

June 18, 2010

The Honorable Carl Levin
Chair
Senate Armed Services Committee
United States Senate
Washington, DC 20510

The Honorable John McCain
Ranking Member
Senate Armed Services Committee
United States Senate
Washington, DC 20510

Re: NDAA Inspector General Investigation Provision

Dear Chairman Levin and Senator McCain:

We are writing to express our strong opposition to Section 1037 of H.R. 5136, the House version of the National Defense Authorization Act for Fiscal Year 2011 (“House NDAA”). We strongly urge you to oppose adding any comparable provision to the Senate version of the National Defense Authorization Act or to any conference bill.

Section 1037 of the House NDAA would require the Inspector General to conduct a 90-day investigation of attorneys who represent Guantanamo detainees and for whom there is a reasonable suspicion that they have engaged in any conduct or practice that has (i) interfered with the operations at Guantanamo, (ii) violated any applicable Department of Defense Policy, (iii) violated any law of the United States, or (iv) generated any “material risk to a member of the Armed Forces.”

As former judges and prosecutors who are familiar with the duties that attorneys owe their clients, we find the potential practical and legal effects of this provision deeply troubling. Lawyers have a fundamental ethical duty to zealously represent the interests of their clients and to adopt whatever lawful and ethical measures are required in order to do so. However, under the sweeping language of Section 1037, almost every lawyer who has represented a detainee at Guantanamo could be deemed to have “interfered with the operations of the Department of Defense.” The representation itself may have caused interference, for example, by merely informing detainees of their rights or petitioning the courts for their release. We cannot overstate the gravity of the chilling effect this provision is likely to have on lawyers in their efforts to provide Guantanamo detainees with the meaningful access to the courts as required by law pursuant to *Boumediene v. Bush*.

We agree that lawyers who engage in inappropriate conduct or counsel a client to engage in conduct that is criminal or fraudulent should be subject to investigation and potential punishment, including criminal prosecution where appropriate. Moreover, these lawyers are already subject to the disciplinary authority of the jurisdiction(s) in which they are admitted to practice, regardless of where the conduct occurs.

However, the Department of Defense Inspector General is not the appropriate authority to investigate allegations of misconduct in the course of legal representation. The Department of Justice is the most suitable and appropriate forum to investigate and prosecute allegations of criminal wrongdoing.

The substantial majority of the civilian lawyers involved in the Guantanamo cases have represented their clients on a *pro bono* basis, at great personal and financial sacrifice and despite the extraordinarily challenging circumstances in which they have had to advocate on behalf of their clients. So long as Congress continues to consider language that so severely limits the ability of lawyers to zealously and effectively represent their clients, such lawyers will be forced to spend their time and resources on their own defense rather than the defense of those to whom they are bound by their professional and ethical duties.

Thus, we strongly urge you to oppose inclusion of any comparable provision in the Senate version of the National Defense Authorization Act and to use all means to ensure that no similar language is added to any conference bill.

Sincerely,

Hon. Jay W. Burnett, Harris County, Texas Senior Criminal District Judge (Sitting by Assignment); Former Visiting Criminal District Judge, 2nd Judicial Administrative Region of Texas (1999-2000); Former Judge, 183rd Criminal District Court, Texas (1986-1998); Former Judge, 351st Criminal District Court, Texas (1984)

A. Bates Butler III, U.S. Attorney, District of Arizona (1980-81)

Robert J. Del Tufo, Attorney General, State of New Jersey (1990-1993); United States Attorney, District of New Jersey (1977-1980)

W. Thomas Dillard, United States Attorney, Northern District of Florida (1983-1986); United States Attorney, Eastern District of Tennessee (1981)

Hon. Bruce J. Einhorn, United States Immigration Judge (ret.) (1990-2007); Special Prosecutor and Chief of Litigation, United States Department of Justice Office of Special Investigations (1979-1990)

Hon. John J. Gibbons, United States Circuit Judge (ret.), United States Court of Appeals for the Third Circuit (1970-1990) (Chief Judge (1987-1990))

