

NACDL ETHICS ADVISORY COMMITTEE
Opinion 03-04 (August 2003)
Approved by the Board of Directors at the
NACDL Annual Meeting, Denver, CO, August 2, 2003

Question Presented:

The NACDL Ethics Advisory Committee has been asked by the NACDL Military Law Committee the following question: Given the restrictions placed on civilian defense counsel, what are a criminal defense attorney's duties to the client before a Military Commission at Guantanamo Bay under Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (Nov. 16, 2001), and its implementing instructions issued April 30, 2003?

Digest:

It is NACDL's position, by unanimous vote of the Board of Directors on August 2, 2003 having considered MCI-5's Annex B and debating the question, that it is unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation. Defense counsel cannot contract away his or her client's rights, including the right to zealous advocacy, before a military commission, which is what the government seeks in Annex B, although it says it is not, in spite of the clear language of the MCI's.

NACDL will not condemn criminal defense lawyers who undertake to represent persons accused before military commissions because some may feel an obligation to do so. If defense counsel undertakes representation and can abide by these rules, counsel must seek to raise, with knowledge of the serious and unconscionable risks involved in violating Annex B, including possible indictment, *see* note 35, *infra*, every conceivable good faith argument concerning the jurisdiction of the military commission, the legality of denial of application of the Uniform Code of Military Justice (UCMJ), international treaties, and due process of law, including resort to the civilian courts of the United States to determine whether the proceedings are constitutional.

A military or civilian lawyer representing an accused person before a military commission at Guantanamo Bay under the 2001 Military Order must provide a zealous and independent defense, notwithstanding the severe limitations imposed on counsel and the denials of due process and attorney-client confidentiality and privilege by the Military Commission Instructions. The problem with these military commissions is that full zealous representation likely will not and cannot be achieved because of severe and unreasonable limits on counsel imposed by the government, in violation of the UCMJ and treaties the United States has signed guaranteeing rights to the accused before these commissions. Criminal defense lawyers are severely disadvantaged in their duties to represent their clients. The loss of rights can only help insure unjust and unreliable convictions.

A military or civilian lawyer appearing before a military commission at Guantanamo Bay under the 2001 Military Order should not be involved unless the lawyer is qualified to handle death penalty cases in the lawyer's local jurisdiction or in the federal or military courts. Counsel must assume that every one of these cases is presumptively a death penalty case, even though the rules do not require, as in the civilian courts, that the government provide timely notice that it is a death penalty case or even allege an aggravating circumstance to support the death penalty that the government will seek to prove beyond a reasonable doubt.

If counsel appearing before a military commission has an ethical quandary that cannot be resolved, the lawyer should consult with their state bars. Defense counsel are cautioned, however, that if defense counsel seeks outside ethical assistance on an ethical problem, defense counsel must take care in seeking that advice not to reveal matters that defense counsel swore to keep secret because a breach of security could lead to defense counsel being indicted. One must assume that defense counsel's calls from Guantanamo Bay will be monitored, too.

A nation founded on due process of law must provide due process of law to everyone it prosecutes and incarcerates. If it does not, it is no better than the persons it is prosecuting, and it gains no respect from the international community, and even its own citizens.

Ethical Rules, Federal Regulations, Statutes, and Constitutional Provisions Involved:

- U.S. Const., Art. I, § 8 (war powers in Congress) & Art. II, § 2 (President is commander-in-chief)
- “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,”
66 F.R. 57833 (Nov. 16, 2001)
- 28 U.S.C. § 530B
- 28 C.F.R. § 77.3
- Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*
- Geneva Conventions of 1949, III (GPW), IV (civilians)
- Military Commission Order No. 1 (March 21, 2002)
- Military Commission Instructions (April 30, 2003):
 - No. 4: Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel
 - No. 5: Qualification of Civilian Defense Counsel and Annex B (Affidavit and Agreement of Civilian Defense Counsel) (as amended, undated)
- Manual for Courts Martial, Preamble ¶ 2 (2000)
- Rules of Professional Conduct (1983):
 - Preamble: A Lawyer's Responsibilities
 - Rule 1.1 (competence)
 - Rule 1.6 (confidentiality)
 - Rule 1.7(b) (personal conflict of interest)
 - Rule 1.16 (declining or terminating representation)
- ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. ed. 2003)

Opinion:

I. INTRODUCTION

A. NACDL's Previous Committee Positions on The Question Presented

The Military Law Committee has raised a difficult question that has been touched on in an NACDL Board of Directors resolution of May 4, 2002 (quoted *infra*), and is related to our comments to the Department of Justice in opposition to the adoption of 28 C.F.R. § 501.3 in December 2001¹ and **Ethics Advisory Opinion of November 2002² involving the duty of an attorney to a client when the attorney learns that attorney-client communications are subject to monitoring under § 501.3. We concluded as to the latter:**

A criminal defense attorney has an ethical and constitutional duty to take affirmative action to protect the confidentiality of attorney client communications from government surveillance. This includes seeking relief from the jailers, if possible, or judicial review and seeking of protective orders. Defense counsel should argue that the Sixth Amendment right to counsel and a fair trial and the Fifth Amendment right to due process and a fair trial protects attorney-client communications from disclosure to the government.

NACDL Ethics Advisory Committee Op. 02-01, at 1 (Nov. 2002).³

B. NACDL Board Resolution on Military Commissions, May 4, 2002

The NACDL Board of Directors passed the following resolution on Military Commissions on May 4, 2002 where we have already questioned the constitutionality, violations of human rights treaties, and fundamental fairness of the government's plan for the current system of military commissions:

**Resolution of the NACDL Board of Directors
Regarding Military Commissions**

WHEREAS the National Association of Criminal Defense Lawyers, whose

¹ <http://www.nacdl.org/public.nsf/freeform/Leg-atclientdoc?opendocument>.

² <http://www.nacdl.org/public.nsf/freeform/attorneyclient?opendocument>.

³ See generally Ellen S. Podgor & John Wesley Hall, Essay, *Government Surveillance of Attorney-Client Communications: Invoked in the Name of Fighting Terrorism*, __ GEO.J.LEGAL ETHICS __ (Vol. 17, No. 1, 2003) (discussing NACDL's positions in opposition to the promulgation of 28 C.F.R. § 501.3 in NACDL's position paper and NACDL Op. 02-01).

