

FROM THE PRESIDENT

BARBARA E. BERGMAN

Troubling Times

There is much that I can write about — topics on which I suspect virtually all NACDL members can agree. The fact that our criminal justice system is short-sighted and far too harsh and incarcerates the disproportionate numbers of poor people of color for longer periods of time than virtually any other country. The fact that our prisons and jails have turned into our mental asylums because we, as a country, are not willing to provide the community mental health services that so many of these people need. The fact that in far too many states criminal defense attorneys are not paid fees sufficient to provide effective representation. But those are not what I have decided to write about in this column — perhaps next month.

The tragedy of 9/11, and what has happened since then, has affected so many aspects of our lives and practices. We live in fear, and our government relies upon that fear to justify outrageous violations of human rights. I cannot watch a news program about the behavior of our troops in Abu Ghraib without being deeply ashamed. At the same time, we have continued to incarcerate people at Guantanamo Bay for over four years without charging them with any offenses. And the government has announced that those individuals it eventually decides to charge will be tried before military commissions that fail to conform to military justice, international law, or constitutional standards.¹ When those held at Guantanamo engage in a hunger strike to protest their treatment the government force-feeds them.² And our government secretly “renders” suspected terrorists to countries that we know engage in torture.³

Shortly after 9/11, some attorneys in the Office of Legal Counsel at the Department of Justice advised the President that what most people (not to mention the Convention Against Torture) would view as torture is permissible when

done in the name of national defense.⁴ Then, recently, we learn that for the past four years President Bush has repeatedly authorized the National Security Agency, a Defense Department intelligence agency, to conduct surveillance of domestic communications involving foreign contacts without ever seeking any judicial approval as required by the Foreign Intelligence Surveillance Act. And the justification for all these actions is that the danger of terrorism — which itself is indefinitely defined in both scope and duration — justifies whatever the government chooses to do, and that we must simply trust the Executive to do unilaterally what is in our interest.

As criminal defense lawyers, we appreciate how torture can result in false confessions and how informants who have much to gain may be less than totally truthful. We are also particularly sensitive to the argument that the ends justify the means. That is the argument some prosecutors use when they trample on our clients’ constitutional rights. (We all know that for some prosecutors, the need to get a conviction is more important than preserving anyone’s individual rights.) Finally, the claim that we should trust the government also rings hollow. Pardon my skepticism, but I need only consider the times that a prosecutor has told me that I can trust them to do what is right, and later learned that my trust was misplaced.

When Ephraim Margolin was NACDL President, he wrote a column entitled, “Building the Ark for the Coming Flood.”⁵ While the concerns he addressed back in 1989 may seem somewhat different than those we face today, in reality, they are much the same. He wrote: “A majority of those who vote in our elections perceive themselves as passengers on the *Titantic*. In the rush for lifeboats, people would trample over each other, especially over those less powerful, and people would also trample on values such as the Bill of Rights; suddenly, freedom itself becomes a relative term.” In contrast, he viewed “Noah’s Ark” as “a metaphor for choosing not to remain passive in the face of an impending danger.” He asked, “How do we respond to the fear and ignorance that consume our society, and the consequent call for the dismantling of the Bill of Rights? For if we do nothing, we may end as nothing. . . . Our liberties, like our republic, will remain ours only if we can keep them.”

It is far too easy today to say nothing — to do nothing — to challenge the actions the Executive Branch takes in our name. But when the Executive ignores the Bill of Rights, the separation of powers, and the basic constitutional principles upon which our republic is based, then we cannot remain silent. Just as we stand as the last champions of liberty for our clients, so too must we stand in support of the Constitution and the values that originally made this country great.

Notes

1. See *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443 (D.D.C. 2005).

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and sentence computation technicians will be housed at this location, supervised by six designators and their respective assistants. The last two Regions scheduled to transition are the Northeast (in April) and the Mid-Atlantic (in May). Be advised that Community Corrections Offices are experiencing processing delays during this changeover, which may necessitate longer voluntary surrender dates to avoid reporting to the U.S. Marshal's Service.

