

101B

**AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ARMED FORCES LAW
REPORT TO THE HOUSE OF DELEGATES**

RECOMMENDATION

RESOLVED, that the American Bar Association urges the amendment of federal law to provide military capital prisoners the same opportunity for the assistance of counsel in seeking federal post-conviction habeas corpus relief as is now provided by federal law for persons sentenced to death in the civilian courts of this country.

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REPORT

I. Overview

A disparity currently exists in the availability of meaningful habeas corpus review in the federal courts for military death-row inmates, as compared to civilian death-row inmates, in that federal law does not provide to military capital prisoners a mandatory right to counsel for habeas corpus relief. Such a mandatory right to counsel is provided for civilian federal and state capital prisoners to pursue federal post-conviction remedies.¹

No military death penalty case has entered federal habeas review since the last military execution occurred in 1961. But with one military death penalty case pending decision at the United States Supreme Court and another seven capital cases in the military appellate system, it is increasingly likely that a federal habeas petition will soon be filed in a military death penalty case. Under current law, a military death row inmate's habeas review will likely be less effective than that of a federal or state death row inmate, due to the absence of a mandatory right to appointed counsel.²

II. Appointment of Counsel

The Anti-Drug Abuse Act gives both state and federal death row inmates a statutory right to appointed counsel during federal post-conviction review. 21 U.S.C. § 848(q) (1994). Counsel appointed under this provision are exempted from the Criminal Justice Act's maximum compensation rates, falling instead under 21 U.S.C. § 848(q)'s more generous \$125-per-hour cap. The statutory right to counsel, however, applies only to actions brought under 28 U.S.C §§ 2254 (habeas relief for *state* prisoners) and 2255 (post-conviction relief for federal *civilian* prisoners).³

Servicemembers bring habeas actions under 28 U.S.C. § 2241. The inmates on the military's death-

¹ Military defendants enjoy the right to free appointed military counsel for trial and direct appeal (including petition for review on writ of certiorari by the Supreme Court) regardless of the ability to pay. This proposal addresses only the right to mandatory appointment of counsel after all direct appellate review has been completed, and the sentence to death has been approved by the President.

² See generally Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 MIL. L. REV. 1 (1994). The recent amendment of the federal habeas corpus provisions in the Antiterrorism and Effective Death Penalty Act of 1996, 104 P.L. 132, has significantly changed the standards and certain other aspects of current federal habeas law. The newly adopted provisions do not address or affect the counsel rights of military capital prisoners. If anything, these provisions reaffirm Congressional intent that capital prisoners be provided counsel for post-conviction remedies as a matter of right. See, e.g., 104 P.L. 132, § 104, making reference to § 408 of the Controlled Substances Act (Anti-Drug Abuse Act), 21 U.S.C. 848.

³ Even though military prisoners are confined under the authority of the United States, they cannot seek post-conviction relief under 28 U.S.C. § 2255. To seek relief under § 2255, a federal prisoner must "move the court which imposed the sentence to vacate, set aside or correct the sentence." For a military prisoner, this requirement presents an impossibility. Unlike federal district courts, courts-martial are not standing courts. Courts-martial are called into existence to hear specific cases, and cease to exist once the case moves into the appellate arena. By the time a sentence to death is affirmed and post-conviction remedies become timely, the sentencing court has long since passed out of existence.

101B

row, located at the United States Disciplinary Barracks (USDB) at Fort Leavenworth, Kansas, are the only death-sentenced habeas petitioners in the country who do not enjoy the Anti-Drug Abuse Act's protections, and there are no alternative provisions in military law or regulation for the mandatory appointment of counsel (military or civilian).⁴ Unlike the Anti-Drug Abuse Act, the Criminal Justice Act specifically authorizes appointment of counsel for indigent petitioners "seeking relief under [28 U.S.C.] section 2241," 18 U.S.C. § 3006A(a)(2)(B) (1994), thus covering incarcerated servicemembers. Such appointment, however, is discretionary. "[E]ven for a death row inmate," appointment under the Criminal Justice Act "is not mandatory or automatic." Arthur W. Ruthenbeck, *You Don't Have to Lose Your Shirt on Death Penalty Cases*, CRIM. JUST., Spring 1988, at 10.

By adopting 21 U.S.C. § 848(q), Congress determined that capital habeas petitioners should be protected by legal representation. The Act, however, failed to extend the right of representation to military death row inmates. The sponsors know of no good reason for not providing condemned servicemembers this protection. In the absence of any sound justification for the distinction, servicemembers should not be denied this most important right.