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

We are not alone in questioning the constitutionality and fundamental fairness of these proceedings. Several law review articles by distinguished scholars on constitutional and military law find these military commissions are: an unconstitutional exercise of the War Power reserved to Congress; U.S. Const., Art. I, § 8; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643-46 (1952); an unconstitutional suspension of the writ of habeas corpus, fundamentally unfair and a denial of due process, and a violation of human rights under international law. We cannot add to them here, so we merely cite and rely on them.⁴

We share the concern of these scholars and others⁵ that the stature of the United States as a world power is denigrated by these closed proceedings that are fundamentally flawed in their obvious potential for denial of a fair trial and the appearance of impropriety for failure to follow our own law and international law and utilize the UCMJ for trials before Military Commissions. While the government publicly seeks to assure a fair trial, and we know that defense counsel will zealously defend, as is their sworn duty, the limits on defense counsel, the secrecy of the proceedings, the due process flaws, including the denial of applicability of the UCMJ and protections of double jeopardy⁶ and all other rights we hold as U.S. citizens,⁷ all will lead the rest of the world to believe that the persons tried before these commissions were not treated in accord with our national beliefs

⁴ George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL'Y 635 (2002); Neal K. Katyal, Essay, *Waging War, Deciding Guilt: Trying Military Tribunals*, 111 YALE L.J. 1259 (2002); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649 (2002); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1 (2001); Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DoD Rules of Procedure*, 23 MICH. J. INT'L L. 677 (2002).

⁵ In addition, newspaper and magazine articles and columns too numerous to cite have raised the same concerns.

⁶ Art. 86 of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.S.T.S. 135, 6 U.S.T. 3316, T.I.A.S. 3364, guarantees double jeopardy protection.

⁷ For a comprehensive discussion of lost rights, see Donald G. Rehkopf, Jr., *Military Commissions: A Primer for Defense Counsel* (2003) (CLE paper, first delivered in Detroit, May 2003). See also Jack B. Zimmermann, *Liberty at risk, Part 5: Handling legal aspects of captured al Qaeda detainees*, THE CHAMPION 53, 54-55 (July 2002).

in the “Rule of Law,”⁸ due process of law,⁹ or international law.¹⁰ In a World War II war crimes trial, two dissenting Justices of the U.S. Supreme Court were taken aback by our disregard for “elementary due process” and international law. *See Application of Yamashita*, 327 U.S. 1, 27-28, 49 (1946) (Justices MURPHY and RUTLEDGE dissenting, respectively).

Therefore, our own service members and citizens captured by an “enemy” abroad are even more likely to be subjected to similar denials of due process or atrocities in foreign lands.¹¹ We are not “leading by example” as a free nation should. Our government is

⁸ One cannot help but note that the “Rule of Law” was politically invoked to impeach the last President for lying about a private sexual matter, but now is being ignored for political convenience by many of the same persons who relied on it before in the name of “national security.” The President takes the following oath: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.” All federal officials take a similar oath. These military commissions do not “preserve, protect and defend the Constitution of the United States”—they make a mockery of it.

⁹ The application of the UCMJ to military commissions would provide due process. The current regime does not.

¹⁰ For example, Art. 84 of the Geneva Convention requires that a prisoner of war be tried in a military or civilian court. Manuel Noriega was prosecuted in a civilian court for drug crimes and RICO offenses after he was captured during the Panama invasion. *United States v. Noriega*, 746 F.Supp. 1506, 1525-26 (S.D. Fla. 1990), *later opinion*, 808 F.Supp. 741, 796 (S.D. Fla. 1992) (Noriega was a “prisoner of war” under the Geneva Convention; he was allowed to wear his military uniform during the trial), *aff’d*, 117 F.3d 1206 (11th Cir. 1997), *cert. denied*, 523 U.S. 1060 (1998).

¹¹ *See Noriega*, 808 F.Supp. at 803:

[T]hose charged with that determination [Noriega’s confinement location and status] must keep in mind the importance to our own troops of faithful and, indeed, liberal adherence to the mandates of Geneva III. Regardless of how the government views this Defendant as a person, the implications of a failure to adhere to the Convention are too great to justify departures.

In the turbulent course of international events . . . the relatively obscure issues in this case may seem unimportant. They are not. The implications of a less-than-strict adherence to Geneva III are serious and must temper any consideration of the questions presented. (bracketed material added)

This happened in both the Vietnam conflict and the 1991 Gulf War. In Vietnam, our captured service members were treated as an invading force and denied the benefits of the Geneva Convention. In the 1991 Gulf War, a female pilot and her crew were shot down, and she

demonstrating a disregard for the protections of our own legal system and moral principles by circumventing established domestic and international law. See *Yamashita*, 327 U.S. at 81 (Justice RUTLEDGE dissenting), quoted *infra*. One cannot help but feel that secret trials with secret evidence, evidence sometimes even presented in secret from the accused and defense counsel, with little restrictions on the admissibility of evidence and ignoring the requirement that the protections and procedures of the UCMJ are applicable to military commissions¹² and Geneva Convention will lead to unjust¹³ and unreliable results that will lead to these proceedings being viewed as a mere way station on the way to an inevitable conviction and probable execution.

A nation founded on due process of law must provide due process of law to everyone it prosecutes and incarcerates. If it does not, it is no better than the persons it is

was repeatedly raped, tortured, and otherwise degraded. Zimmermann, note 7, *supra*, at 54. Many other of our shot down POWs were tortured, including men threatened with rape and sexual abuse, and their suffering is recounted at length in *Acree v. Republic of Iraq*, 2003 WL 21537919 (D. D.C. 2003), *later opinion*, 2003 WL 21754983 (D. D.C. 2003).

¹² MANUAL FOR COURTS-MARTIAL, Preamble ¶ 2(b)(2) (2000) requires that military commissions “. . . shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial.”

UCMJ, Art. 36, 10 U.S.C. § 836, provides:

Art. 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

The question then is: May the DoD determine that special rules are required for military commissions that are actually “contrary to or inconsistent with the” UCMJ? We believe not. Congress mandated that application of the procedures of the UCMJ to commissions and tribunals be consistent with it, and the President cannot simply ignore Congress, in his capacity as Commander-in-Chief.

¹³ At the request of the British Prime Minister, our government recently decided to waive the death penalty for two British citizens in the initial six to be tried by the Military Commission and to permit them to have British counsel. Our government is now treating citizens of favored nations differently and granting them more rights than the others accused. A denial of equal protection is a denial of due process under American law and international law.

prosecuting, and it garners no respect from the international community, and even its own citizens.

