

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a bold, serif font, centered between two horizontal blue bars.

NEW YORK  
CITY BAR

March 1, 2010

Hon. Harry Reid  
Senate Majority Leader  
522 Hart Senate Office Building  
Washington, DC 20510

Hon. Mitch McConnell  
Senate Minority Leader  
361-A Russell Senate Office Building  
Washington, DC 20510

Dear Majority Leader Reid and Minority Leader McConnell:

On behalf of the Association of the Bar of the City of New York (the “Association”), we write to express our profound concern with, and strong opposition to, Senate Bill 2977 (“S.2977”), introduced by Senator Lindsey Graham on February 2, 2010. If passed into law, S.2977 would terminate any Department of Justice funding intended to further the prosecution of a non-citizen in an Article III court of the United States, for any offense related to the events of September 11, 2001 that could potentially be prosecuted by military commission.

Enactment of this bill would deprive the Department of Justice of what has proven to be its most effective and fairest enforcement weapon to prosecute and bring suspected terrorists to justice. It would also be an unprecedented intrusion into the judgment and discretion of the Executive branch to enforce federal law that raises grave questions under our system of separation of powers. Moreover, for Congress to intervene to dictate the means for prosecuting a specified group of persons may also raise serious constitutional issues and certainly threatens the rule of law. It will not only tarnish any conviction of persons covered by the bill’s terms through military commissions but supply grounds to challenge the legality of their prosecution by military commissions, leading to yet further delay in bringing them to justice.

The Association is a professional association of over 23,000 attorneys. Founded in 1870, it has long been committed to studying, addressing, and promoting the rule of law and, when appropriate, law reform. Through its many standing committees, the Association educates the bar and public about legal issues relating to the war on terrorism, the pursuit of suspected terrorists, and the treatment of detainees. The principal lesson we have derived from our work is that full and faithful respect for the rule of law strengthens our country. Our system of justice – based on time-tested constitutional and international norms – is a source of strength, not vulnerability. The Association believes that the federal system of civilian courts is well-equipped to try individuals who are accused of terrorist activities. The Association submits this letter to present the U.S. Senate with additional information about the capacity of the federal justice system to handle criminal cases against individuals suspected of complicity in terrorism, and express its concerns about the problems of over-reliance on military tribunals. In short, we urge the Senate to reject S.2977.

## The Federal Criminal Justice System is Well-Equipped to Prosecute Terrorism

Throughout this nation's history, and particularly in the past 20 years, federal courts have done an excellent job in handling scores of terrorism cases, including many that involved complex scenarios. These federal-court prosecutions have yielded just, reliable results – and in most cases severe sentences – without any demonstrated leaks of classified information, all while maintaining our commitment to the due process of law.

Existing criminal statutes proscribe a broad range of potential terrorist conduct, providing prosecutors with a “well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 547 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in judgment). These statutes allow for prosecutions based on a wide variety of threatening behavior, including but not limited to: material support of terrorism, 18 U.S.C. §§ 2339A and 2339B; attacks against U.S. nationals abroad, 18 U.S.C. § 2332; serious attacks “transcending national boundaries,” 18 U.S.C. § 2332b; harboring or concealing terrorists, 18 U.S.C. § 2339; and the handling of an explosive or lethal device with the intent to cause death, serious injury or major economic loss, 18 U.S.C. § 2332f.

Federal law regarding terrorism is even more expansive when one considers the fact that conspiracy, fraud, accessory liability, and other crimes can also trigger investigation and/or prosecution by the Department of Justice. In the case of Zacarias Moussaoui, for instance, an arrest on immigration charges ultimately led to his guilty plea on serious terrorism charges and his imprisonment for life. *See* Judgment, *United States v. Moussaoui*, No. 01-cr-00455 (E.D. Va. May 4, 2006) (Dkt. No. 1854). Application of these statutes by the federal criminal system results in swift incarceration, safe detention, and severe punishment where warranted.