The military services have been invited to provide views on the proposal, and three have submitted comments. We anticipate the possibility of further comments from the Department of Defense.

The United States Coast Guard has supported the proposal, observing that providing a mandatory right to counsel for military death row habeas petitioners "would be beneficial to the Government" as well as to the accused. Letter from Acting Chief Counsel of the United States Coast Guard to Kevin J. Barry (Jan. 29, 1996). The Coast Guard notes that a mandatory right to counsel would promote effective litigation of issues because habeas petitions drafted by a lawyer, unlike the typical *pro se* petition, will properly and clearly frame issues. *Id.* Furthermore, the Coast Guard observes that appointment of counsel for all military death row habeas petitioners would actually reduce the time it takes to resolve these claims. *Id.* Finally, the Coast Guard maintains that the cost of providing counsel to the small number of military death row inmates would be minimal. *Id.*

The United States Navy has opposed the proposal, largely on the basis that it is "unnecessary," in view of the potential for the appointment of counsel pursuant to the Criminal Justice Act in cases where "the interests of justice so require." Memorandum from Judge Advocate General of the Navy to ABA Standing Committee on Armed Forces Law (Feb. 1, 1996). The United States Air Force has also opposed the proposal, indicating that military personnel have the right to appointed military counsel at all stages of trial and direct appeal, and that "a military prisoner seeking habeas relief from the military appellate courts would be entitled to the appointment of military appellate counsel. Thus, the very relief sought by this proposal, the right to counsel . . . is already in place in the military justice system." Memorandum from the Judge Advocate General of the Air Force to ABA Standing Committee on Armed Forces Law (Nov. 16, 1995). The Air Force suggests that the right to counsel, and the other guarantees within the military justice system, account for the fact that "Congress and the courts have chosen not to extend a mandatory right to

⁴ The Anti-Drug Abuse Act's legislative history contains no indication that Congress intentionally excluded military prisoners from the statute's protections. In light of the great haste with which the Act's counsel provision was drafted and considered, *see* Marcia Coyle, *The Drug Bill's Secret Provision*, NAT'L L.J., Feb. 20, 1989, at 3, 22, it seems most likely that Congress simply overlooked the fact that military death row inmates seek habeas review under a different statutory section than do civilian death row inmates.

counsel . . . to military prisoners in federal habeas petitions." *Id.*

The sponsors have carefully considered these objections, but believe them outweighed by other factors. The proposal affects a petition for relief which is addressed to an Article III federal court, but which deals with a sentence adjudged by a court-martial, an Article I federal court. Courts-martial and military appellate courts, including the Court of Appeals for the Armed Forces, are Article I courts. Viewed from this perspective, although they are federal courts, they are in many ways akin to the system of state courts, which have all the same levels of process -- including trial courts, appellate courts handling direct appeals, and those same appellate courts handling post-conviction petitions. Both state and military death-row prisoners have a right to seek certiorari from the Supreme Court upon the completion of direct review. In both systems, the death-row inmate can seek collateral review by writ of habeas corpus filed in a federal district court. From these perspectives, a military death-row habeas petitioner's position is nearly identical to that of a state death-row habeas petitioner.⁵

In addition, the Standing Committee could discern no reason why a member of the armed forces, tried pursuant to military law, should have less opportunity to obtain meaningful relief by having the assistance of counsel in post-conviction federal habeas petitions than would a civilian tried pursuant to federal (civilian) or state law. It is true that military persons either give up, or enjoy less full application of, the protections afforded by the Bill of Rights, but the courts have long stated that such losses should be no greater than required by military necessity.⁶ The Committee could discern no reason in law or logic why a military prisoner should not enjoy comparable access to counsel for habeas relief as is afforded as a matter

⁵ It would appear that the Congress has always intended that military prisoners have equivalent rights to post-conviction relief as civilian prisoners. In establishing the opportunity for certiorari review of military convictions by the Supreme Court, the Senate specifically indicated its intent that review by Article III courts not limit the availability of other collateral review, and that military prisoners enjoy equivalent rights with other prisoners. The Senate Armed Services Committee stated the intent as follows:

[T]he authority for review of the decisions of the [Court of Appeals for the Armed Forces] by the Supreme Court . . . does not affect existing law governing collateral review in the Article III courts of cases in which the [Court of Appeals for the Armed Forces] has granted review. *The Committee intends that the availability of collateral review of such cases be governed by whatever standards might be applicable to the availability of collateral review of civilian criminal convictions subject to direct Supreme Court review.*

S. Rep. No. 98-53, 98th Cong., 1st Sess. 35 (1983), quoted in Sullivan, *supra* note 1, at 10 (emphasis added).

⁶ See, e.g., *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976), which set forth the principle:

Even though the Bill of Rights applies to persons in the military, "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." *Burns v. Wilson* [346 U.S. 137, 140 (1953)]. However, the burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule. *Kauffman v. Secretary of the Air Force*, 135 U.S. App. D.C. 1, 415 F.2d 991 (1969).

