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DEPARTMENT OF JUSTICE OVERSIGHT: PRESERVING OUR FREEDOMS WHILE DEFENDING AGAINST TERRORISM

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

FIRST SESSION

NOVEMBER 28, DECEMBER 4, AND DECEMBER 6, 2001

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DEPARTMENT OF JUSTICE OVERSIGHT: PRESERVING OUR FREEDOMS WHILE DEFENDING AGAINST TERRORISM

WEDNESDAY, NOVEMBER 28, 2001

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9:05 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kennedy, Kohl, Feinstein, Feingold, Schumer, Durbin, Hatch, Grassley, Specter, Kyl, DeWine, Sessions, and McConnell.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning. This is one of a series of hearings this Committee is holding on the Department of Justice's response to the September 11th attacks and on implementation of the anti-terrorism legislation, the USA PATRIOT Act.

I know I speak for those on both sides of the aisle in beginning this hearing by commending the hardworking men and women of the agencies of the Department of Justice and also our State and local officers for their dedicated law enforcement efforts. We have seen it across this country, and, of course, we have seen it especially in the affected areas of the terrorist attacks.

Now, at the time Congress worked on the anti-terrorism bill, many observed how important congressional oversight would be in the aftermath. And to fulfill our constitutional oversight obligation, Senator Hatch and I invited Attorney General Ashcroft to appear before the Committee today, but he asked to have his appearance put off until next week so that he could spend time with the U.S. Attorneys who are in town today and tomorrow. And on Monday, I learned that the Department was asking that Mr. Chertoff appear as our first witness at this hearing.

I have accommodated both requests by the Attorney General. I look forward to his appearance before the Committee next week on December 6th. In the meantime, our oversight hearing today and additional hearings next Tuesday should help build a useful record on several significant issues.

We are all committed to bringing to justice those involved in the September 11 attacks and to preventing future acts of terrorism. As we showed in our passage of anti-terrorism legislation, Congress

can act promptly to equip the executive branch with the appropriate tools to achieve these goals. The administration requested many new powers, and after adding important civil liberty protections, we empowered the Justice Department with new and more advanced ways to track terrorists.

We passed the bill in record time and with an extraordinarily level of cooperation between Democrats and Republicans, the House and the Senate, and the White House and Congress. The separate but complementary roles of these branches of Government, working together and sharing a unity of purpose, made that bill a better law than either could have made through a unilateral initiative.

In the wake of that achievement, the administration has departed from that example to launch a lengthening list of unilateral actions, and that is disappointing because we had worked together to get the original legislation. Rather than respect the checks and balances that make up our constitutional framework, the executive branch has chosen to cut out judicial review in monitoring attorney-client communications and to cut out Congress in determining the appropriate tribunal and procedures to try terrorists.

The three institutional pillars of our democratic Government are stronger guarantees of our freedoms than any one branch standing alone. America benefits when we trust our system of Government—our system of checks and balances—to work as it should. And most Americans trust that it would. And today we may get some insights into why the administration has chosen this new approach.

Today and in the days ahead we will have an opportunity to explore the Executive action to charter military tribunals that bypass our civilian justice system, to permit eavesdropping on attorney-client communications without court orders, and the circumstances under which hundreds are being detained without public explanation. Whether any or all of these ideas are popular or unpopular at the moment, as an oversight Committee we accept our duty to examine them.

The President's Military Order of November 13 paves an overly broad path to the use of military commissions to try those suspected of a variety of activities. It is a marked departure from existing practices and raises a wide range of legal and constitutional questions and international implications.

As with several of the unilateral steps announced by the administration over the last month, a question that puzzles many about the order on military tribunals is this: What does it really gain us in the fight against terrorism? Would military commissions, however expedient, genuinely serve our national interests in the long term?

As we examine the wisdom of the military order as written, we should consider the risk whether this could become a template for use by foreign governments against Americans overseas. As written, the military order does not incorporate basic notions of fairness and due process, those notions that are the hallmark of American justice. It does not specify a standard of guilt for convicting suspected terrorists.

It decrees that convictions will not be subject to judicial review, a determination that appears to directly conflict with our inter-

national commitments. It allows the Government to tailor rules to fit its proof against individual suspects.

In short, the military order describes a type of military tribunal that has often been criticized by the United States when other nations have used them. William Safire, in a column in the New York Times on Monday, described it as a "fiat (that) turns back the clock on all advances in military justice, through three wars, in the past half-century."

And what would this mean for Americans abroad, for the traveling public, or, in another instance, for the many U.S. humanitarian aid workers who often serve in areas subject to autocratic and unstable regimes? I don't think any of us want, inadvertently, by our example, to encourage a type of rough justice those regimes could mete out under military order.

Moreover, these military tribunals may greatly inhibit cooperation from our partners in the fight against terrorism. Spain recently captured several suspects it believes are complicit in the September 11 attacks.

Last week Spain announced that it would not extradite suspects to the United States if they would be tried by military commissions instead of civilian courts, and now we hear a number of European allies share Spain's concerns.

We are the most powerful Nation on earth, the most powerful Nation history has ever known. And sometimes we indulge in the luxury of going it alone. But in the struggle against terrorism, we don't have the option of going it alone. We need the support of the international community to prevail in a battle that all of us know could last several years. Would these military tribunals be worth jeopardizing the cooperation we expect and need from our allies? That is a question we must ask ourselves.

