THE National Association of Criminal Defense Lawyers
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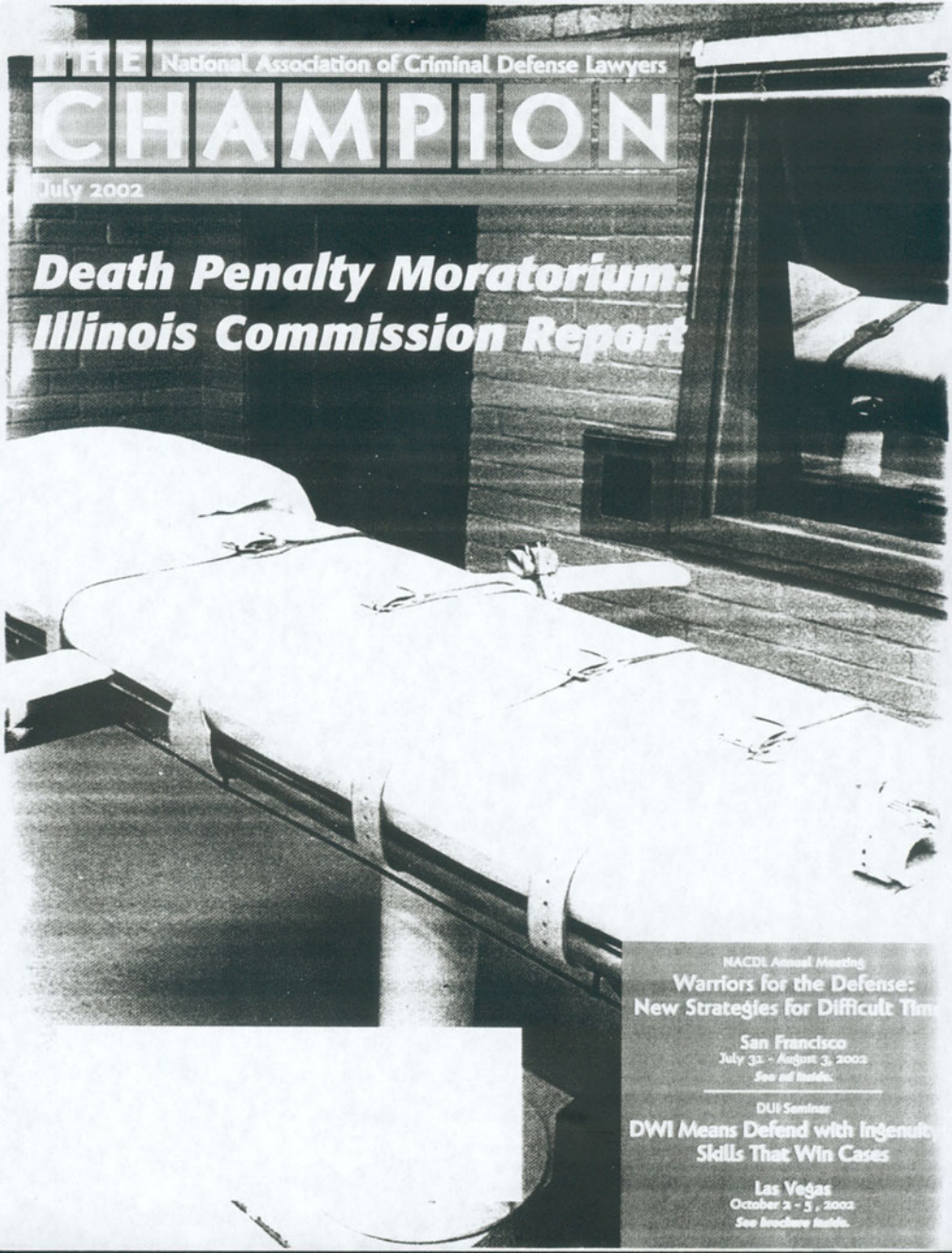
July 2002

Death Penalty Moratorium: Illinois Commission Report



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LEGISLATION

BY JACK B. ZIMMERMANN

Liberty at risk, Part 5: handling legal aspects of captured al Qaeda detainees

When the first group of captured al Qaeda detainees reached the United States Naval Base at Guantanamo, Cuba, rumors began to circulate about how these individuals were to be processed. NACDL, dedicated to the Rule of Law under our Constitution, did not respond as an organization until events unfolded that caused concern among our members.