101B

of right to a state or federal death-row inmate.

The Article III judiciary already possesses habeas jurisdiction over every military death penalty case. This proposal addresses whether the exercise of that jurisdiction will be meaningful. Regardless of the protections available to a capital defendant within the military justice system, federal habeas proceedings would be rendered ineffective and the right illusory if the petitioner were not represented by counsel. Congress has determined that the Article III judiciary's review of state and federal civilian death sentences is too important for the appointment of counsel to be discretionary, rather than mandatory. The Article III judiciary's review of military death sentences is no less important.

III. A Proposed Solution

The proposed legislation is designed to provide condemned servicemembers with an equivalent right to counsel as enjoyed by capital prisoners convicted in civilian criminal courts. Attempts to reform the habeas corpus process have been among the most contentious issues before Congress in recent years, and the recent enactment of habeas reforms in the Antiterrorism and Effective Death Penalty Act of 1996 has substantially modified and restricted prior rights of habeas corpus petitioners, but has not affected the situation relative to military capital prisoners' counsel rights.

A proposal to amend either 28 U.S.C. § 2241 or 21 U.S.C. § 848(q) to provide this equality might be unlikely to receive favorable consideration due to the recent enactment of amending legislation affecting habeas corpus, and the probable reluctance of the Congress to again consider amending these statutes. The "Military Capital Habeas Corpus Equal Access to Counsel Act" seeks to accommodate the goal with the least drastic statutory change: a minor modification to the Uniform Code of Military Justice.⁷ Rather than establishing a rigid right to counsel for military capital prisoners, the bill merely calls for the application to military capital habeas cases of the identical right to counsel now provided in the civilian arena. The bill advances only one principle: equality of counsel rights for military death-row habeas petitioners. Quite simply, the bill would give death row inmates at the USDB the same opportunity for the assistance of counsel to challenge their sentences before the Article III courts that death row inmates at San Quentin or the Virginia State Penitentiary, or any federal penitentiary, already have.⁸

The counsel rights sought to be made available to military prisoners are currently available to both

⁷ Alternatively, the possibility of a technical amendment to § 848(q) has been suggested by the Coast Guard, as the approach more likely to be well received by the Congress. Such a technical amendment could be accomplished by inserting into 21 U.S.C. § 848(q)(4)(B), immediately after the words "Title 28", the words "or 2241 by a petitioner sentenced to death by court-martial pursuant to Chapter 47 of Title 10." The Standing Committee recognizes that this technical amendment would be effective to implement the desired counsel right. While the Committee favors the proposed amendment to Title 10 as the more desirable approach, it considers this alternative worthy of careful consideration. The Recommendation, which sets forth the goal, can obviously be accomplished by more than one path.

⁸ The Standing Committee's military advisors have indicated that the desired counsel right could be provided by regulations within the military services, pursuant to 10 U.S.C. 870(e), a statute which gives the Judge Advocate Generals discretionary authority to require that military appellate counsel perform "such other functions in connection with the review of court-martial cases as [the JAG] directs." No such regulations currently exist.

state death-row prisoners challenging their convictions under 28 U.S.C. § 2254 and federal civilian death-row prisoners challenging their convictions under 28 U.S.C. § 2255. The proposed statute adopts application of the rights applied in 28 U.S.C. § 2254. This is partly a matter of an arbitrary choice among equals. More importantly, however, the choice of § 2254 has a theoretical basis, which makes it a clearly more applicable analogy than § 2255.

First of all, an examination of these statutes reveals that the federal remedy provided for in § 2255 requires the prisoner to "move the court which imposed the sentence to vacate, set aside or correct the sentence." For a military prisoner, such a requirement presents an impossibility. Military courts are not standing courts, like federal district courts. Courts-martial are called into existence, often for a specific case, and cease to exist when the case is concluded. By the time a sentence to death is affirmed and post-conviction remedies become timely, the sentencing court has long since ceased to exist.