Apart from these practical issues, questions remain about the executive branch's authority to establish military commissions on its own and without specific congressional authorization. The Constitution entrusts the Congress with the power to "define and punish...Offenses against the law of Nations." On those rare occasions when military commissions have been used in the past, Congress played a role in authorizing them.

This administration has preferred to go it alone, with no authorization or prior consultation with the legislative branch. Now, this is no mere technicality. It fundamentally jeopardizes the separation of powers that undergirds our constitutional system. It may undercut the legality of any military tribunal proceeding.

Finally, there is the danger that if we rush to convict suspects in a military commission—relying on circumstantial or hearsay evidence tailored to serve the Government's case—we deepen the risk of convicting the wrong people, which would leave the real terrorists at large. The administration has cited the landmark case against German saboteurs during World War II. Let's look a little bit more closely at that.

Two of the eight Germans who landed in New York immediately informed the Department of Justice about their colleagues' plans. Immediately. The actions of these men were covered up by J. Edgar Hoover, the FBI Director at the time. It now appears, historians believe, that Mr. Hoover was more interested in claiming credit for

the arrests than in ensuring fair treatment of the two informants, who were then tried with the others, in secret, and sentenced to death before their sentences were commuted to a long time at hard labor.

The lesson is that secret trials and lack of judicial oversight can breed injustice and taint the legitimacy of verdicts. Our procedural protections are not simply inconvenient impediments to convicting and punishing guilty people. They also promote accurate and just verdicts.

So it sends a terrible message to the world that, when confronted with a serious challenge, we lack confidence in the very institutions we are fighting for, beginning with a justice system in the United States that is the envy of the world. Let us have some confidence in those things that make us strong and great as a Nation.

The Justice Department's actions since September 11 have raised many serious questions and concerns, and I hope that today we can seek answers.

Earlier generations of Americans have stared evil in the face. We are not the first Americans to face evil. Trial by fire can refine us, or it can coarsen us. It can corrode our ideals and erode our freedom. But if we are guided by our ideals, we can be both tough and smart in fighting terrorism.

Our parents and our parents' parents faced just as great evils during their lifetime. This country survived and it will again.

The Constitution was not written primarily for our convenience. It was written for our liberty by people who knew in their actions just preceding that could have let them be hanged had they failed. Instead, they wrote into the Constitution and our Bill of Rights those things that would protect them and anybody else who might raise questions.

Many of the choices that we will face after September 11 will test both our ideals and our resolve to defend them. As these choices emerge, let us first pause long enough to ask: What does it gain us?

I look forward to hearing from our witnesses today and to hearing from the Attorney General next week, and I yield to my good friend and colleague, the senior Senator from Utah.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. I want to thank you for convening this timely hearing. The issues we will address today have generated a great deal of attention, and I hope that this hearing will allay the concerns about the steps our Government is taking to protect our Nation from terrorists.

I must say, however, that with only a few notable exceptions, much of the public criticism appears confined to those who make their living carping about the Government—especially Republican administrations. I am reminded of a recent line from the journalist Christopher Hitchens, a self-described man of the left. Criticizing the reaction of many on the left to the war on terrorism, Hitchens charged that "all the learned and conscientious objections, as well as all the silly or sinister ones, boil down to this: Nothing will

make us fight against an evil if that fight forces us to go to the same corner as our own government."

The American people have quite different feelings. In my travels over the holidays last week and before, I was struck by the almost universal praise and gratitude Americans feel toward the President and his administration for the steps they are taking to defeat terrorists abroad and to protect us here at home. To their credit, the American people instinctively know that our country's leaders are acting out of a sincere concern for both our security and our liberty. And unlike some, most Americans also realize that, as Harvard Professor Laurence Tribe—whom no one would accuse of being a member of the "vast right-wing conspiracy"—acknowledged, "Civil liberties is not only about protecting us from our government. It is also about protecting our lives from terrorism." Indeed, most Americans worry that we are not doing enough to thwart potential terrorist attacks, not that we are doing too much. We might be better served if next week's hearing with the Attorney General focused on whether we have done all we can to address the threat of terrorism and to help our President obtain all the tools he needs to fight Osama bin Laden and the Al Qaeda organization.

Still, oversight hearings such as this one today provide a valuable service to us as Members of Congress and to the public at large. We will learn from Assistant Attorney General Michael Chertoff the legal and policy justifications underlying the administration's decision to monitor lawyer-client communications, detain aliens, and employ military commissions for non-citizens accused of terrorism. The six other witnesses—four of whom were called by the chairman—will, one hopes, provide their own dispassionate analysis of the legal and policy issues raised by these powers. One only regrets that, given the importance of this hearing and the need for Congress to act in a bipartisan manner in such times, we were not able to agree to an equal number of experts to present a balanced view and analysis of the issues. Nonetheless, it is my hope that the testimony we do have here will dispel many of the needlessly alarmist misconceptions one hears in the media and from the media.

Mr. Chairman, before I go further, I want to clear up one small misconception concerning the letter you and I recently sent to the Attorney General. It was widely reported that we demanded that he appear and that I shared in your apparent displeasure with his alleged refusal to cooperate with this Committee. I should note that I did join you in asking that the Attorney General come before this Committee, but I strongly disagree with those who charge that the Attorney General has been less than completely responsive to the Congress. And while I do agree with you that we have a legitimate oversight responsibility, I also want to point out that each time we have asked the administration to appear, they have been more than willing to comply.