Additionally, the U.S. Court of Appeals for the 3rd Circuit is the first appellate court to consider BOP's February 2005, 10 percent halfway house rule change. *Woodall v. Federal Bureau of Prisons*, 432 F.3d 235 (3d Cir. 2005); see T. Bussert and J. Sickler, *Bureau of Prisons Update*, Champion at 42 (March 2005) (background on halfway house rule change). It struck down the policy due to BOP's failure to account for designation considerations enumerated in 18 U.S.C. § 3621(b). The Court rejected BOP's claim that it was entitled deference under *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), finding that Congress clearly intended for the bureau to account for § 3621(b) when placing prisoners and that even if congressional intent were vague, the rule is based on impermissible statutory construction, and thus unreasonable and invalid. The Court also rejected BOP's reliance on *Lopez v. Davis*, 531 U.S. 230 (2001), distinguishing that situation, where Congress directed BOP to keep individuals convicted of "crimes of violence" from earning a sentence reduction for drug program completion, from § 3621(b), which mandates individualized determinations without limitations. *Woodall* should mean that federal prisoners housed in Pennsylvania, New Jersey and Delaware will be considered for transfers to halfway houses at the end of their sen-

tences without regard to the February 2005 rule. See BOP Program Statement 7310.04, *Community Corrections Center (CCC) Utilization and Transfer Procedure* (Dec. 16, 1998) (ordinarily

to be considered for up to 180 days' placement without regard to sentence length). Prisoners housed elsewhere must still mount challenges under 28 U.S.C. § 2241. ■

Hon. Matthew J. Perry Jr. Receives NACDL Judicial Recognition Award

Senior U.S. District Judge Matthew J. Perry, Jr. received NACDL's Champion of Justice Judicial Recognition Award Feb. 10 in recognition of more than a half-century of service in the struggle for civil rights. The award was presented by Past-President Nancy Hollander (1992-93).

Judge Perry, Jr. became the first African-American from the Deep South to be appointed to the federal bench in 1975 when he was sworn in to the U.S. Court of Military Appeals in Washington, D.C. (now the U.S. Court of Appeals for the Armed Forces). In 1979, President Jimmy Carter appointed him to the U.S. District Court for the District of South Carolina, his home state. Prior to his federal judicial service, Judge Perry, Jr. was one of the country's most noted and successful civil rights lawyers of the 1950s, '60s and '70s. Among his cases were the desegregation of Clemson University in 1963 and the 1972 redistricting case which enabled African-Americans to serve in the South Carolina legislature in meaningful numbers for the first time since Reconstruction.

Judge Perry, Jr. took senior status in 1995 and continues to serve actively in that capacity today, at age 85. The recently-completed federal courthouse in Columbia which bears his name was dedicated on April 23, 2004.



Senior United States District Judge Matthew J. Perry, Jr., accepts NACDL's Judicial Recognition Award from Past-President Nancy Hollander at the Midwinter Meeting in Charleston, SC, on February 10, 2006.

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2. See, e.g., Eric Schmitt and Tim Golden, *Force-Feeding at Guantanamo Is Now Acknowledged*, NEW YORK TIMES Feb. 22, 2006.

3. See, e.g., U.S. DEP'T OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2003), available at (report on Syria); U.S. DEP'T OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27930.htm> (report on Jordan); U.S. DEP'T OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27926.htm> (report on Egypt).

The Swedish Ministry of Justice has confirmed the U.S. involvement in the transfers. Craig Whitlock, *A Secret Deportation of Terror Suspects*; WASHINGTON POST, July 25, 2004, at A1. See also DeNeen L. Brown & Dana Priest, *Deported Terror Suspect Details Torture in Syria: Canadian's Case Called Typical of CIA*, WASHINGTON POST, Nov. 5, 2003; Scott Shane, *Suit by Detainee on Transfer to Syria Finds Support in Jet's Log*, NEW YORK TIMES, March 30, 2005.

4. The memorandum may be found at http://www.human-rightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801_JD_%20Gonz_.pdf.

5. Ephraim Margolin, "Building the Ark for the Coming Flood," THE CHAMPION, President's Column, 1, 39 (July 1989). ■