FROM THE PRESIDENT

CARMEN D. HERNANDEZ

Protecting the Rights of the Accused

As my term as president comes to an end, I am buoyed by the measure of who we are as criminal defense lawyers, the strength of our Association, and the work we have been able to accomplish through the help of the fine men and women who staff NACDL in Washington, D.C. As I have crisscrossed the country during the past several years and also met lawyers in Canada and abroad, I have been struck by the immense skill, passion and dedication of criminal defense lawyers in the defense of their clients. From Detroit to San Juan, from Pensacola to San Antonio, in Congress and the U.S. Supreme Court, NACDL members stand up each day to preserve the rights of accused persons to be treated fairly under the laws. We should all be proud of NACDL's work in supporting its members and in improving the criminal justice system.

In many locations and for many defense lawyers it is not an easy task. In far too many places, public defenders and court-appointed lawyers struggle with too few resources and too little respect for their ethical obligations and for the constitutional rights of their clients. Still sometimes, praise for the skill of public defenders comes from unexpected sources, albeit sarcastically, as when Justice Scalia recently commented that "more often I am startled by the fact that this young woman who is a, you know, public defender from Podunk is so good, is so smart, and is so competent." Yet in recent weeks, we have seen a few disturbing signs that communities faced with budgetary shortfalls are turning back the clock on indigent defense reform by reducing funding. These communities are resorting to fixed-price contracts that discourage attorneys from conducting necessary investigations and consulting experts. These and similar cost-saving measures for public defender services violate national standards concerning the provision of indigent defense services. In this, the 45th anniversary of *Gideon v. Wainwright*, NACDL will continue to enlist the legal community, including judges, prosecutors, civil attorneys, as well as legislators and the public to reject the under-funding of indigent defense that threatens the Sixth Amendment right to counsel.

Even where resources are not an issue, the criminal justice system still suffers from rulings that give short shrift to constitutional guarantees. Although *Crawford v. Washington* prohibits the government from introducing testimonial hearsay that is not subject to confrontation, when judges fail to perform their gatekeeping responsibilities prosecutors are too often able to circumvent this bright-line prescription by using "experts" who clothe hearsay as opinion testimony. Similarly, even as *United States v. Booker* explained that "the Framers would not have thought it too much to demand that, before depriving a man of [ten] more years of liberty," the government be required to submit its accusations to a unanimous jury, too often sentencing hearings continue to function as "tails that wag the dog" where prosecutors are allowed to rely on unreliable information and hearsay not proven to a jury. It is only through the steadfast work, vision and resourcefulness of criminal defense lawyers that our constitutional guarantees can be properly preserved. I salute criminal defense lawyers for the job they do.

In the wake of the Supreme Court's recent opinion in *Boumediene v. Bush*, upholding the centrality of the writ of habeas corpus as a "vital instrument for the protection of individual liberty" and extending the constitutional guarantee of habeas corpus to those designated as enemy combatants and held in Guantanamo, it makes sense to recognize the work of the many lawyers and judges who have played a part in this chapter of our legal history. Of the many who deserve praise, I wish to commend in particular the military lawyers appointed to represent the Guantanamo detainees. They deserve credit for their unwavering defense of their clients in the face of the adverse consequences to their military careers. NACDL's Military Law Committee and Guantanamo Bay Detainees Subcommittee also deserve special recognition for their work. As with criminal defense lawyers in the United States who face opprobrium in their communities when they

Continued on page 8

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has had exclusive control of the accused for years and has subjected him to endless interrogation and who knows what physical and psychological abuse — accepting a waiver of counsel at the first appearance, and after counsel has had perhaps one or two opportunities to meet the defendant!

That's not all. Consider the schedule that was set at the first appearance. The military judge, Col. Ralph H. Kohlman, who, as chief judge of the commissions, appointed himself to this case, directed that all defense law and discovery motions must be filed by July 11th, all evidentiary motions by July 18th, and set a trial date in September. This would be an impossible and unreasonable schedule in any routine multi-defendant criminal case. It would be unheard of in a murder case. It would be as unconscionable as it would be unthinkable in a capital prosecution. And here we are confronting a case the government has characterized as "the most investigated case in the history of the United States."