Since September 11, the Attorney General has, in effect, been the commanding general of our domestic defense, a job that requires around-the-clock attention on his part. He has borne the awesome responsibility of ensuring that our military efforts overseas are not met with more terrorist attacks at home. I for one want to thank the President, the Attorney General, and the rest of our law en-

forcement and intelligence communities for performing a tough job well in a very difficult time.

Now, Mr. Chairman, I also want to clarify some of the misconceptions about lawyer-client monitoring, detention of aliens, and military commissions, which are the issues that we intend to address today.

First, some have charged that lawyer-client monitoring is a flagrant violation of the Fourth and Sixth Amendments to the Constitution. While I agree that we should examine this power closely to determine whether it is a wise policy, the administration's regulation has been carefully crafted to avoid infringing on constitutional rights. It is well-established that inmates and detainees have greatly diminished Fourth Amendment rights while in custody, and the Supreme Court, in Weatherford v. Bursey, upheld the Government's authority to monitor detainee-attorney conversations where there is a legitimate law enforcement interest in doing so. The communications are protected from disclosure, and no information obtained through the monitoring is used by the Government in a way that deprives the defendant of a fair trial. The regulation recently promulgated by the Department of Justice appears to satisfy all of these conditions.

With respect to the detention of aliens, some have accused the Government of unlawfully holding detainees incognito and preventing them from obtaining legal counsel. As the Attorney General made clear at a news conference yesterday, these charges are, at best, irresponsible exaggerations. Those being held are in custody on criminal charges, immigration violations, or pursuant to material witness complaints under longstanding statutory authority. In other words, those people have committed crimes, violated our Nation's immigration laws, or have information critical to the terrorism investigation. And to the extent that they are not released on bond, it is because a judge has determined that they are likely to flee, will likely pose a danger to the community, or, in the case of immigration detainees, are alleged to be deportable from the United States on the basis of criminal—including terrorist—activity.

What is more, the detainees also have access to counsel who can assist them in challenging the legality of the detention. Any alien charged with a criminal offense or held as a material witness has the right to court-appointed counsel. Under longstanding immigration law, any alien charged with an immigration violation is unequivocally afforded a minimum of 10 days to secure counsel and may request a continuance for additional time if necessary. Many public interest groups have stepped in to provide counsel to those immigration detainees who cannot otherwise afford a lawyer.

As for the charge that these people are being held incognito, the Attorney General has, at least in my view, rightly refused to provide a public list of the names of the detainees. I personally agree, as an advocate of personal privacy rights, that such a list would not only alert our enemies to the status of our investigation, it would also violate the privacy of those being held. I find it richly ironic that the same civil liberties groups that adamantly oppose the publication of the names of sexual predators now wax indignant when the Department of Justice refuses to provide the New

York Times, the Washington Post, any other newspaper or any other media source a list of those detained in connection with this terrorism investigation.

Finally, there have been many alarmist and misleading statements about the potential use of military commissions. Most glaring is the claim by some of my colleagues this past weekend that military tribunals are "unconstitutional." The Supreme Court has repeatedly upheld the constitutionality of using military commissions to prosecute individuals charged with crimes under the law of war. Specifically, the Court unanimously upheld the constitutionality of President Roosevelt's use of a military commission to try eight Nazi saboteurs who entered the United States via submarine during World War II in *Ex Parte Quirin*. The Court also upheld the use of a military commission at the end of the war to try the Japanese commander in the Philippines for violations of the laws of war, *In re Yamashita*. As the Supreme Court has explained, "[s]ince our Nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war." That is in *Madsen* v. *Kinsella*.

Furthermore, contrary to recent suggestion, military tribunals can be—and have been—established without further congressional authorization. Because the President's power to establish military commissions arises out of his constitutional authority as Commander-in-Chief, an act of Congress is unnecessary. Presidents have used this authority to establish military commissions throughout our Nation's history, from George Washington during the Revolutionary War to President Roosevelt during World War II. Congress, for its part, has repeatedly and explicitly affirmed and ratified the use of military commissions. Article 21 of our Code of Military Justice, codified at Section 821 of Title 10 of the United States Code, expressly acknowledges that military commissions have jurisdiction over offenses under the law of war.

Now, Mr. Chairman, the oversight we conduct today can be a useful exercise only if we steer clear of distortion and focus on the policy choices we face. That these tools—military tribunals, detainee-attorney monitoring, and detention of aliens—are constitutional is largely beyond dispute. On the other hand, whether, how, and when they should be employed, and against whom, and with what oversight and accountability are questions we have a right to ask. And the administration is wise to answer.

As we confront these policy issues, I would ask my colleagues to heed the strong sentiment of the majority of the American people, both liberal and conservative, to do more than just criticize. It is easy to criticize from where we sit; it is much harder to go to work every day knowing that you are the person in charge of protecting Americans from terrorists. Yes, the administration has been aggressive in using all the constitutional powers at its disposal to protect Americans under these situations. But given what happened on September 11, wouldn't they be unforgivably derelict if they did not do everything in their power? After all, our enemies in this war are not, as many on the extreme left are fond of saying, simply trying to change our way of life. They are trying to kill Americans—as many as they possibly can. And though we may

never know for certain, I for one believe that the steps taken by our law enforcement and intelligence communities have saved us from even more harm.

I think this is a legitimate hearing. It is an important hearing. It is legitimate to ask tough questions. These are important questions. And it is legitimate for us to find out just why the administration has taken the positions that it has in some of these areas. But let nobody be deceived. The administration can take these positions. They have to justify them, but they can take them, and I think there is more than enough information here to justify the positions they have taken.

