



March 17, 2011

**AMERICAN CIVIL
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The Honorable Steve Thompson, Co-Chair
The Honorable Carl Gatto, Vice-Chair
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Re: House Joint Resolution 18
ACLU Review of Legal Issues

Co-Chair Saddler, Co-Chair Thompson, Vice-Chair Gatto:

Thank you for the opportunity to submit written testimony with respect to House Joint Resolution 18.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions.

Fundamentally, as the ultimate denial of civil rights, and as an unfair and arbitrary system, the ACLU opposes capital punishment.

Where capital punishment is at issue, proceedings must be undertaken with seriousness and all appropriate processes. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 286–89 (1972) (Brennan, J., concurring) (“[d]eath is a unique punishment”; “[d]eath . . . is in a class by itself”); *id.* at 306.

We note that the military has instituted proceedings deliberately to protect both the rights of defendants as well as concerns of society. As such, and given the legal posture of the Hasan matter, it would be improper for the Alaska Legislature to inject the political process into a legal proceeding.

Procedural Status of Hasan Military Proceedings

It is our understanding that the matter of Maj. Hasan is *already proceeding* with a recommendation from the officer exercising special court-martial jurisdiction that it be capital, and that the Lieutenant General commanding Third Corps has the discretion to accept or disregard this recommendation. Thus, as a procedural matter, it does not appear that the Resolution's direction to the Judge Advocate General would be procedurally correct.

Unethical Interference in Legal Proceedings

It is vital to our American legal system that proceedings – both civilian and military – have the highest confidence of the American people, and are respected for their fairness. *Injection of political sentiment into jurisprudential matters is unwise and runs counter to the ethics required of lawyers and judges.*

Military lawyers must follow the Army Rules of Professional Conduct for Lawyers, http://www.loc.gov/rr/frd/Military_Law/pdf/AR_27-26_5-1-1992.pdf. Rule 3.5, concerning Impartiality and Decorum of the Tribunal, states that:

A lawyer shall not:

- (a) seek to influence a judge, court member, member of a tribunal, prospective court member or member of a tribunal, or other official by means prohibited by law;

The commentary notes:

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. *(emphasis added)*

It is difficult to comprehend how a resolution from a political body could be seen as anything other than an attempt to “improperly influence” a proceeding.

Likewise, the ABA Model Code of Judicial Conduct, which we understand to be binding on military tribunals, sets forth two relevant Canons.

Canon 1 - A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.

Canon 2 - A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

<http://www.ajs.org/ethics/pdfs/ABA2007modelcodeasapproved.pdf>

Should the Alaska Legislature pass and transmit to the military HJR 18, it would damage the proceedings and expose the tribunal to questions regarding its independence and impartiality, and raises the specter of the “appearance of impartiality.” Moreover, the injection of a purely political document into the ongoing proceedings might actually give Maj. Hasan an avenue for appeal, should a capital sentence be imposed: that the decision to pursue the death penalty was the product of political influence.

For the above reasons, we urge the Committee not to pass HJR 18 and table any further consideration.

Please feel free to contact the undersigned should you require any additional information. We are happy to reply to any questions which Members of the Committee may have.

Thank you again for the opportunity to share our thoughts.

Sincerely,



Jeffrey Mittman
Executive Director
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