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## PROFESSIONAL CONDUCT

### With Liberty and Justice for All:

*Lawyers Who Defend Constitution Deserve  
Our Support and Protection*

BY ELLEN C. BROTMAN  
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*Special to the Legal*

As lawyers, we know that we have a duty to zealously represent our clients within the bounds of the law. As our thoughts turn to the American ideals of liberty and freedom that we celebrate on the Fourth of July, we want to discuss a new threat to the ability of one particular group of lawyers to fulfill that duty.

If adopted, a controversial provision buried within the 1030-page H.R. 5136, the National Defense Authorization Act for Fiscal 2011, or NDAA, would expose lawyers who represent detainees held at the Naval Station in Guantanamo Bay to an unprecedented level of government oversight and investigation by the Department of Defense (DOD). The provision's sponsor, Florida Republican Rep. Jeff Miller, argues that the national security implications of the Guantanamo attorneys' work justify this heightened scrutiny. Numerous legal organizations have condemned this encroachment on attorneys' freedom to zealously represent clients, a backbone of the freedoms we hold so dear.

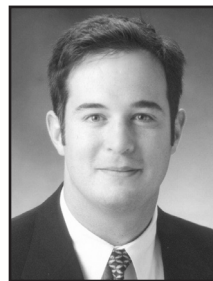
Section 1037 of the NDAA requires the Inspector General of the DOD to investigate lawyers who represent foreign



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nationals detained at Guantanamo Bay in conjunction with habeas corpus and military commission proceedings, if there is a "reasonable suspicion" that those lawyers have: 1) "interfered with the operations" of the DOD at Guantanamo Bay; 2) violated "any applicable" DOD policy; 3) "violated any law within the exclusive investigative jurisdiction" of the DOD inspector general; or 4) "generated

any material risk to a member" of the U.S. Armed Forces. The NDAA passed in the House of Representatives on May 28. The version of the bill currently before the Senate does not contain language similar to that in Section 1037.

The proposal was prompted by allegations last year that lawyers for the detainees hired private investigators to secretly photograph undercover intelligence officers who previously interrogated the detainees. Those attorneys apparently sought to identify potential witnesses to interrogation sessions that allegedly employed techniques tantamount to torture, intending to call the witnesses at their clients' trials. Some of the photographs were later found in detainees' cells — potentially compromising the identities of the undercover operatives. The Department of Justice is currently investigating how the photographs got into, and why they were left in, the detainees' cells.

Miller inserted the attorney investigation proposal into the NDAA because, in his view, the attorneys' alleged actions "created a significant security risk to intelligence and military personnel, as well as compromised our national security," and Miller demanded an immediate and thorough investigation of "the disgraceful actions apparently undertaken by the disloyal defense lawyers." While we agree that lawyers, like all others,

are subject to the rule of law, and that unlawful conduct should be investigated and punished appropriately, the alleged activities of the Guantanamo detainees' lawyers are already the subject of an investigation by the Justice Department. We agree with the ABA that Justice is the appropriate agency both to investigate, and if necessary, prosecute any legal wrongdoing. Additionally, we think the proposed legislation fails to recognize that all lawyers are subject to the disciplinary authority within their own jurisdiction, and that ethical violations, if any, are most appropriately addressed there.

Numerous legal organizations, including the American Bar Association, the American Civil Liberties Union, the Association of Professional Responsibility Lawyers (APRL) and the Judge Advocates Association oppose the proposal. Their opposition centers around two core arguments: first that it is not the DOD inspector general's place to conduct investigations into alleged misconduct by lawyers and second, the legislation may have a chilling effect on the willingness and ability of lawyers to defend Guantanamo Bay detainees.

In a letter to Sens. Carl Levin, D-Mich., and John McCain, R-Ariz., opposing the NDAA, numerous former judges and prosecutors expressed similar concerns, stating that the language of Section 1037 is so broad that "almost every lawyer who has represented a detainee at Guantanamo could be deemed to have 'interfered with the operations of the Department of Defense.'" Indeed, a criminal defense attorney's exact mission is to "interfere" with the governmental objectives of swift prosecution and incarceration of suspects by informing clients of their rights, preventing unencumbered interrogation, and petitioning courts for their clients'

release. Steve Vladeck, a professor at American University Washington College of Law who has defended detainees in the past, further condemned the broad scope of the legislation, pointing out in a blog post that "this language would basically require the DOD IG to report to Congress on every lawyer who has represented a

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Guantanamo detainee at any time in the past eight years."

APRL and the ABA have both expressed concern that the legislation will inhibit lawyers' ability to zealously and lawfully represent the Guantanamo detainees. APRL pointed out that the proposed investigation "will provide no procedural protection for the lawyers whose conduct is scrutinized" and that the proposal encourages "an unfocused and hasty investigation ... into ill-defined activities." ABA President Carolyn Lamm, in a letter to the Senate Armed Services Committee, wrote that the legislation would "compromise the professional independence of counsel and divert already starved defense resources from defending clients to defending the conduct, practices and actions of their lawyers."

Defense attorneys should not have to choose between protecting themselves from hasty prosecution and providing their

clients with the zealous representation deserved by all who seek counsel.

It appears to us that the legislation singles out attorneys who have volunteered, often on a pro bono basis, to represent individuals accused of committing the most severe of crimes. We recall that, earlier this year, a group of lawyers who were involved in advocacy for the Guantanamo detainees and later went on to take positions with the Justice Department were labeled in political advertisements as the "Al Qaeda 7" and attacked for being unpatriotic and disloyal to the United States. The DOD investigation provision seems to be motivated by the same desire to attribute the views and behaviors of clients to their lawyers.

Two years ago, the Criminal Law Section of the Federal Bar Association here in Philadelphia awarded the Honorable Clifford Scott Green Bill of Rights Award to a group of dedicated lawyers from several local firms and the Defender Association. These lawyers had dedicated thousands of unpaid hours to the representation of Guantanamo Bay detainees. We're proud to work in a place where this work is encouraged and recognized. As the Fourth of July approaches, and we pause to appreciate our system of government, we must remember that our constitutional system of justice would cease to exist if attorneys were not willing to speak on behalf of those accused of even the most heinous offenses. These are the ideals upon which this country was founded.

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