I myself am very concerned when these type of broad powers are used, but under these circumstances I am less concerned, hoping that we can prevent future terrorist acts. But I want to thank you, Mr. Chairman, for calling this hearing. I think it is the right thing to do. I think you have led us in the proper direction in calling it and in asking the appropriate people the tough questions that need to be asked. And I look forward to hearing from our witnesses.

Chairman LEAHY. Thank you.

Mr. Chertoff, 2 days ago, we received a request that you wanted to testify, and I am happy to concede to your request, with the understanding, of course, that the Attorney General will be here next week. I want to wish you a happy birthday on behalf of the Committee. I am sure this is the thing that you have looked forward to the most as a way to spend your birthday.

[Laughter.]

Chairman LEAHY. So consider it our gift to you. Please go ahead.

STATEMENT OF MICHAEL CHERTOFF, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. CHERTOFF. Thank you, Mr. Chairman. Good morning, Mr. Chairman, Senator Hatch, members of the Committee. I do welcome the opportunity and appreciate the invitation to appear today to talk about the Department of Justice's response to the attacks of September 11th.

Mr. Chairman, I agree that we have taken steps here which represent a departure from some of the things we have done in recent times. But then, again, we are not in recent times. We face an extraordinary threat to our national security and physical safety of the American people of a character that, at least in my lifetime, we have never faced before.

The President and the Attorney General have directed the Justice Department to make prevention of future terrorist attacks our number one and overriding priority. And to that end, we are aggressively and systematically conducting an investigation that is national and international in scope. But I believe we are doing so within carefully established constitutional limits.

In fact, in conducting this investigation, I should point out we are already making use of the tools which the Congress passed in the recently enacted USA PATRIOT Act for which we commend the Congress in acting so swiftly.

Members of this Committee have raised important questions about some of the investigatory steps that we have taken in recent weeks, and I look forward during the course of this hearing to

learning more about the Committee's specific concerns, but also to having the opportunity to assure the Committee that what we are doing is both sound policy and well within constitutional limits.

All of us understand and appreciate the importance of honoring the Constitution's enduring values, even in a time of national crisis. And we believe the Constitution gives us the tools to respond to the threat while remaining faithful to our basic values.

I don't need to restate for the Committee the images we all bear of September 11th: planes crashing into the Twin Towers and the Pentagon, grieving and devastated faces of survivors, the firefighters, the image of firefighters ad police heroes, and even the passengers on United Flight 93 who were forcibly enlisted as combatants against terrorists. All of us have these images burned into our national consciousness.

But as a Nation, the overwhelming, brute fact of Senator is this: This country was wantonly and deceitfully assaulted by an enemy intent on destroying as many innocent lives as possible. Before September 11th, Osama bin Laden and his henchmen wanted to kill thousands of innocent Americans. On September 11th, they succeeded. And since September 11th, bin Laden and his co-conspirators have brazenly announced that they will kill more of us.

In a February 1998 directive, bin Laden ordered his followers "to kill Americans and plunder their money whenever and wherever they find it." Just last month, bin Laden made a video, declaring to his supporters, "The battle has moved inside America, and we shall continue until we win this battle, or die in the cause and meet our maker."

So for those who question whether we are at war, my answer is Mr. bin Laden has declared war on us.

Unlike enemies we have faced in past wars, however, this is an enemy that comes not openly but cravenly and in disguise. The terrorists in the Al Qaeda network plan their terrors years in advance. They are sophisticated, meticulous, and patient.

Of particular concern is their use of so-called sleepers. A sleeper is a committed terrorist sent sometimes years in advance into a possible target location, where he may assume a new identity and lead an outwardly normal life, all the while waiting to launch a terrorist attack. I will give you a example from the 1998 embassy bombing in Nairobi, Kenya.

Mohamed Odeh, who was convicted early this year for participating in that bombing, spent 5 years undercover in Kenya while actively assisting Al Qaeda. During that time he started a fishing business. He got married. He lived an outwardly modest and quiet life. But when called upon, he played a critical role in unleashing the terror that killed hundreds of innocent people.

Now, how are we going to combat the terrorists' use of sleepers? In many ways it is more difficult than looking for the proverbial needle in a haystack because in this instance the needle comes in disguise, disguised as a stalk of hay. We could continue as before and hope for the best, or we can do what we are currently doing: pursuing a comprehensive and systematic investigative approach that uses every available lawful technique to identify, disrupt, and, if possible, incarcerate or deport persons who pose threats to our national security.

Are we being aggressive and hard-nosed? You bet. But let me emphasize that every step that we have taken satisfies the Constitution and Federal law as it existed both before and after September 11th.

Let me now turn very briefly to four areas that I know are of particular concern to the Committee.

First, the number of persons who have been arrested or detained arising out of the investigation into the events of September 11th and the conditions of their detention. There are currently 548 individuals who are in custody on INS charges and 55 individuals in custody on Federal criminal charges. Every person detained has been charged with a violation of either immigration law or criminal law or is being lawfully detained on a material witness warrant issued in connection with a grand jury investigation.

Every one of these individuals has the right to counsel. Every person detained has the right to make phone calls to family and attorneys. Nobody is being held incommunicado.

The identity of every person who has been arrested on a criminal charge is public. We have not released the names of persons being held on material witness warrants because those warrants are issued under seal as related to grand jury proceedings.