But wait, there's more. Consider that, due to classification restrictions, discovery can be reviewed only in a Secure Compartmentalized Information Facility (SCIF). Consider also that the SCIF at Guantanamo is too small to accommodate the defense teams and that it is available only from 7:00 a.m. to 6:00 p.m. Also, bear in mind that even when traveling to Guantanamo on a special military flight, it took the lawyers 13 hours (one way) to see their clients. When special flights are not available, travel each way consumes two days.

In addition, communications facilities for the defense are wholly inadequate. Lawyers have at best sporadic access to the Internet in the Guantanamo facilities. Indeed, the best hope to secure an Internet connection is the WiFi at the base Starbucks. Further, recent regulations make all communications — including privileged communications — from a government computer subject to review by the government.

(See NACDL News, page 10.) The tribunal requires electronic filing and will not accept hard copies; yet, efforts by attorneys to file their appearances were hampered because no scanners were provided and there was no Internet connection available to them.

The most pervasive obstacle to mounting a defense is the government's manipulation of the classification restrictions to gain unfair advantage and impede the defense. Everything a client tells counsel is presumptively classified, and much of the discovery relevant to the defense will be classified as well. How does a lawyer prepare a defense or investigate a capital case, with the need for extensive investigation of mitigation, if the lawyer cannot discuss the evidence or the client's version of events? While specific statements may be declassified upon request, the official who must process this request has not been appointed. And, remember, classified information can be discussed only in the SCIF and attorney notes on the classified information cannot be removed from the SCIF. Imagine trying to prepare a case for trial under these conditions.

This then is just a hint of the travesty that is brewing at Guantanamo. With the goodwill and global support that America enjoyed in the wake of 9/11 squandered, and the reputation of our country hanging in the balance, it remains to be seen what future generations will see when they look through the keyhole of history and see *Boumediene*. Will this case be one that reveals the true character and content of our republic? Will it be that defining moment when America heeded Justice Kennedy's plea on behalf of a bitterly divided Supreme Court to ensure that the laws and Constitution "survive and remain in force, in extraordinary times?" Time will tell. Of this we can be certain: the ACLU and NACDL, and the heroic defense lawyers who have answered the call of duty, both civilian and military, are bona fide champions of liberty. They understand that the zealous defense of the least popular accused is nothing less than the defense of freedom itself.

About the Author

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Notes

1. The quote is the opening line from Mary McCarthy's 1953 essay *My Confession,* in which she wrote about American fascination with communism just before that fascination was subsumed by the obsession that tyrannized the nation.

2. *Boumediene v. Bush,* No. 06-1195, 2008 WL 2369628, ___ U.S. ___, (June 12, 2008; *Rasul v. Bush,* 542 U.S. 466 (2004) and *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006).

3. Military Commissions Act Sections 7(a) and (b).

4. U.S. Constitution, Article I, Section 9 [2].

5. *Boumediene,* 2008 WL 2369628 at *47.

6. ABA Guidelines require that a defense team include no fewer than two attorneys duly trained and experienced in capital defense, an investigator, a mitigation specialist and at least one team member qualified by training and experience to screen for the presence of mental or psychological disorders or impairments. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 4.1 "The Defense Team and Supporting Services," *see also* Guidelines 5.1, 8.1. 10.4.

7. NACDL is partnering with the ACLU in "The John Adams Project," an effort to augment the woefully inadequate defense resources provided for the detainees under the Military Commissions Act. For more on the project, visit www.aclu.org/safefree/detention/johnadams.html.

From the President

Continued from page 5

defend those who society finds notorious and loathsome, these men and women have earned our gratitude and admiration for zealously representing their clients exactly as the Sixth Amendment requires.

Boumediene reminds us of the fundamental importance of an independent judiciary, willing to make righteous decisions and the equally fundamental importance of the right to counsel. It bears noting that in August 2003, NACDL was the first national bar association to publically challenge the validity of the extraordinary restrictions placed on defense counsel and other procedures adopted for the Guantanamo military commissions. NACDL took that stance in the best tradition of the American criminal defense bar that since 1770, when John Adams represented British soldiers accused of the Boston massacre, has recognized its obligation to represent all persons accused of crime, even the most despised. Each day in the courts of this land, NACDL members continue that proud tradition and protect individual liberty. I have been so inspired by your work.