Secondly, military death-row prisoners' right to seek habeas relief from the Article III judiciary upon the exhaustion of the military justice system's remedies is nearly identical to state prisoners' comparable right to seek federal habeas relief upon exhaustion of state remedies. Accordingly, military death-row inmates filing under 28 U.S.C. § 2241 should have a comparable counsel right as that provided to state death-row inmates filing under 28 U.S.C. § 2254.

For all the reasons set forth, and consistent with the apparent intent of the Congress and the obvious legal and policy considerations, the proposal seems to be a simple and fair way to give equal access to counsel for habeas corpus to military death-row prisoners.

IV. Draft Bill

A draft bill that would accomplish the objective follows.

A BILL

To amend Chapter 47 of title 10, United States Code
(the Uniform Code of Military Justice), to
establish parity between habeas corpus counsel rights
for civilian and military capital cases

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE

This Act may be cited as the "Military Capital Habeas Corpus Equal Access to Counsel Act."

SEC. 2. PROVISION OF COUNSEL: SCOPE OF REVIEW

(a) IN GENERAL--Chapter 47, of Title 10, United States Code, is amended by adding the following new section:

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Armed Forces Law

Submitted by: Kevin J. Barry, Chair, Standing Committee on Armed Forces Law (SCAFL)

1. Summary of Recommendation. Under current law, a military death row inmate enjoys considerably less access to meaningful habeas corpus review than do either federal or state death row inmates because of the absence of a mandatory right to appointed counsel. The Recommendation would remedy this disparity by providing military inmates the same opportunity for counsel for post-conviction relief as now granted to state and federal civilian death row inmates.
2. Approval by Submitting Entity. The SCAFL approved the submission of this resolution at a special telephonic meeting held on May 2, 1996.
3. Previous Submission to the House or Relevant Association Position. There have been no known previous submissions of this or a related position.
4. Relation to Relevant Existing Association Policies. Policies previously adopted by the Association are entirely consistent with this proposal. The Association has opposed limitations on access to federal courts for habeas review for both state and federal prisoners, and has called for provision of competent representation at all stages of the process. *Policies and Procedures Handbook*, "Habeas Corpus" 8/82 (p. 190, 1994-1995 ed.). The Association has long urged the provision of counsel in post-conviction death penalty circumstances, and their adequate compensation, *Id.*, 2/79 (p. 185, 247), 2/90 (p. 185), and has proposed guidelines for the qualification of such counsel (with certain exceptions "as may be appropriate in the military.") *Id.*, 2/89 (p. 185). All military death row inmates are incarcerated in a military prison in the state of Kansas. The Standing Committee knows of no "appropriate" exceptions which ought to be applied to the qualifications of counsel to assist military death-row inmates in seeking post-conviction relief, and this proposal would extend equivalent counsel rights to military prisoners as are now enjoyed by all other federal and state death row inmates.
5. Need for Action at This Meeting. The Court of Appeals for the Armed Forces has affirmed a military death penalty case for the first time since *Furman v. Georgia*, and that case will be decided by the Supreme Court this Term. If the Supreme Court does not grant relief, and the President approves the sentence to death, which could happen in 1996, the case will move into the post-conviction arena. The assistance of counsel to pursue such remedies, presently unavailable, will then be needed. Seven other capital punishment cases are in various states of appellate review, and post-conviction counsel will certainly be needed by some if not all of these.
6. Status of Legislation. There is no pending legislation on this issue. Legislation is required to implement the recommendation.
7. Cost to the Association. There will be no cost to the Association.
8. Disclosure of Interest. Members of the Standing Committee on Armed Forces Law are either active

101B

duty members of the armed forces subject to the Uniform Code of Military Justice, are reserve members of the armed forces intermittently subject to the UCMJ, or are retired members or practitioners in the private or public sector who may on occasion practice within the military justice system. None of the members currently holds a status in direct responsibility for the service-wide administration of military justice. None is felt to have any interest which would directly conflict with the approval of the Report and Recommendation. One member who potentially could be viewed as having a conflict did not participate in the Standing Committee's deliberations.

9. Referrals. This Recommendation and Report has been referred to:

The General Practice Section
The Litigation Section
The Criminal Justice Section
The Section of Individual Rights and Responsibilities
The Judicial Administration Division
The Government and Public Sector Lawyers Division
The Young Lawyers Division
The Law Students Division
The Standing Committee on Legal Assistance to Military Personnel
The Federal Bar Association
The Judge Advocates Association

These referrals have been recently made, and no responses have yet been received.

10. Contact Person (Prior to Meeting).

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11. Contact Person (Who will present the report to the House).

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12. Amendments.

There are no known proposed amendments to the Resolution.