Finally, we have not compiled a public list of the persons detained on immigration charges, both to protect their privacy and for legitimate law enforcement purposes. But I emphasize there is nothing to prevent any of these individuals from identifying themselves publicly or communicating with the public.

Second, law enforcement is seeking to interview just over 5,000 persons on a voluntary basis. This list was assembled using common-sense criteria that take into account the manner in which Al Qaeda has traditionally and historically operated. So, for example, persons have been identified for interview because they entered the United States with a passport from one of about two dozen countries where Al Qaeda typically recruits or trains its members. Or people have been identified for interviews because they entered the country on particular types of visas that experience shows tend to be favored by terrorists.

Third, the monitoring of attorney-client communications. This monitor is taking place under a Bureau of Prisons regulation issued on October 31. It arises out of a 1996 Department regulation that permits monitoring of communications of inmates in Federal prisons where there is a substantial risk that if those people communicate with the outside, they may cause death or serious injury to others. The regulation applies only to 16 out of approximately 158,000 inmates in the Federal system.

The regulation or the regulatory amendment that was issued on October 31 extends the pre-existing special regulation to allow the monitoring of attorney-client communications for this very small group of people only if the Attorney General makes an additional finding that reasonable suspicion exists that a detainee may exploit his attorneys to communicate with others to facilitate acts of terrorism. And we have set up substantial safeguards to protect against the misuse of this information, which I will be happy to discuss.

Finally, I would like to turn briefly to the subject of military commissions. Unmistakably, we are at war. Our homeland was suddenly and deliberately attacked from abroad on September 11th. I share with you, Mr. Chairman, an absolute confidence in the ability of our criminal justice system to deal with any kind of criminal act. But I also recognize that the criminal justice system is not the only tool the President must have in exercising his responsibilities not only as Chief Executive but as Commander-in-Chief in a time of war.

The fact is that military commissions are a traditional way of bringing justice to persons charged with offenses under the laws of armed conflict. The Supreme Court has repeatedly upheld the use of such commissions, and there may be sound policy reasons to employ them in individual cases, including urgent concerns about physical security and protection of classified information.

What the President's order of November 13th did was to initiate the process of invoking this traditional constitutional power. The order assigns to the Department of Defense primary responsibility for developing the specific procedures to be used. That process is ongoing, and, therefore, it is simply too early to talk about what the specific details will be about how—

Chairman LEAHY. Excuse me. Somebody must have an urgent phone call. Why don't we let them step out of the room so they can answer it?

Go ahead, Mr. Chertoff.

Mr. CHERTOFF. Thank you, Mr. Chairman. That process of writing these regulations is ongoing, and, therefore, it is simply too early to discuss the specific details of how any such commission would operate. But certain protections are already built into the President's initial order, which, of course, can be expanded upon by rules that are issued by the Department of Defense.

Under the President's order, every person will have the right to an attorney. Under the President's order, there will be a full and fair trial of the charges. And, notably, as an indication of the seriousness with which the President views the exercise of this power, he has taken the responsibility to determine whether trial by commission is appropriate in an individual case.

In this respect, therefore, Mr. Chairman, as in all others, the President has exercised his established constitutional powers to defend against the extraordinary threat which this Nation now faces. And I would be happy to respond to questions the Committee has.

[The prepared statement of Mr. Chertoff follows.]

STATEMENT OF HON. MICHAEL CHERTOFF, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Good morning, Mr. Chairman, members of the Committee. I welcome the opportunity to appear before you today to discuss the Department of Justice's response to the terrorist attacks of September 11th.

The country faces a truly extraordinary threat to our national security and the physical safety of the American people, one that has necessitated an extraordinary redefinition of our mission. The President and the Attorney General have directed the Justice Department to make prevention of future terrorist attacks our top and overriding priority. We are pursuing that priority aggressively and systematically with a national and international investigation of unprecedented scope, but we are carefully doing so within established constitutional and legal limits. We are also taking advantage of the new tools and authorities provided by the USA PATRIOT Act to enhance our investigation. For example, we have, on a number of occasions,

already made use of the new authorities relating to nationwide search warrants, and amendments to 18 U.S.C. § 2703 which allow us to more efficiently obtain e-mail and other information from internet service providers. We have also relied on the Act to begin expanding our sharing of information with the Intelligence Community. I know from the correspondence that the Department has received from members of this Committee that a number of you have in good faith raised important questions about some of the investigatory steps we have taken apart from the new legislation. I look forward during the course of this hearing to learning more about your specific concerns and to explaining—to the extent I can without compromising the on-going investigation—the reasons for the investigative approaches we have taken.

In my opening remarks, I would like to briefly outline the nature of the threat we are facing and explain why we believe the threat necessitates the type of investigative response we have been pursuing.

The images of September 11th—the planes crashing into the twin towers; the grieving and devastated faces of survivors, the heroism of the police, the firefighters and those passengers who were forced into the role of combatants against terrorists—these images and many others have been permanently seared into our collective national consciousness. Each of us has personal recollections of that day—where we were when we first heard, what our first thoughts were, what we did to see if our loved ones were safe. It is a day that each of us will always remember in his or her own way.

But as a nation, the overwhelming, brute fact of September 11th is this: This country was wantonly and deceitfully assaulted by an enemy intent on destroying as many innocent lives as possible. Before September 11th, Usama Bin Laden and his henchmen wanted to kill thousands of innocent American civilians. As we sit her, he and his co-conspirators brazenly announced that they will kill more of us. He and his followers actually believe they have a duty to kill Americans. Those are not my words; those are his words.