II. WHAT ETHICAL LAW GOVERNS LAWYERS BEFORE COMMISSIONS?

When a military or civilian lawyer appears before a military commission or tribunal, what ethical law governs? It is clear that lawyers before a military commission must adhere to the Rules of Professional Conduct and are mandated to provide independent and zealous representation.

The problem with these military commissions is that full zealous representation likely will not and cannot be achieved because of limits on counsel imposed by the government.

A. RULES FOR COURTS MARTIAL 502(d)(6)(B) (2000)

The RULES FOR COURTS MARTIAL 502(d)(6)(B) (2000) provides that defense counsel in a military proceeding shall provide zealous representation the same as required of civilian lawyers:

General duties of defense counsel. Defense counsel must: guard the interests of the accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the accused; disclose to the accused any interest defense counsel may have in connection with the case, any disqualification, and any other matter which might influence the accused in the selection of counsel; represent the accused with undivided fidelity and may not disclose the accused's secrets or confidences except as the accused may authorize (*see also* Mil. R. Evid. 502). A defense counsel designated to represent two or more co-accused in a joint or common trial or in allied cases must be particularly alert to conflicting interests of those accused. Defense counsel should bring such matters to the attention of the military judge so that the accused's understanding and choice may be made a matter of record. *See* R.C.M. 901(d)(4)(D).

All prior versions of the MANUAL FOR COURTS MARTIAL or the RULES FOR COURTS MARTIAL required defense counsel to provide zealous, independent representation.

B. 28 U.S.C. § 530B

The "McDade Amendment," 28 U.S.C. § 530B(a), provides as follows:

An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties to the same extent and in the same manner as other attorneys in that State.¹⁴

¹⁴ The Department of Justice must defend the constitutionality of the McDade Amendment. *See* The Attorney General's Duty to Defend the Constitutionality of Statutes, 5 Op.

28 C.F.R. § 77.3 is in accord:

In all criminal investigations and prosecutions, in all civil investigations and litigation (affirmative and defensive), and in all civil law enforcement investigations and proceedings, attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State, as these terms are defined in Sec. 77.2 of this part.¹⁵

Off. Legal Counsel DOJ 25 (1981).

¹⁵ See also 28 C.F.R. § 77.4 on "guidance":

(a) Rules of the court before which a case is pending. A government attorney shall, in all cases, comply with the rules of ethical conduct of the court before which a particular case is pending.

(b) Inconsistent rules where there is a pending case.

(1) If the rule of the attorney's state of licensure would prohibit an action that is permissible under the rules of the court before which a case is pending, the attorney should consider:

(i) Whether the attorney's state of licensure would apply the rule of the court before which the case is pending, rather than the rule of the state of licensure;

(ii) Whether the local federal court rule preempts contrary state rules; and

(iii) Whether application of traditional choice-of-law principles directs the attorney to comply with a particular rule.

(2) In the process of considering the factors described in paragraph (b)(1) of this section, the attorney is encouraged to consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(c) Choice of rules where there is no pending case.

(1) Where no case is pending, the attorney should generally comply with the ethical rules of the attorney's state of licensure, unless application of traditional choice-of-law principles directs the attorney to comply with the ethical rule of another jurisdiction or court, such as the ethical rule adopted by the court in which the case is likely to be brought.

(2) In the process of considering the factors described in paragraph (c)(1) of this section, the attorney is encouraged to consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(d) Rules that impose an irreconcilable conflict. If, after consideration of traditional choice-of-law principles, the attorney concludes that multiple rules may apply to particular conduct and that such rules impose irreconcilable

Pre-McDade Amendment, it was held that there is no preemption of state ethics law when states seek to regulate the licenses of and discipline federal prosecutors, for example. *United States v. Ferrara*, 847 F.Supp. 964, 968-70 (D.D.C. 1993), *aff'd*, 54 F.3d 825 (D.C.Cir. 1995) (D.C. federal prosecutor licensed in New Mexico; no federal jurisdiction in D.C. to question state disciplinary action in New Mexico; state regulation of federal prosecutors was expressly authorized by Congress since 1980 starting in an appropriations act. (Pub.L. 96-132, 93 Stat. 1040, 1044 (1979)); *Matter of Doe*, 801 F.Supp. 478, 485-88 (D.N.M. 1992). Post-McDade cases are in accord. *Stern v. U.S. Dist. Ct. for Dist. of Mass.*, 214 F.3d 4 (1st Cir. 2000); *Mendoza Toro v. Gil*, 110 F.Supp.2d 28 (D.P.R. 2000).

C. Military Regulations

Regulations of the branches of the military provide that military lawyers are governed by the Model Rules of Professional Conduct. Army Reg. 27-26 (1992); AF Rules of Professional Conduct (1989); Navy JAG Inst. 5803.1 (1987).

D. State Bar Influences and Control Under Military Law

Military case law and regulation recognize that military lawyers are still governed by their state bars and rules,¹⁶ as was reaffirmed by § 530B. *See, e.g., United States v. Baker*, 58 M.J. 380, 386 (2003) (applying free narrative approach to client perjury; also applying RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 120 (2000)); *United States v. Wheeler*, 56 M.J. 919, 922 (A.Ct. Crim. App. 2002); *United States v. Beckley*, 55 M.J. 15, 23 (A.F.Ct.Crim.App. 2001); *United States v. Smith*, 35 M.J. 138, 140 (C.M.A. 1992) (state bar

obligations on the attorney, the attorney should consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(e) Supervisory attorneys. Each attorney, including supervisory attorneys, must assess his or her ethical obligations with respect to particular conduct. Department attorneys shall not direct any attorney to engage in conduct that violates section 530B. A supervisor or other Department attorney who, in good faith, gives advice or guidance to another Department attorney about the other attorney's ethical obligations should not be deemed to violate these rules.

(f) Investigative Agents. A Department attorney shall not direct an investigative agent acting under the attorney's supervision to engage in conduct under circumstances that would violate the attorney's obligations under section 530B. A Department attorney who in good faith provides legal advice or guidance upon request to an investigative agent should not be deemed to violate these rules.

¹⁶ Army Reg. 27-26, *supra*, Rule 8.5, cited in John Jay Douglas, *Military Lawyer Ethics*, 129 MIL. L. REV. 11, 14-15 & n. 6 (1990).

