decide the facts. Now it is the source of fear and rebuke, lest a defendant —

even in a single notorious state murder case — be acquitted. Remember that enduring adage that our system tolerated the acquittal of nine guilty persons rather than suffer the conviction of a single innocent accused? That level of perspective has disappeared from the legal landscape.

Also, the right of confrontation and even the adversary process itself have been substantially diminished. Prosecutors and judges, and even defense attorneys, have become all too accustomed to secret discovery and proceedings. Extravagantly restrictive protective orders that impair the operation and preparation of the defense are now routine in all manner of federal criminal cases.

In a federal criminal prosecution, the government's presentation of classified evidence to the jury — to which evidence neither the defendant nor his trial lawyer was permitted access — was deemed harmless error.

Irony, though, dictates pointing to ameliorative aspects of 9/11: Finally there has been crack-cocaine sentencing reform, likely because Congress has been busy this past decade demonizing others. Indeed, the "War on Drugs" has become somewhat passé unless the word "narco" is followed by "terrorism." And African American and Hispanic defendants are no longer the sole poster children for inherent prejudice in the legal system, but now share that dubious distinction with Muslims and those from the Middle East and South Asia.

But focusing on those "improvements" misses the point. Incrementally and in large chunks, 9/11 has led to fear, distrust, and negation of the institutions and principles forged more than two centuries ago not in tranquility and

Last month on the 10th anniversary of the devastating attacks of September 11, 2011, all Americans reflected with sadness and a renewed sense of national purpose on the lives lost on that dreadful day. As criminal defense lawyers, we know that the ensuing decade has also extracted a toll on our legal system. *The Champion* invited the chair of NACDL's National Security Committee to share his perspective on the compromises to fundamental rights and erosion of liberties that resulted from the 9/11 tragedy.



prosperity, but in the far greater peril of a nascent republic.

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