In a February 1998 directive, Bin Laden ordered his followers "to kill Americans and plunder their money whenever and wherever they find it." And just last month, Bin Laden gave an inflammatory interview which has been circulating, in the form of a video, among supporters in the al Qaida network. He said: "Bush and Blair. . . don't understand any language but the language of force. Every time they kill us, we will kill them, so the balance of terror can be achieved." He went on: "The battle has been moved inside America, and we shall continue until we win this battle, or die in the cause and meet our maker."

So we have a terrorist organization with thousands of members and followers worldwide, which is fanatically committed to killing Americans on our own soil, through suicide attacks if necessary. And unlike the enemies we have faced in past wars, this is an enemy that comes not openly, but deceitfully, in disguise. We know from what we have learned about the 19 hijackers from September 11thth and what we know about those responsible for earlier attacks against America that the terrorists in the al Qaida network plan their terror years in advance. They are sophisticated, meticulous, and very patient.

Of particular concern is their use of so-called "sleepers." A sleeper is a committed terrorist sent sometimes years in advance into a possible target location, where he may assume a new identity and lead an outwardly normal lifestyle, while waiting to spring into action to conduct or assist in a terrorist attack. Although it would be inappropriate for me to get into details of the pending investigations, I can give you an illustrative example of a sleeper from one of the 1998 embassy bombing cases.

Mohamed Sadeek Odeh was convicted early this year for participating in the August 1998 bombing of the U.S. embassy in Nairobi, Kenya. He was sentenced to life imprisonment in October. The evidence at trial established that Odeh was the technical advisor to those who carried out the bombing, having received explosives training at some of al Qaida's terrorist camps in Afghanistan. One of the key pieces of evidence against Odeh was a memo book that had sketches of the vicinity of the embassy and what appeared to be a suggested location for the bomb truck.

The evidence in the case revealed that Odeh became a sworn member of al Qaida in 1992 in Afghanistan and was subsequently sent to Somalia to train Islamic militants. In 1994, Odeh moved to Mombasa, a coastal town in southeast Kenya. Once in Mombasa, Odeh set up a fishing business with the help of Muhammad Atef, the apparently late military commander of al Qaida. As part of this business, Odeh was given a large boat, which was to be used to transport fish along the Kenyan coast. According to at least one of the co-defendants, this boat was used to transport al Qaida members from Kenya to Somalia in 1997 and was otherwise used for *jihad*.

Odeh got married in Mombasa in November 1994. Several individuals who later carried out the bombings of our embassies in Nairobi and Dar es Salaam attended the wedding. Between 1994 and 1997, Odeh maintained regular contact with various al Qaida leaders, including Wadih el Hage and Mustafa Fadhil, two of the leaders of the East African cell of al Qaida. In 1997, he was sent to Somalia once again to train Islamic militants.

After living in Mombasa for a few years, Odeh moved to Malindi, another coastal town in Kenya, and then later to a small village known as Witu, where he lived until August 1998. At all times, Odeh lived modestly and quietly. For example, in Witu, Odeh lived in a hut, where he had no telephone or other means of communication.

But when the time came to participate in plotting the embassy bombings, Odeh sprang into action. In the Spring and Summer of 1998, he met other al Qaida members in Kenya and discussed ways to attack the United States. In the days immediately preceding the August 7, 1998 embassy bombings, Odeh met repeatedly with al Qaida members who participated in the bombing in Mombasa and Nairobi. Hours before the bombing, Odeh suddenly left Kenya, flying to Pakistan during the night of August 6 and through to the early morning of August 7. Odeh was detained at the Karachi airport (due to a bad false passport), and eventually returned to Kenya.

Odeh is just one example of how an al Qaida member was able over time to integrate himself into the local environment in a way that made his terrorist activities much more difficult to detect. Examples of other sleepers can be found in the Millennium bombing case, which involved planned attacks against various U.S. facilities during the millennium, and in the 1993 World Trade Center bombing.

How can we combat the terrorists' use of sleepers? In many ways it is more difficult than trying to find a needle in a haystack because here the needle is masquerading as a stalk of hay. We could do nothing, and hope we get lucky as we did in the Ressam case. Or, as we are currently doing, we can pursue a comprehensive and systematic investigative approach, informed by all-source intelligence, that aggressively uses every available legally permissible investigative technique to try to identify, disrupt and, if possible incarcerate or deport sleepers and other persons who pose possible threats to our national security.

Without understanding the challenge we face, one cannot understand the need for the measures we have employed. Are we being aggressive and hard-nosed? You bet. In the aftermath of September 11th, how could we not be? Our fundamental duty to protect America and its people requires no less.

Yet it is important to emphasize that the detentions, the targeted interviews, and the other aggressive investigative techniques we are currently employing would all have been legal under the Constitution and applicable federal law on September 10th—Nobody is being held incommunicado; nobody is being denied their right to an attorney; nobody is being denied due process. As federal prosecutors, we have great discretion under the Constitution and well-established federal law to decide how aggressively to investigate and charge cases. In light of the extraordinary threat facing our country, we have made a decision to exercise our lawful prosecutorial discretion in a way that we believe maximizes our chances of preventing future attacks against America.