First, the President of the United States issued a Presidential Order on November 13, 2001, establishing military commissions to try these men (The Bush order). Legal organizations, including the American Bar Association (ABA), the Bar Association of the District of Columbia, and NACDL, began to formulate policy about these tribunals. On March 21, 2002, the Secretary of Defense issued an order establishing the procedures to be used by these commissions (The Rumsfeld rules).

NACDL President Irwin Schwartz appointed an *ad hoc* committee to present a proposed Position Paper and proposed Resolution to the NACDL Board of Directors. On May 4, 2002, the Board unanimously adopted the Resolution printed below. It was based on a Position Paper printed below in condensed form, plus numerous research papers (done primarily by Donald G. Rehkopf, Jr.) and background material not printed in this article, but available from the NACDL office if requested.

We believe the Position Paper and Resolution speak for themselves. However, to put them in context, please consider the following background information:

1. The Congress did not pass legislation or a resolution authorizing these commissions before or after the Presidential Order of November 13, 2001.

2. Under international law and certain treaties, prisoners of war are entitled to the same legal protection as members of the armed forces of the capturing nation.

3. In order to be considered a prisoner of war, captured personnel must be a member of a uniformed, identifiable armed force of a state, or at least identifyed as a combatant with a fixed sign recognizable at a distance and carrying weapons openly.

4. The Bush Administration does not consider al Qaeda detainees to be prisoners of war; they are considered to be "unlawful belligerents" or "unlawful combatants."

5. American service personnel are subject to the Uniform Code of Military Justice (UCMJ), found at Title 10 of the U.S. Code. This statute provides most protections found in the federal trial and appellate courts, and in some instances, more protections.

6. Under the UCMJ, every defendant is entitled to free detailed military counsel, without regard to indigency. Civilian counsel may be retained, at the accused's expense.

The condensed version of the Position Paper and the Resolution were written by the Co-chairs of the Military Law Committee, Jack B. Zimmermann of Texas, Donald G. Rehkopf, Jr. of New York, and Terri R.Z. Jacobs of Texas; Leslie Hagin, Co-chair of the Legislative Committee, of Washington state, and Co-chair of the Indigent Defense Committee, Kathryn M. Kase of New York. Each of the Military Law Committee Co-chairs is a Reserve Officer, and has extensive active duty and reserve experience as a judge advocate. Jack Zimmermann is a retired Marine Corps colonel, Don Rehkopf is an Air Force lieutenant colonel, and Terri Jacobs is a Marine Corps major. Please feel free to contact any of us with questions or comments.

Ad Hoc Military Tribunals Committee Position Paper for the Board of Directors of the National Association of Criminal Defense Lawyers

Preamble

You may ask yourselves, "Why should NACDL care?" First, as you read the Bush order and the Rumsfeld rules, please consider this: both appear to allow for prosecution before a tribunal for violations of the "laws of war" and "other violations of law." When Deputy Attorney General Larry Thompson spoke with us in Miami (and when President Schwartz heard him again a few weeks later in California), he said that it was limited to the former. But this remains a troubling uncertainty, going to the very heart of what most of us, as non-military members of NACDL, do to uphold the Constitution of the United States and other principles of fundamental fairness.