Contra: Col. E. Albertson, *Rules of Professional Conduct for the Navy Judge Advocate*, 35 FED. B.J. 334, 336 (1988) ("when conflict exists between the state rule and the JAG rule, the latter prevails") (but, this article pre-dates the McDade Amendment and 28 C.F.R. § 77.3, so the Supremacy Clause is no longer an argument).

duties argued as controlling; declining to decide whether the Supremacy Clause overrides state bar rules); *Rhea v. Starr*, 26 M.J. 683, 684 (A.F.C.M.R. 1988). See also *United States v. Dorman*, 58 M.J. 295, 299 n. 3 (2003) (relying on opinions of state bars for guidance).

The appearance of impropriety standard applies in the military. *United States v. Golston*, 53 M.J. 61, 66 n. 5 (2000); *United States v. Lewis*, 38 M.J. 501, 517 (A.C.M.R. 1993).

E. Duty of Zealous Advocacy under Military Law

Lawyers in the military, like their civilian counterparts, are expected to give independent and zealous representation, without regard to personal consequences. RULES FOR COURTS MARTIAL 502(b)(6)(B), quoted *supra*;¹⁷ *United States v. Nicholson*, 15 M.J. 436, 438 (C.M.A. 1983); *United States v. Rodriguez*, 44 M.J. 766, 776 (N.M.Ct.Crim.App. 1996); *United States v. Thomas*, 33 M.J. 768, 777 (N.M.Ct.Crim.App. 1991), *aff'd in part and rev'd in part on other grounds*, 46 M.J. 31 (1997); *United States v. Whidbee*, 28 M.J. 823, 826 n. 5 (C.G.C.M.R. 1989); *Martindale v. Campbell*, 25 M.J. 755, 757 (N.M.C.M.R. 1987). “[T]he personal honor of the individual” is vitally important in the military. *Officer’s Guide 2* (37th ed. 1973), quoted in Douglas, note 16, *supra*. Zealous criminal defense is a military tradition and duty.

III. DUTIES BEFORE MILITARY COMMISSIONS

Because of the foreign nature¹⁸ of these military commissions established under the March 21, 2002 Department of Defense Military Commission Order No. 1 (MCO-1), criminal defense lawyers are severely disadvantaged in their duties to represent their clients. The loss of rights can only help insure unjust and unreliable convictions. The government on one hand states that zealous representation is required of detailed military counsel or civilian counsel, and then puts severe limits on counsel’s ability to provide a complete defense.¹⁹

¹⁷ In addition, RULES FOR COURTS MARTIAL 104(b)(1)(B) prohibits giving any defense counsel a less favorable rating or evaluation “because of the zeal with which such counsel represented any accused.”

¹⁸ Secretary of Defense Rumsfeld admitted in a press release with the adoption of the directive that these rules were new “to a certain extent.” “DoD Presents Procedural Guidelines For Military Commissions,” http://www.defenselink.mil/news/Mar2002/n03212002_200203213.html. This is an understatement.

¹⁹ “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). “Few rights are more fundamental than that of an accused to present witnesses in his own defense.” *Id.*, 410 U.S. at 302.

There are thus far seven Military Commission Instructions (MCIs) issued April 30, 2003 under MCO-1. The first appears at http://www.defenselink.mil/news/May2003/d20030430_milcominstno1.pdf, and they are consecutively numbered; e.g., ~no2.pdf, ~no3.pdf, etc. We are primarily concerned with MCI-4 & -5.

A. MCO-1, the MCIs, Assigned Military or Civilian Defense Counsel, and Their Duties

1. Defense counsel in general

MCO-1 provides as to defense counsel in ¶ 4(C):

(2) Detailed Defense Counsel.

Consistent with any supplementary regulations or instructions issued under Section 7(A), the Chief Defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission (“Detailed Defense Counsel”). The duties of the Detailed Defense Counsel are:

- (a) *To defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused;*
and
- (b) To represent the interests of the Accused in any review process as provided by this Order.

(3) Choice of Counsel

- (a) The Accused may select a Military Officer who is a judge advocate

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967). Accordingly, it is held that “the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

Our national view of due process does not apply to these military commissions, even though law; MANUAL FOR COURTS MARTIAL, Preamble ¶ 2(b)(2); and the Geneva Convention and other human rights treaties require it.

of any United States armed force to replace the Accused's Detailed Defense Counsel, provided that Military Officer has been determined to be available in accordance with any applicable supplementary regulations or instructions issued under Section 7(A). . . .

- (b) The Accused may also retain the services of a civilian attorney of the Accused's own choosing and at no expense to the United States Government ("Civilian Defense Counsel"), provided that attorney:(i) is a United States citizen; (ii) is admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in reference (c); and (v) *has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings.* Civilian attorneys may be prequalified as members of the pool of available attorneys if, at the time of application, they meet the relevant criteria, or they may be qualified on an *ad hoc* basis after being requested by an Accused. Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2). The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under Section 6(D)(5). (emphasis added)

The second italicized portion refers to MCI-5, Annex B, *infra*. What the government gives in ¶ 4(C)(2) as to Detailed Defense Counsel it takes away as to civilian defense counsel under ¶ 4(C)(3)(b)(v).

2. Office of Chief Defense Counsel for the Military Commissions

MCI-4 ¶ 3 establishes the Office of Chief Defense Counsel and it delineates its duties in assigning Detailed Defense Counsel. Chief Defense Counsel must insure that the accused is always represented by Detailed Defense Counsel even if civilian counsel also represents an accused. *Id.* ¶ 3(B)(11). Chief Defense Counsel will also monitor counsel to seek to ensure zealous representation but also to ensure that defense counsel do not enter into joint defense agreements that create confidentiality obligations beyond the accused.²⁰ ***Id.* ¶ 3(B)(10).** **Moreover, ¶ 3(C)(2) provides:**

²⁰ This is ironic because of a lack of confidentiality, discussed *infra*.

- 2) **Detailed Defense Counsel shall represent the Accused before military commissions when detailed in accordance with references (a) [MCO-1] and (b) [Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” 66 F.R. 57833 (Nov. 16, 2001)]. In this regard, Detailed Defense Counsel shall: defend the Accused to whom detailed zealously within the bounds of the law and without regard to personal opinion as to guilt (emphasis and bracketed material added)**

Detailed Defense Counsel, however, are in the same position as civilian defense counsel except that they may not be barred from the courtroom, but they cannot discuss with their civilian co-counsel what happened in a “closed session.”