Before responding to your questions, let me now turn briefly to four areas that I know are of interest to some of you: First, the number of persons who have been arrested or detained arising out of the investigation into the events of September 11th and the conditions of their detention. As the Attorney General indicated yesterday, there are currently 548 individuals who are in custody on INS charges and 55 individuals in custody on federal criminal charges. The Department has charged 104 individuals on federal criminal charges (which includes the 55 in custody), but some of the indictments or complaints are under seal by order of court. Every detention is fully consistent with established constitutional and statutory authority. Every person detained has been charged with a violation of either immigration law or criminal law, or is being lawfully detained on a material witness warrant.

Every one of these individuals has a right to access to counsel. In the criminal cases, and the case of material witnesses, the person is provided a lawyer at government expense if the person cannot afford one. While persons detained on immigration charges do not have a right to lawyers at public expense, INS policy is to provide each person with information about available pro bono representation. Every one of the persons detained, whether on criminal or immigration charges or as a material witness, has the right to make phone calls to family and attorneys. None is being held incommunicado.

The identity of every person who has been arrested on a criminal charge is public. We have not compiled a public list of the persons detained on immigration charges for two reasons: to protect the privacy of those detained and for legitimate law-en-

forcement purposes. If the government publicly released the identities of all those being detained, they could be labeled as being connected to September 11, even if the investigation ultimately concludes there is no link. In addition, there is no reason to advertise to al Qaida which of its members we may have in custody and where they are located, or to give them information that may help them gain insights about the course of our investigation. We have not released the names of persons being held on material witness warrants because they are issued under seal as related to grand jury proceedings in different districts. They cannot be disclosed.

Second, law enforcement is seeking to interview just over 5,000 persons voluntarily. These are people who we believe may have information that is helpful to the investigation or to disrupting ongoing terrorist activity. The list of persons we wish to interview is simply a common-sense effort to identify persons who might conceivably have some information that might be helpful to the investigation-indeed, some of these persons might not be aware that information they have is helpful. The list was assembled by using common-sense criteria that take into account the manner in which al Qaida has operated-for example, that particular countries have been a focus of recuiting. These persons have been identified for interview because they entered the United States with a passport from one of about two dozen countries, which intelligence information indicates al Qaida recruits from. They use particular types of Visas that al Qaida appears to favor. They entered the United States after January 1, 2000. The persons are not suspects, but simply people who we want to talk to because they may have helpful information.

Third, I would like to discuss the monitoring of attorney-client communications under a Bureau of Prisons regulation promulgated on October 31. The Justice Department has amended a 1996 regulation that permits the monitoring of certain communications of inmates who are subject to special administrative measures. This regulation currently applies to only 16 of the 158,000 inmates in the federal system. Under this pre-existing regulation, a very small group of the most dangerous inmates are subject to special administrative measures if the attorney general determines that unrestricted communication with these inmates could result in death or serious bodily harm to others. When that determination has been made, restrictions are put on those inmates' ability to communicate with and contact others. The amendment promulgated on October 31 extends the regulation to permit the monitoring of attorney-client communications for this very small and discrete group of inmates only if the Attorney General makes an additional finding that reasonable suspicion exists that a particular detainee may use communications with attorneys to further or facilitate acts of terrorism.

The regulation provides for important safeguards to protect the attorney-client privilege. First, the attorney and his client will be notified if their communication will be monitored. Second, the team monitoring the communications will have no connection with any ongoing prosecution that involves the client. Third, no privileged information will be retained by the persons monitoring the conversations; the only information retained will be unprivileged threat information. Fourth, absent an imminent emergency, the government will have to seek court approval before any information is used for any purpose from those conversations. And fifth, no information that is protected by the attorney-client privilege may be used for prosecution.This regulation accords with established constitutional and legal authority. Courts have long recognized that a client's communications are not privileged if they are in furtherance of criminal activity. And the Supreme Court has expressly recognized that the government may, consistent with the right to counsel, monitor attorney-client communications if there is a legitimate law-enforcement reason for doing so and if privileged communications are not used against the defendant. Both those conditions are met here.

Finally, I'd like to briefly mention military commissions. We are at war: Our homeland was suddenly and deliberately attacked from abroad on September 11, resulting in the intentional murder of thousands of unarmed civilians. Usama Bin Laden has candidly said he intends to continue his attacks as long as he and his organization are able. In view of such circumstances, military commissions are a traditional way of bringing justice to persons charged with offenses under the laws of armed conflict. The Supreme Court has repeatedly upheld the use of such commissions.

The use of such commissions is not only legally proper; it also represents sound policy. Military commissions are best equipped to deal with the significant security concerns that will necessarily arise from a trial of the necessarily arise from a trial of the perpetrators of the September 11th terrorist attacks. Use of civilian courts could place judges and juries-and, indeed, entire cities where the courts are located-at great risk. Proceedings before military commissions can better safeguard classified information that may be used at the trial of members of al Qaida. Commissions

will be able to consider a wider range of relevant evidence, including intelligence information, helping to render just verdicts. Furthermore, the attacks on September 11 were attacks launched by a foreign power that killed thousands of innocent people, which is not just another matter on the criminal docket. The procedures developed for trials in civil courts are simply inappropriate for the trial of ware crimes. And the use of military commissions will be limited to the trial of war crimes.

The President's order represents just the first step in invoking this traditional power to prosecute those who violate the well-settled law of war. The order assigns the Department of Defense primary responsibility for developing the specific procedures to be used, and because that process is still ongoing, it is simply too early to discuss the specific details of how any such commissions would operate. However, certain minimal protections are already built into the order, which can be expanded upon by regulations promulgated by the Defense Department. The order specifies that all persons will have the right to an attorney. The order specifies that the proceedings must allow a full and fair trial of the charges. In addition, the order requires humane conditions of pretrial detention, including the right to free exercise of religion during detention.