But even if the prosecutions are limited to alleged violations of the "laws of war," we think NACDL should still be troubled, and *proactive in its concerns.* The National Association of Criminal

Defense Lawyers, whose members have dedicated their professional lives to defending the Constitution, should, and does, support the efforts to bring to justice those responsible for the September 11, 2001, attacks on our country. However, because the rest of the world will note how we treat those persons captured by American forces in the military actions against terrorism, it is imperative not only that we set the example for fair and humane treatment, but that our efforts be perceived as fair and just. The United States cannot be, or be viewed as being, less lawful than those we seek to defeat militarily.

Indeed, to be so viewed imperils the lives of our men and women in uniform around the world. It is important to note that one of the things that the North Vietnamese did initially to our United States POWs during the Vietnam War was to declare them "criminals", "international bandits," etc., instead of affording them POW status. For those of us who are veterans, the use of these commissions should suggest a clear and present danger that should our service members get captured, their "status" will be the same: "international criminals." Indeed, during the 1991 Gulf War, a female pilot and her crew were shot down and captured by the Iraqis, and she was repeatedly raped, tortured and otherwise degraded.

Our dedication to the rule of law drives our positions on the creation of military commissions and the rules that will govern them. We objected to the creation of these particular military commissions by the presidential order of November 13, 2001, on the basis that the President was not empowered by law to unilaterally create these commissions.

With that position unchanged, this paper represents our suggested view of the procedures that have now been officially promulgated by the Bush Administration to govern such commissions, as announced by the Secretary of Defense on March 21, 2002.

Position

The *Preamble* to the MANUAL FOR COURTS-MARTIAL (2000) (MCM), Paragraph 2(b)(2), states that such commissions ". . . shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial." We think NACDL should support this principle. Fundamentally, because the rules promulgated by the Secretary of Defense do not comply with the provisions of the MCM, we believe NACDL should oppose their implementation.

In addition, as addressed in more detail below, because certain of the promulgated procedures violate principles of fundamental fairness and would cause the United States to be viewed in a very negative manner by the international community, we think NACDL should oppose their implementation and urge the Secretary of Defense to use the authority given to him to amend his order of March 21, 2002. Without wavering from our earlier objection to the commissions as apparently unconstitutionally created, we believe NACDL should urge the repeal and/or modification of the rules through efforts in Congress and the appropriate judicial fora, if need be. We remain unsure as a group whether NACDL should encourage its members, or convene a task force of its leaders and members, to act as "civilian counsel" to the accused before these commissions.

Unacceptable features

The rules for these commissions as currently promulgated do not meaningfully provide for basic rights. For example, hearsay ("unsworn") statements are allowed as evidence. It is also unclear whether there is any real right to "appeal" the commission's decisions. Nor is it clear what court would have jurisdiction, under what authority, to so review these proceedings.

Moreover, the accused can be excluded from the proceedings (and not just because he or she is disruptive), and his or her lawyer barred from conferring with the accused, or even telling him or her what transpired while so barred. The Rumsfeld rules allow not only one's "civilian counsel," but indeed the accused, to be excluded from at least part of the proceedings, and prohibit the "detailed" military defense counsel (who is the only one who cannot be so excluded) from disclosing to the accused and/or civilian counsel — or consulting with them concerning — what transpired before the commission while they are excluded.

In particular, following are specific unacceptable provisions of the rules promulgated to date that we have identified:

1. Failure to provide for questioning of potential commission members for possible challenge (no *voir dire*).

2. Failure to provide for challenges for cause and peremptory challenges of the potential members.

3. Failure to provide for challenge for cause of the presiding officer.

4. Failure to ensure that the accused can confront all witnesses against him by being present at all sessions of the commission (unless he is disruptive).

5. Failure to permit civilian defense counsel to be present at all sessions of the commission.

6. Failure to provide that the presiding officer makes binding rulings of law and otherwise presides as does a military judge under the UCMJ.

7. Failure to provide maximum sentences for specific offenses.

8. Failure to provide what crimes can result in the death penalty, and to require pre-trial notice of intent to seek the death penalty.