3. Civilian Defense Counsel

Civilian Defense Counsel are governed by MCI-5. The burdens on a civilian becoming eligible to serve as defense counsel before a military commission are onerous. To become a defense counsel, civilian lawyers are required to execute an Affidavit and Agreement by Civilian Defense Counsel, MCI-5, Annex B. It provides in pertinent part in ¶ II under “Agreements”:

- B. I will be well-prepared and will conduct the defense zealously, representing the accused through the military commission process, from inception of my representation through the completion of any post trial proceedings
- ...
- H. I understand that there may be reasonable restrictions on the time and duration of contact I may have with my client, as imposed by the Appointing Authority, the Presiding Officer, detention authorities, or regulation.
- I. I understand that my communications with my client, even if traditionally covered by the attorney-client privilege, may be subject to monitoring or review by government officials, using any available means, for security and intelligence purposes. I understand that any such monitoring will only take place in limited circumstances when approved by proper authority, and that any evidence or information derived from such communications will not be used in proceedings against the Accused who made or received the relevant communication. I further understand that communications are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.
- J. I agree that I shall reveal to the Chief Defense Counsel and any other

appropriate authorities, information relating to the representation of my client to the extent that I reasonably believe necessary to prevent the commission of a future criminal act that I believe is likely to result in death or substantial bodily harm, or significant impairment of national security.

- K. I understand and agree that nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s).²¹

It should be apparent to all that the purpose of forcing defense counsel to sign this agreement is so violations of the agreement may be prosecuted under 18 U.S.C. § 1001, as happened in the Stewart case. *United States v. Stewart*, 2002 WL 1300059 (S.D.N.Y. 2002),²² *later opinion United States v. Sattar*, 2003 WL 21698266, *16-17 (S.D.N.Y. July 22, 2003) (dismissal of § 1001 count denied; even if the government could not have asked the question, it had to be answered truthfully or objected to before hand). Her co-defendant's case is *United States v. Sattar*, 2002 WL 1836755 (S.D.N.Y. 2002), *later opinion*, 2003 WL 21698266 (S.D.N.Y. July 22, 2003).

B. The Duty of Zealous Representation

The DoD repeatedly tells us that it expects all defense counsel to zealously defend. We have no doubt that defense counsel will do so, in the highest traditions of duty of American criminal defense lawyers and military lawyers. The problem with MCI-4 & -5 is that it makes it impossible for defense counsel to provide a zealous and ethical defense before these military commissions.

²¹ MCI-5 also provides that civilian defense counsel, *inter alia*:

- will not be paid by the U.S. government (*id.* ¶ 3(A)(1))
- must have a SECRET or higher security clearance which they have to pay for (*id.* ¶ 3(A)(2)(d))
- ensure the commission proceedings are counsel's primary duty and no matter in counsel's private practice or personal life can interfere with the commission's proceedings (*id.*)
- once proceedings have begun, counsel will not leave the site of the proceedings without approval of the Appointing Authority or Presiding Officer (*id.* ¶ II(E)(2))
- will make no public or private statements regarding closed sessions or about classified material (*id.* ¶ II(F))
- agree to abide by all rules and regulations concerning classified material (*id.* ¶ II(G)).

²² Indictment: <http://news.findlaw.com/hdocs/docs/terrorism/ussattar040902ind.pdf>. The government's theory is that the lawyer made a false affirmation under SAMs to the government that she would not disclose certain things learned from the client. Indictment ¶s 7 (attorney signed affirmations) & 10 (attorney violated SAMs).

We give three examples, two involving military tribunals, of lawyers taking highly unpopular cases:

1. The Boston Massacre Criminal Trial (1770)

The British garrisoned troops in Boston starting in 1768. On March 5, 1770, a lone guard was attacked by a mob (estimated to be between 30-60 men and young men). First came shouting and insults. Then they threw objects. One British soldier standing alone was hit first by snowballs, and then by chunks of ice, coal, rocks, paving stones, and sticks. He called for reinforcements, and other troops came to his aid. Only the troops were armed. When a soldier was hit with a stick, he fired into the crowd, and others did, too. Five died and several were injured. Of course, a furor erupted in Boston. The popular sentiment was immediately obvious: this was murder, and the officer in charge, British Capt. Thomas Preston, had ordered the shooting. Eight soldiers and Capt. Preston were turned over to the Sheriff of Suffolk County, Massachusetts.

On March 6th, a friend of Preston's came to lawyer John Adams's office and asked him to undertake their defense because Preston did not order the shooting. Adams, a busy lawyer at the time, took the case. Before he could get involved, however, an inquest was held, and Preston gave a lengthy deposition. 3 LEGAL PAPERS OF JOHN ADAMS 4 (Butterworth, ed., 1965, Atheneum).

An indictment soon followed in the name of the British government, but the case was pursued in the Superior Court of Suffolk County, Massachusetts, *Rex v. Preston* and *Rex v. Wemms*. *Id.* at 46-47. Adams and Robert Auchmuty, Jr. and Josiah Quincy, lawyers for the soldiers, stalled the trials as long as they could so tempers would cool and a fair trial would be more likely. Seven months later, the case came to trial before a Boston and Suffolk County jury. *Id.* at 48. After a week's testimony (*id.* at 50-86), Adams persuaded the jury that the witnesses that put Preston outside ordering his troops to fire were mistaken or lying—Preston only ordered the troops to stop shooting (*id.* at 86-88), and Preston was acquitted.

The soldiers were tried separately less than three weeks later. At the end of the second trial, six of the soldiers were acquitted, and two were convicted of manslaughter.²³

Adams's career was not harmed by his taking the case, although he admitted that his practice dropped off for over a year. He went on to become the second President of the United States. Adams's diary account of why he took the case is pertinent to us today:

The Part I took in Defence of Cptn. Preston and the Soldiers, procured me Anxiety, and Obloquy enough. It was, however, one of the most gallant, generous, manly and disinterested Actions of my whole Life, and one of the best Pieces of Service I ever rendered my Country. Judgment of Death

²³ Their trial comprises the balance of *id.* vol. 3.

against those Soldiers would have been as foul a Stain upon this Country as the Executions of the Quakers or Witches, anciently. As the Evidence was, the Verdict of the Jury was exactly right.²⁴

2. The Nazi Saboteurs Military Tribunal (1942)

In late June 1942, eight “Nazi Saboteurs” entered the United States in civilian clothing allegedly to engage in, what would be called today, domestic terrorism. One of them turned himself in to the FBI and he gave the locations of the rest. The arrests were all made by June 23d. The one who turned himself in apparently was fleeing Nazi Germany and was using this surreptitious entry as a method of gaining asylum. J. Edgar Hoover of the FBI, however, gave the impression that they made the case and captured the saboteurs by their own investigation and actions for the benefit of Germany so they would think that further such invasions would fail. The government gave the impression to the one who came in that it would give him leniency, but it reneged. All eight were charged with being saboteurs subject to trial before a military commission since they entered the country as spies. On July 2d, President Roosevelt issued his proclamation for a military tribunal, and the rules of procedure for the trial were issued on July 7th. The secret trial began on July 11th.