Despite claims to the contrary, the federal criminal justice system adequately protects the secrecy of classified information, even in the most sensitive cases. Those who claim otherwise ignore the extensive statutory framework that has been put in place in order to handle classified material in a judicial setting, created by Congress itself in the Classified Information Procedures Act (“CIPA”). CIPA establishes procedures allowing judges and cleared counsel to determine, before trial, how to manage classified evidence so that the defendant receives a fair trial while secret information is protected. *See* 18 U.S.C. app. 3; *see also* Richard B. Zabel & James J. Benjamin, Jr., Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, at 82-84 (2008) (summarizing CIPA's provisions). Since the late 1980s, when the statute was first used in the terrorism context, courts have applied CIPA in a large number of terrorism cases, and we have found no documented evidence of serious breaches when CIPA procedures have been invoked. *See id.* at 8-9 (summarizing findings); *id.* at 84-86 (collecting cases). Importantly, CIPA is neither exhaustive nor exclusive with respect to the use of classified evidence, as district judges can still be relied upon “to fashion creative and fair solutions to these problems,” *i.e.*, the problems raised by the use of classified information in trials.” *United States v. Rosen*, 520 F. Supp. 2d 786, 788 (E.D. Va. 2007) (quoting S. Rep. 96-283, reprinted in 1980 U.S.C.C.A.N. 4294).

In case after case, involving even the highest-profile individuals, federal courts have effectively pursued justice against terrorists. *See* Zabel & Benjamin, at 13-20 (discussing federal prosecution of the airline hijackings of the 1980s, the first World Trade Center bombing, and the East African embassy bombings, among others); *see also* *United States v. Abu Ali*, 528 F.3d 210

(4th Cir. 2005) (affirming conviction of Ahmed Omar Abu Ali, who conspired with Al Qaeda to hijack airplanes, blow up nuclear plants and assassinate President George W. Bush); *Guilty Plea Made in Plot to Bomb New York Subway*, N.Y. Times, Feb. 22, 2010 (discussing the investigation, prosecution and conviction of Najibullah Zazi). Prosecution of these vitally important cases resulted in no significant leaks of confidential information or increased threat to the American public, and ended with significant terms of imprisonment. In addition, trying these cases in Article III courts served the national interest by providing a public determination of guilt or innocence by an impartial jury overseen by an independent judge. The far greater acceptance of the fairness of such trials more than compensates for any marginal advantage that military commissions might offer with respect to the protection of classified information or the likelihood of conviction.

### **Military Commissions Should Not Be the Sole Means for Prosecuting Terrorism**

Military commissions are useful tools, but they have never been intended to accommodate every criminal or terrorist defendant. Historically, military commissions were not intended to afford a venue for all possible grievances concerning war-related crimes. Indeed, the overuse of military commissions is frequently cited as grounds for attacking the human rights records of foreign countries.

It may well be the case that some cases should be tried in military commissions, and the enactment of the Military Commissions Act (“MCA”) may mitigate some of the historical inadequacies in the military commissions process. Still, significant uncertainty remains concerning the way in which they would work pursuant to the MCA, and whether the commissions would in fact comport with due process. There are also legal uncertainties as to whether material support and conspiracy are war crimes and if not, whether they could be prosecuted by military commissions. Indeed, two of the persons previously convicted by military commissions are challenging their material support convictions on this ground before an appellate review panel, and last year the Department of Justice urged Congress to remove material support from the crimes triable by military commissions because of the risk that convictions obtained by military commissions might later be overturned on this ground. Thus, military commissions cannot and should not be the sole method for prosecuting terrorism in this country.

The reality is that military commissions have been largely unsuccessful in reaching any final verdicts or sentences in recent years. As former Secretary of State Colin Powell has commented, “[i]n eight years the military commissions have put three people on trial. Two of them served relatively short sentences and are free. One guy is in jail. Meanwhile the federal courts, our Article 3 regular legal court system has put dozens of terrorists in jail. They’re fully capable of doing it. So the suggestion that somehow a military commission is the way to go isn’t borne out by the history of the military commission.” Interview with Colin Powell, *Face the Nation* (CBS television broadcast, Feb. 21, 2010). In contrast, the federal courts have established their fairness and effectiveness through their operation over more than two hundred years, and demonstrated their specific capacity to deal with terrorism crimes over the last two decades. Indeed, since September 11, over 300 individuals charged with terrorism crimes have been successfully prosecuted and sentenced in federal court, more than 30 of whom were convicted in 2009 alone. Accordingly, it would be self-defeating to foreclose them as an avenue for prosecuting terrorism.

## Conclusion

The Association therefore calls upon the Senate to reject S.2977 and to leave to the judgment of the Department of Justice the choice between the federal criminal justice system and military commissions as specific conditions dictate.

Respectfully,

Sidney S. Rosdeitcher <i>Chair, Task Force on National Security and Rule of Law</i>	Stephen L. Kass <i>Chair, International Human Rights Committee</i>
Myles K. Bartley <i>Chair, Military Affairs Committee</i>	Arthur W. Rovine <i>Chair, International Law Committee</i>
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