9. Failure to specifically provide that the principle of double jeopardy applies.

10. Failure to provide that the Rules of Evidence or their equivalent apply and failure to exclude unreliable evidence, such as unsworn statements.

11. Failure to provide for a meaningful appeal, including review by the United States Court of Appeals for the Armed Forces for sentences above a certain level.

12. Failure to provide for equal requirements and treatment of civilian attorneys, whether they are prosecutors or defense counsel.

13. Failure to prohibit members of a commission from discussing a case until

Resolution of the NACDL Board of Directors Regarding Military Commissions

WHEREAS the National Association of Criminal Defense Lawyers, whose members have dedicated their professional lives to defending the Constitution of the United States, supports efforts to bring to justice those responsible for the September 11, 2001 attack on our country;

WHEREAS the rest of the world will note how we treat those persons captured by American forces in the military actions against terrorism;

WHEREAS it is imperative not only that the United States set an example for fair and humane treatment, but that our efforts be perceived as fair and just;

WHEREAS the United States cannot be, or be viewed as being, willing to depart from its own laws and principles;

WHEREAS the international view of the United States as being willing to depart from its own laws and principles imperils our country's men and women in uniform across the world;

WHEREAS our dedication to the rule of law drives our positions on the creation of military commissions and the rules that will govern them;

WHEREAS we object to the creation of the particular military commissions reflected in the Presidential Order of November 13, 2001, on the basis that the President was not empowered by law to unilaterally create these commissions;

WHEREAS moreover, that position unchanged, the procedures announced as governing such commissions, as promulgated by the Secretary of Defense on March 21, 2002, are also inadequate as a matter of fundamental fairness;

WHEREAS the *Preamble* to the MANUAL FOR COURTS-MARTIAL (2000), Paragraph 2(b)(2), states that such commissions ... shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial;"

WHEREAS NACDL supports the principle articulated in the *Preamble* to the MANUAL FOR COURTS-MARTIAL (2000), Paragraph 2(b)(2), and the procedures promulgated by the Secretary of Defense do not comply with the provisions of the MANUAL FOR COURTS-MARTIAL,

THEREFORE BE IT RESOLVED that NACDL opposes implementation of the procedures promulgated by the Secretary of Defense for these commissions;

IT IS HEREBY FURTHER RESOLVED that NACDL shall urge the President and the Congress of the United States, as well as appropriate judicial tribunals, to find that these procedures promulgated by the Administration to date violate principles of fundamental fairness, and threaten our country's stature and the welfare of its military personnel throughout the world, and thus that such rules should be revised by the Secretary of Defense through amendment of his Order of March 21, 2002, to make applicable to such commissions the Uniform Code of Military Justice and the Manual for Courts-Martial.

APPROVED this 4th day of May, 2002
Cincinnati, Ohio

the evidence is closed and deliberations occur.

Each of the foregoing omissions and failures in the current rules relate to rights or procedures provided to the accused in a trial under the UCMJ which grew out of the norms of the Geneva conventions. The MCM abides by these norms. For example, the Military Rules of Evidence essentially track the Federal Rules of Evidence.

We recognize that the full protections afforded by the UCMJ are not provided because the Secretary of Defense does not recognize potential defendants as prisoners of war. Nonetheless, we believe the foregoing failures are egregious denials of the fundamental fairness that must be accorded any accused tried by a United States tribunal of any kind. To do less subjects our nation to ridicule by the international community. Worse, it subjects American service personnel captured in a future armed conflict to the same type of unacceptable and unfair treatment by their captors.

The Uniform Code of Military Justice is tried and true. Indeed, as both Congress and the President already had this system set up, two questions seem obvious: What is the legal basis for creating a totally alien system, and furthermore, why is it even necessary? It is important to note that in 1950, when Congress passed the UCMJ, and in 1951, when the first MCM was promulgated under the UCMJ, there was an acute awareness of and specific intent to comply with the then recently ratified 1949 Geneva Conventions. The UCMJ/MCM system unequivocally complied with that. This *ad hoc* committee believes that if we used our courts-martial system, there could be no question of our compliance with international law, and no real issue as to due process for these cases.