During the trial, defense counsel sought habeas review in the U.S. District Court for the District of Columbia and certiorari in the U.S. Supreme Court, and the trial had a hiatus while the Supreme Court considered the case on an expedited basis, hearing argument starting the day the briefs were filed and carrying over to a following half day, and it promptly denied relief on July 29th with an opinion following months later. *Ex Parte Quirin*, 317 U.S. 1 (1942). The trial resumed immediately and ended on August 1st with convictions and death sentences for six and life for two. The President reviewed the findings and refused to stop the executions. The six were electrocuted in the D.C. Jail on August 8th: Forty-six days from arrest to execution, including a three week trial. The other were granted clemency to a 10 year sentence in the 1950's.

Military defense counsel assigned to the case were Col. Cassius M. Dowell and Col. Kenneth Royall. Col. Carl L. Ristine was shortly appointed to represent the one who came in first because of an apparent conflict of interest, so Dowell and Royall had the other seven (two were arguably U.S. citizens, but that was found irrelevant). By all accounts of the proceedings, many believe that defense counsel provided zealous representation in the face of a trial that was a foregone conclusion, designed to result in conviction, challenging the constitutionality of the proceedings, futilely seeking a writ of habeas corpus challenging the jurisdiction of a military tribunal, and putting on a full (to the extent allowed by the rules) and zealous defense in a completely secret trial held in Washington in the Department of Justice building. The quality of their representation was not known until years later when the papers of the proceeding were released to the public. *See generally* LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL & AMERICAN LAW ch. 3 (Univ. Press of Kansas, 2003).

²⁴ Douglas Linder, “The Boston Massacre Trials: An Account,” <http://www.law.umkc.edu/faculty/projects/ftrials/bostonmassacre/bostonmassacre.html> (2001).

The outcome of the trial was foreordained by Hoover himself, believing that swift trial and execution of the saboteurs would lead the Nazis to believe in the invincibility of the FBI in the saboteurs' capture, but the defense lawyers apparently did all they could for their clients. They did what was expected of American military criminal lawyers and criminal defense lawyers in general: they defended their clients with zeal, creativity, and utmost vigor under undisputably bad circumstances, and they sought civilian review of what they believed was an unconstitutional process. Their reputations as lawyers were not harmed by their zeal, either. After retirement, Col. Royall was appointed Secretary of War by President Truman.

3. The Military Tribunal of General Yamashita (1946)

After the surrender of Japan at the end of World War II, Japanese General Tomoyuki Yamashita was brought before an American military tribunal sitting in the Philippines. He was charged barely three weeks after surrender. He was assigned six American military lawyers to defend him, and only one had extensive trial experience, Capt. Frank Reel. The others proved their mettle²⁵

The tribunal was obviously organized to convict General Yamashita because of the gross denials of due process of law visited upon him. Nevertheless, the defense lawyers served heroically, if nothing else, fighting the government every step of the way, seeking to show that General Yamashita could not be held accountable for what was happening all over the Philippines, in light of how the American invasion fragmented his forces and he could not communicate with them. Essentially, he was being held responsible for the actions of troops under his command, even though he was unable to command them at the time of many of the acts they were accused of.

From the Philippines, Capt. Reel dispatched a handwritten²⁶ petition for writ of habeas corpus to the U.S. Supreme Court, and it was actually heard, but, of course, rejected. *Application of Yamashita*, 327 U.S. 1 (1946). The Supreme Court found the tribunal to be constitutional, but one cannot appreciate what defense counsel and the accused had to endure without reading the dissenting opinions of Justices MURPHY, 327 U.S. at 26-41, and RUTLEDGE, 327 U.S. at 41-81.

Justice MURPHY found that the tribunal violated virtually every tenet of law argued on behalf of the accused Japanese general:

²⁵ See generally FRANK REEL, *THE CASE OF GENERAL YAMASHITA* (U. Chi. Press 1949).

Compare the differing proceedings before the International Tribunal for the Far East (ITFE) where due process actually was accorded, and the results for the individual persons accused were better in T. MAGA, *JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIAL* (U. Ky. Press 2001).

²⁶ They had no typewriters or other basic things to conduct such a trial.

The significance of the issue facing the Court today cannot be overemphasized. An American military commission has been established to try a fallen military commander of a conquered nation for an alleged war crime. The authority for such action grows out of the exercise of the power conferred upon Congress by Article I, § 8, Cl. 10 of the Constitution to “define and punish * * * Offenses against the Law of Nations * * *.” The grave issue raised by this case is whether a military commission so established and so authorized may disregard the procedural rights of an accused person as guaranteed by the Constitution, especially by the due process clause of the Fifth Amendment.

The answer is plain. The Fifth Amendment guarantee of due process of law applies to “any person” who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.

The existence of these rights, unfortunately, is not always respected. They are often trampled under by those who are motivated by hatred, aggression or fear. But in this nation individual rights are recognized and protected, at least in regard to governmental action. They cannot be ignored by any branch of the Government, even the military, except under the most extreme and urgent circumstances.

The failure of the military commission to obey the dictates of the due process requirements of the Fifth Amendment is apparent in this case. . . .

Yamashita, 327 U.S. at 26-27 (Justice MURPHY dissenting). There were no evidentiary or constitutional protections available to the accused (similar to these commissions).

In my opinion, such a procedure is unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind. The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in an army, from sergeant to general, can escape those future [implications]. Indeed, the fate of some future President

of the United States and his chiefs of staff and military advisers may well have been sealed by this decision. But even more significant will be the hatred and ill-will growing out of the application of this unprecedented procedure. That has been the inevitable effect of every method of punishment disregarding the element of personal culpability. The effect in this instance, unfortunately, will be magnified infinitely for here we are dealing with the rights of man on an international level. To subject an enemy belligerent to an unfair trial, to charge him with an unrecognized crime, or to vent on him our retributive emotions only antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world.

Id. at 28-29 (bracketed material added).

Justice RUTLEDGE was less kind to the government. *Id.* at 41-42 (Justice RUTLEDGE dissenting):

More is at stake than General Yamashita's fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. In this stage of war's aftermath it is too early for Lincoln's great spirit, best lighted in the Second Inaugural, to have wide hold for the treatment of foes. It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late.

