

**Written Statement of Irwin H. Schwartz, Esq. on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

Before the Senate Committee on the Judiciary

**“Reducing the Risk of Executing the Innocent:
The Report of the Illinois Governor’s Commission on Capital Punishment”**

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Irwin Schwartz, of Seattle, Washington, is President of the National Association of Criminal Defense Lawyers ("NACDL"). He is a litigator concentrating in the representation of persons and companies in federal criminal matters. After graduating from Stanford Law School in 1971, he served as a federal prosecutor and then the Federal Public Defender in the Western District of Washington.

Mr. Chairman and Distinguished Members of the Committee:

The National Association of Criminal Defense Lawyers (NACDL) writes to express support for the National Death Penalty Moratorium Act of 2001 and to thank the Committee for its attention to our nation’s deeply flawed capital punishment system. As the preeminent organization for criminal defense lawyers in the United States, NACDL has been an outspoken critic of the death penalty system, which countless studies have shown to be arbitrary, discriminatory and fraught with error. Because we believe that no amount of tinkering will save the death penalty from its inherent flaws, NACDL supports abolition.

Until the time that the United States abandons the death penalty, NACDL seeks reforms that will reduce the risk of executing innocent persons and will assure that all persons have adequate defense services. Absent those reforms, NACDL supports efforts for moratoriums, to halt and study the death penalty in state and federal criminal justice systems.

The fallibility of the death penalty system is beyond question. As pointed out by Supreme Court Justice O’Connor, “If statistics are any indication, the system may well be allowing some innocent defendants to be executed.” Statistics indicate that, since reinstatement of the death penalty in 1973, 101 people sentenced to death in the United States were exonerated after their trials. Many others have had their sentences commuted to life imprisonment because of serious doubts about their guilt. During the same time, 780 people have been executed — in some cases, despite serious questions concerning their innocence.

Exonerations have occurred in 24 of the 38 states with the death penalty. Circumstances as those giving rise to Governor Ryan’s moratorium order are not unique to Illinois. What sets Illinois apart is that it had the courage to face its mistakes and halt executions while it searches for ways to address the injustices revealed there.

In order to minimize the risk of wrongful convictions and bring greater guarantees of fairness to our capital punishment system, we must address core problems, including mistaken eyewitness identification, coerced confessions, unreliable forensic laboratory work, the use of jailhouse informants, and inadequate resources for defense counsel. The Illinois report not only provides a useful model for other moratorium efforts but proposes well-considered reforms including:

Videotaping interrogations. False confessions and false law enforcement testimony alleging that a suspect confessed have resulted in an untold number of wrongful convictions, many carrying death sentences. A videotape recording of an interrogation — from beginning to end — provides the most objective means for evaluating what occurred during the interrogation, what the suspect and law enforcement agents said and did, any alleged waiver of the suspect’s rights to remain silent and to the presence of an attorney, and the accuracy of any statement. Videotaped interrogations have promoted effective law enforcement and provided generally reliable and accurate evidence, thereby furthering the search for the truth in those jurisdictions where it is the required or accepted practice. In the words of the Alaska Supreme Court, such recording is “a reasonable and necessary safeguard, essential to the adequate protection of the accused’s right to counsel, his right against self-incrimination, and, ultimately, his right to a fair trial.”

Narrowing the offense characteristics which trigger death penalty eligibility. According to a recent study, “the more often officials use the death penalty, the wider the range of crimes to which it is applied, and the more it is imposed for offenses that are not highly aggravated, the greater the risk that capital convictions and sentences will be seriously flawed.”

Providing adequate funding for the appointment of counsel and experts. People accused of capital crimes are often defended by lawyers who lack the skills, resources and commitment to handle such serious matters. Recent studies of the death penalty system have found incompetence of counsel — ranging from failure to investigate a case to sleeping through portions of the trial — to be the most common reason for conviction reversals. Critical to preventing wrongful conviction is a strong adversary system in which the defense has adequate resources to investigate a case and mount a defense.

As the Illinois report observed, it is impossible to make the death penalty system infallible, and this somber fact leads to two principled choices: repeal or reform. While NACDL strongly believes that repeal is the better choice, we are nonetheless eager to work with supporters and opponents of the death penalty to prevent killing innocent persons.

Thank you for holding this hearing and for considering our views on this matter.