In short, the commissions promulgated by the Administration are inappropriate not only because they do not comply with fundamental domestic law (*i.e.*, the UCMJ), but because they do not comply with our treaties, the Geneva conventions, and the basic "laws of war."

What should NACDL do?

We believe the Board of Directors should adopt the proposed resolution below. We believe it lays out what the organization's position should be, which is that the UCMJ and the MCM should, at least, apply to these commissions. And we think the organization should, within its practical resources, work both alone

and with the diversity of coalitions we think should exist to make this vision a reality. In our view, this would include work within the Administration (*e.g.*, DOJ dialogue), in the Congress (legislative efforts), and in the courts, to the extent possible.

Following are some potential areas for NACDL efforts that we think require careful Board consideration.

Administration efforts?

We think that NACDL direct and coalition channels of communication within the Administration must be pursued.

Congressional efforts? Bills?

There is currently proposed legislation in the area. None of these bills would apply the entire UCMJ and MCM to these commissions. A lot of work remains to be done here.

Appropriations for 'Civilian Counsel'

There is no appropriation made for appointed "civilian counsel." Moreover, there do not appear to be any accommodations for such counsel on Guantanamo (assuming that is where these proceedings take place).

We don't know whether Congress would be willing to expand Criminal Justice Act (CJA) lawyer and federal public defender roles and funding to take on the representation of detainees before the commissions. It is also unclear how the appropriations process for appointed civilian counsel funding would work (these are not Article III tribunals).

As best we can discern, absent congressional approval of funding, we don't see any defense counsel role for CJA lawyers or federal public defenders in the military commissions as currently proposed by the Bush Administration. Should there be provisions for civilian counsel and for the appointment of federal defender or CJA counsel? Certainly, and in particular, if we wish to assure the world that the detainees will be receiving due process. However, if we want the federal defenders and CJA counsel involved, we would have to get enabling legislation, as well as funding.

Commissions and court efforts?

One thought we have considered is should NACDL try to dedicate itself in an organized fashion to supplying "civilian counsel" resources to the detainees (along the lines of what it did for the Wounded Knee cause)? We do not have a group view on this. We do believe it warrants cautious and careful discussion by the Board, along the following suggested lines of consideration.

There is a very valid concern, expressed strongly by at least one member of our *ad hoc* committee, that NACDL should not be doing anything for the detainees in Guantanamo that we do not do for our own service personnel. We do not provide civilian counsel for our own military people, nor does CJA, the federal defenders, etc. Is it not wrong, as well as bad policy for NACDL to even appear to be giving people who were captured fighting American forces more consideration than we give to our own service members?

Also, any such effort may be extremely impractical. Recall there are no funds available for such efforts, nor even any accommodations for such counsel on Guantanamo (once again, assuming that is where the proceedings take place).

However, we think the NACDL Board might consider whether any role, within the fold of "civilian counsel," could allow for a "standing" toehold to make court challenges — either before Article III courts (*habeas?*), the U.S. Courts of Appeals for the Armed Forces (All Writs Act and/or *habeas?*), and/or international tribunals — in order to effectuate the rule changes we agree should be made.

About the Author

Jack B. Zimmermann is Co-Chair of the NACDL Military Law Committee.

He is a partner in the Houston firm of Zimmermann and Lavine, PC. A graduate of the United States Naval Academy, he earned his law degree at the University of Texas. A Past President of the Harris County Criminal Lawyers Association (HCCLA), he has also served as Chair of the Criminal Law Section of the Association of Trial Lawyers of America (ATLA). He is a Retired Marine Corps Colonel and a former military trial judge.

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