...

With all deference to the opposing views of my brethren, whose attachment to that tradition needless to say is no less than my own, I cannot believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command. Because I cannot reconcile what has occurred with their measure, I am forced to speak. At bottom my concern is that we shall not forsake in any case, whether Yamashita's or another's, the basic standards of trial which, among other guaranties, the nation fought to keep; that our system of military justice shall not alone among all our forms of judging be above or beyond the fundamental law or the control of Congress within its orbit of authority; and that this Court shall not fail in its part under the Constitution to see that these things do not happen.

Justice RUTLEDGE found the military commission to be unconstitutional, (1) in significant part because of the deficiencies in the rules of evidence that allowed ex parte evidence without authentication (*id.* at 48-49 & n. 9; *id.* at 52-53), something shared by today's military commissions, (2) the lack of an opportunity to prepare a defense to defend against 64 specifications, including the government adding 59 more specifications on the day the trial started (*id.* at 56-61); and a denial of a continuance to prepare a defense (*id.* at 60-61); (3) ignoring of the Articles of War (now the UCMJ) for the trial as required by statute (*id.*

at 61-69); (4) ignoring the Geneva Convention of 1929 (*id.* at 72-78); (5) denying application of the due process clause of the Fifth Amendment to Yamashita (*id.* at 78-81).

Justice RUTLEDGE closed as follows:

I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute.

It was a great patriot who said:

“He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself.”⁴²

42. 2 THE COMPLETE WRITINGS OF THOMAS PAINE (edited by Foner, 1945)
588.

Id. at 81.

Justice RUTLEDGE thus states our concern today: American soldiers and civilians are at risk of being similarly denied due process as happened in Iraq in 1991; *Acree, supra*; if they are captured because of our example of a trial without minimal due process in violation of our own law and international law.

C. Comparison to Today’s Criminal Defense Bar

The kind of defense afforded one accused of crime is an integral part of the American legal tradition, and it is NACDL’s mission:

Ensure justice and due process for persons accused of crime . . .

Foster the integrity, independence and experience of the criminal defense profession . . .

Promote the proper and fair administration of criminal justice.

NACDL Bylaws, Art. II, § 1.

The public and the courts expect criminal defense lawyers to provide a zealous defense to every client, no matter how unpopular that client may be. Representing the unpopular is the job of the criminal defense lawyer, and it is necessary to insure that the rights of all of us are protected and maintained. This has been recognized for hundreds of years. *See Lord*

Brougham’s closing argument in 2 TRIAL OF QUEEN CAROLINE 7-8 (1821), quoted in DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER 188-89 (1973); GEORGE SHARSWOOD, PROFESSIONAL ETHICS 84-84 (1884); *McCoy v. Court of Appeals*, 486 U.S. 429, 435 (1988); *United States v. Wade*, 388 U.S. 218, 256-58 (1967) (Justice WHITE, concurring and dissenting). It is imbedded in the ethical rules by RPC Rule 1.1 (duty to be competent), Rule 1.3 (duty to be diligent), Rules 1.7-1.10 (duty to be independent), and Rule 2.1 (candid advice). *See also* RPC Rule 1.16(b) (duty to withdraw if counsel cannot zealously defend).

If representation of a particular person is or becomes morally repugnant to the lawyer, or simply impossible under the circumstances; RPC Rule 1.7(a)(2); the lawyer should not take the case or may withdraw in a proper case. RPC Rule 1.16(b); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 32, and Comment (2000); Tenn. Op. 96-F-140. Indeed, a lawyer that cannot give the client his or her all should not be in the case because that creates a personal conflict of interest under Rule 1.7(a)(2). A lawyer’s personal conscience or moral code is a valid consideration in determining whether or how to proceed. RPC Preamble ¶ 6. *See also id.* ¶ 14:

The Rules presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Any criminal defense lawyer needs to keep in mind that the government will contend that no law but the MCO and MCIs will apply and that the accused has only the rights the government chooses to give.²⁷ **Defense counsel may feel it necessary to seek civilian court review, as happened in *Ex Parte Quirin* and *Application of Yamashita* even if counsel believes that the courts will unlikely intervene. The scholars uniformly believe that the President has exceeded his authority as Commander-in-Chief when the War Powers Clause of the Constitution resides that power in the Congress. U.S. Const., Art. I, § 8, cl. 11; *see Youngstown Sheet & Tube, supra*. An independent judiciary may, and should, agree.²⁸**

²⁷ *See, e.g.*, Mark Hamblett, “Government Argues Jose Padilla Has Few Rights,” *New York Law Journal* (July 29, 2003) (<http://www.law.com/jsp/article.jsp?id=1058416437338>) involving *Padilla v. Rumsfeld* pending in the Second Circuit (“‘The laws and customs of war recognize no right of enemy combatants to have access to counsel to challenge their wartime detention,’ attorneys for the government said in their brief.”).

²⁸ There is a difficult jurisdictional issue here, too: NACDL believes that Guantanamo Bay, Cuba, was picked for the forum for these military commissions to enable the government to defeat any effort at an accused person obtaining civilian court jurisdiction over him. These

D. ABA's Proposed Recommendation

NACDL also endorses²⁹ the **American Bar Association's proposed Recommendation from its Task Force on Treatment of Enemy Combatants from the ABA's Criminal Justice Section and the Section of Individual Rights and Responsibilities.**³⁰ That recommendation states:

FURTHER RESOLVED, that the American Bar Association endorses the following principles for the conduct of any military commission trials that may take place:

1. The government should not monitor privileged conversations, or interfere with confidential communications, between defense counsel and client;
2. The government should ensure that CDC who have received appropriate security clearances are permitted to be present at all stages of commission proceedings and are afforded full access to all information necessary to prepare a defense, including potential exculpatory evidence, whether or not used, or intended to be used, at a trial;
3. The government should ensure that CDC are able to consult with other attorneys, seek expert assistance, advice, or counsel outside the defense team, and conduct all professionally appropriate factual and legal research, subject to their duty not to reveal or disseminate classified or protected information or to such other conditions as a military commission may determine are required by the circumstances in a particular case after notice and hearing;
4. The government should not limit the ability of CDC to speak publicly, consistent with their obligations under the Model Rules of Professional Conduct, and subject to their duty not to reveal or disseminate classified or protected information, or to such other conditions as a military commission may determine are required by the circumstances in a particular case after notice and hearing;

“enemy combatants” are not being tried in the place of their alleged crimes as required by the Law of War.