Jo Ann Harris, Assistant Attorney General, Criminal Division, United States Department of Justice (1993-95); Executive Assistant United States Attorney, Southern District of New York (1981-83); Chief, Fraud Section, Criminal Division, United States Department of Justice (1979-81); Assistant United States Attorney, Southern District of New York (1972-1979)

Hon. Shirley M. Hufstedler, United States Circuit Judge (ret.), United States Court of Appeals for the Ninth Circuit (1968-1979); United States Secretary of Education (1979-1981); Former Associate Justice, California Court of Appeal (1966-1968); Former Judge, Los Angeles County Superior Court (1961-1966)

Prof. Bruce R. Jacob, Former Assistant Attorney General, State of Florida

William A. Kimbrough Jr., United States Attorney, Southern District of Alabama (1977-1981); Assistant United States Attorney, Southern District of Alabama (1961-1965)

Hon. Gerald Kogan, Former Chief Justice, Supreme Court of the State of Florida; Former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida

Miriam Aroni Krinsky, Assistant United States Attorney, Central District of California (1987-1988, 1990-2002)(Chief, Criminal Appellate Section, 1992-2002; Chief, General Crimes Section, 1991-1992); Chair, Solicitor General's Appellate Working Group (2000-2002); Assistant United States Attorney, District of Maryland (1988-1990)

Phillip Allen Lacovara, Former Deputy Solicitor General of the United States for Criminal and National Security Matters; Former Counsel to the Watergate Special Prosecutor; Former Special Counsel to the Police Commissioner of the City of New York

Hon. Thomas D. Lambros, Former United States District Judge, Northern District of Ohio (1967-1995)

Hon. John S. Martin, Former United States District Judge, Southern District of New York (1990-2003); Former United States Attorney, Southern District of New York (1980-1983)

Kenneth Mighell, United States Attorney, Northern District of Texas (1977-1981); Assistant United States Attorney, Northern District of Texas (1961-1977)

Sam D. Millsap, Jr., Former District Attorney, Bexar County, San Antonio, Texas

Hon. Sheila Murphy, Former Presiding Judge, Sixth Municipal District, Circuit Court of Cook County (1992-1999); Former Associate Judge, Circuit Court of Cook County (1989-1992)

Hon. Robert O'Connor, Former United States District Judge, Southern District of Texas (1975-84)

Hon. Stephen M. Orlofsky, Former United States District Judge, District of New Jersey (1996-2003); Former United States Magistrate Judge, District of New Jersey (1976-1980)

Hon. Deborah T. Poritz, Former Chief Justice, New Jersey Supreme Court (1996-2006); Former New Jersey Attorney General (1994-1996)

Ronald Rencher, United States Attorney, District of Utah (1977-1981)

James H. Reynolds, United States Attorney, Northern District of Iowa (1976-1982)

James K. Robinson, Assistant Attorney General, Criminal Division, United States Department of Justice (1998-2001); United States Attorney, Eastern District of Michigan (1977-80)

Stephen A. Saltzburg, Attorney General's ex-officio Representative, U.S. Sentencing Commission (1989-1990); Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice (1988-1989)

Donald E. Santarelli, Administrator, Law Enforcement Assistance Administration, Department of Justice (1973-1974); Associate Deputy Attorney General (1969-1972); Assistant United States Attorney, District of Columbia (1966-1967)

Harry L. Shorestein, Former State Attorney for the Fourth Judicial Circuit, Florida (1991-2008)

Hon. Patricia Wald, Judge (ret.), United States Court of Appeals for D.C. Circuit (1979-1999) (Chief Judge (1986-1991))

Hon. Alfred Wolin, Former Judge, United States District Court for the District of New Jersey (1987-2004) (Senior Judge (2000-2004)); Former Presiding Judge, Superior Court of New Jersey, Criminal Division (1983-1987); Former Judge, Superior Court of New Jersey, Civil Division (1982-1983); Former Judge, Superior Court of New Jersey, Juvenile and Domestic Relations Division (1980-1982); Former Judge, Union County District Court (1980-1985)

Fran Wikstrom, United States Attorney, District of Utah (1981)

cc: Members of the Senate Armed Services Committee