Guantanamo Bay has a unique status as leased land which the government claims foils any civilian court's efforts to assert jurisdiction over the detainees. *See Odah v. United States*, 355 U.S.App.D.C. 189, 321 F.3d 1134 (2003).

²⁹ This provision was separately unanimously adopted on August 6, 2003, by the NACDL Executive Committee which acts for NACDL between meetings of the Board of Directors.

³⁰ It is also endorsed by the Association of the Bar of the City of New York and the Beverly Hills Bar Association.

5. The government should provide for travel, lodging, and required security clearance background investigations for CDC, and should consider the professional and ethical obligations of CDC in scheduling of proceedings.
6. The Government should permit non-U.S. citizen lawyers with appropriate qualifications to participate in the defense.
7. To the extent that the government seeks modification of any of the foregoing on the basis of national security concerns, it should be required to do so on a case-by-case basis in a proceeding before a neutral officer and with defense participation.

FURTHER RESOLVED, that Congress and the Executive Branch should develop rules and procedures to ensure that any military commission prosecution in which the death penalty may be sought complies fully with the provisions of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. ed. 2003).

The U.S. Supreme Court virtually adopted these ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases on June 26, 2003 in *Wiggins v. Smith*, 123 S.Ct. 2527, 2537 (2003).

E. Duties of Defense Counsel in a Military Commission

It appears from the rules under which these commissions will operate that defense counsel will be severely disadvantaged. Defense counsel has no ability to share information with co-defendant's counsel or witnesses to attempt to put on a common defense, defense counsel likely will be limited in counsel's ability to even meet with the client, and attorney-client communications will be monitored.³¹

A military lawyer detailed to take the case likely has no choice to get involved, but the military lawyer should refuse to sign the military version of Annex B,³² but civilian

³¹ Defense counsel most certainly will need an interpreter to communicate with the client, and the interpreter will likely be provided by the CIA, DIA, or other governmental entity, and the communications *will* be monitored and likely will be recorded. The government insists that the information so obtained will not be used against the accused in that proceeding, and the future crime exception applies. (MCI-5, Annex B, ¶ II(I) & (J) (defense counsel must reveal future crimes likely to result in death or seriously bodily harm or impair national security; compare RPC Rule 1.6(b)(2))

Since there is no double jeopardy protection in these military commissions, admissions of the accused to counsel could be used in another trial over the same facts or a related trial.

³² We take no position on a military lawyer's obligation to refuse to execute what he or

counsel does have a choice to not apply to be counsel.³³

We also believe that no military or civilian defense lawyer should apply to handle such cases unless qualified to handle death penalty cases in their local jurisdictions or in federal or military courts. These military commission cases must presumptively be considered death penalty cases, but, under the rules of the military commission, counsel and the accused may not learn that the case is being pursued as a death penalty case until the opening statement since there is no fundamental fairness requirement, as in the civilian system, of notice and the pleading of an aggravating circumstance so the accused can prepare for a penalty phase.

It is NACDL's position, by unanimous vote of the Board of Directors having viewed MCI-5's Annex B and debating the question, that it is unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation. Defense counsel cannot contract away his or her client's rights, including the right to zealous advocacy, before a military commission, which is what the government seeks in Annex B.

NACDL will not condemn criminal defense lawyers who undertake to represent persons accused before military commissions. If defense counsel undertakes representation and can abide by these rules, counsel must seek to raise, with knowledge of the extraordinarily serious and unconscionable risks involved in violating Annex B just by doing what we do everyday,³⁴ raising every conceivable good faith argument concerning the jurisdiction of the military commission, the legality of denial of application of the UCMJ, treaties, and due process of law, including resort to the civilian courts of the United States to determine whether the proceedings are constitutional.³⁵

she believes is an unlawful order. *See generally* 10 U.S.C. § 892. We leave it to the individual military defense counsel involved, although NACDL through its Military Law and Ethics Advisory Committees will address specific cases on the request of NACDL members.

³³ Civilian counsel has to be a U.S. citizen under the MCO and MCIs (except for British counsel given special status). If a U.S. lawyer is sought to be retained, the lawyer is cautioned that the Office of Foreign Assets Control operating under the International Economic Emergency Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.*, will determine that the defense lawyer cannot be paid under the Taliban Sanctions, 31 C.F.R. § 545, and the Global Terrorism Sanctions, 31 C.F.R. § 594. *Compare United States v. Lindh*, 212 F.Supp.2d 541 (E.D.Va. 2002) (Lindh's lawyers, however, were not paid with foreign funds).

³⁴ **We strongly caution, however, that counsel must keep in mind that signing Annex B and then refusing to abide by its terms likely will be treated by the government as a crime under 18 U.S.C. § 1001.** The government has done so as to Special Administrative Measures agreements in the Bureau of Prisons.

³⁵ By signing Annex B, defense counsel waives the ability to test the constitutionality of

If counsel appearing before a military commission has an ethical quandary that they cannot resolve, they need to consult with their state bars. Military case law has already settled that issue (as noted above), and 28 U.S.C. § 530B and 28 C.F.R. § 77.3 makes all government lawyers subject to regulation by their state bars.³⁶

NACDL members can also consult with the Ethics Advisory Committee. NACDL will stand behind its members to insure that they can give their clients the best defense possible.

One final note, if defense counsel seeks outside ethical assistance on an ethical problem, defense counsel must take care in seeking that advice not to reveal matters that defense counsel swore to keep secret—it could lead to counsel being indicted. One can assume that defense counsel’s calls to outside counsel from Guantanamo Bay will be monitored, too.³⁷

Notice

This is an opinion only of the Ethics Advisory Committee of the National Association of Criminal Defense Lawyers, as approved by the NACDL Board of Directors. NACDL is a voluntary association of nearly 11,000 criminal defense attorneys with more than 80 state and local affiliates. This opinion is intended to be the Committee’s best interpretation of the Model Rules of Professional Conduct and the rules, statutes, and constitutional provisions involved as they apply to the written facts presented to the Committee, and it is not binding on anyone other than to show the lawyer’s good faith in reliance on it.

the proceedings in a civilian court. Defense counsel cannot waive such a fundamental client right.

³⁶ While it varies from state-to-state, state bar ethics opinions may be binding on the lawyer seeking the opinion, or they may be merely advisory.

³⁷ The government then will seek to impose secrecy requirements on counsel that defense counsel consults.