And the President will himself make the determination whether trial by commission will be appropriate in an individual case. I would now be happy to respond to any questions the Committee may have.

Since September 11th, hundreds of federal prosecutors from the Department's Criminal Division and from U.S. Attorney's Offices across the country, along with thousands of federal, state, and local law-enforcement personnel, have been working tirelessly, above and beyond the call of duty, to carry out the investigation.

Chairman LEAHY. A couple of housekeeping things before we begin. Mr. Chertoff, obviously, you can see by the red light you went considerably over the amount of time we had agreed upon, and I had no objection to that because I think, as far as you are speaking for the administration, you should have that opportunity. But because a number of Senators have other hearings and meetings they have to go to, we are going to have to keep to the schedule after that.

Also, as we have asked the Attorney General a number of questions in letters, I hope that we will have those answers before he testifies next week, but also that all members, if they have follow-up questions for Mr. Chertoff, get them to him by close of business today so he can have the answers back to us by the end of this week.

So, starting with that, Mr. Chertoff, I worked closely with the White House Counsel's Office and the Attorney General and actually with you in crafting the new anti-terrorism law. In fact, from September 19, when the Attorney General and I exchanged our legislative proposals, until October 26th, when the President signed the new law, I think I talked with the Attorney General sometimes two and three times a day about the tools needed by our law enforcement and intelligence agencies to prevent terrorist acts and how we are going to bring those people to justice, those who are still alive, who may have been involved in planning this or planning future attacks.

I took those responsibilities very seriously, like all Americans, whether Republican or Democrat, all Americans. We share an abhorrence of the attacks. We wanted the people brought to justice.

But at no time during those discussions—and there were a lot of them, with you, with the President, with the Attorney General. At no time was the question of military commissions brought up. In fact, to the contrary, at the Attorney General's request, the Congress expanded the reach of several criminal provisions so that the authorities in this country are clearly authorized to exercise extra-

territorial jurisdiction in bringing foreign violators to justice in our courts. But less than a month after the ink was dry, the President issues this military order directing the Secretary of Defense to move forward.

My question is this: When did the administration begin considering the use of military commissions rather than our civilian court system to adjudicate charges against the terrorists responsible for the September 11 attacks? When did that start?

Mr. CHERTOFF. Mr. Chairman, I don't know that I can give you a precise date about when it started, nor can I—

Chairman LEAHY. Well, when did you first hear about it?

Mr. CHERTOFF. I certainly have heard discussion about this or heard discussion about this going back some weeks. I think what is important to bear in mind—

Chairman LEAHY. Did you hear discussions about it prior to our discussions here in the Committee, in both our formal and informal discussions with you, as we put together the anti-terrorism—

Mr. CHERTOFF. I would assume—it is probably fair to assume that some people were discussing these matters at various points in time while we were undergoing the process of working out—

Chairman LEAHY. But you didn't feel it at all necessary to tell any of us that you were discussing that as you were asking for these extraordinary powers that we were giving you in the USA PATRIOT Act?

Mr. CHERTOFF. I think, Mr. Chairman, the reason for that is as follows: We are talking about two totally different functions. We came before Congress, and I think rightly so, and with gratitude for Congress' willingness to move swiftly, to enhance the law enforcement powers which we are currently using as we speak in fighting terrorism, and that includes the full panoply of powers we can use to enforce the Federal criminal laws.

At the same time, everybody recognized—and I don't think this is a secret—that the President has responsibilities apart from those as chief of law enforcement.

Chairman LEAHY. But, Mr. Chertoff, with all due respect, you are not answering my question. The administration, as you have testified, is obviously confident that the executive branch has the authority to establish these military commissions, even though there are a number of experts, legal experts, who feel otherwise, who feel that we have to authorize the setting up of the commission and the President has the authority to go forward with it.

But stepping back for a moment from who is right or who is wrong, which legal experts are right and which are wrong, you are a former prosecutor. Like all prosecutors, you know that if you get a conviction, you want it to be upheld. Wouldn't it have made more sense—we are giving you all this extra authority, anyway—at the time when you were asking us for all these things, but apparently not telling us that you were thinking about military commissions, would it not have made some wisdom to come here and say, look, why don't you put in another section authorizing under—as has been done in the past, giving us specific authorization for the President as Commander-in-Chief to set up military commissions, thus removing the legal debate now going on in this country about whether you have the authorization to do so or not?

Mr. CHERTOFF. I think, Mr. Chairman, what I can say is that from the administration's perspective, the issue of military tribunals is a matter that comes under the jurisdiction of the Department of Defense as an extension of the President's power as Commander-in-Chief. I think to the extent the issue arose about how to develop this proposal, it arose on the Defense side of the house, so to speak. It is not normally something, I think, that we would consider raising as part of a law enforcement discussion relating to law enforcement powers.

Chairman LEAHY. So it is those guys' fault, not yours.

Mr. CHERTOFF. I don't think that is what I am saying, Mr. Chairman. I think what I am saying, these are separate and distinct functions, and we want to have both of these functions available to the President, recognizing that we intend to use both and that both have to be available.

But I don't think it was ever our sense that we ought to confuse the two or ought to try to bring the President's power as Commander-in-Chief into the realm of his power as chief executor of the domestic criminal laws.

Chairman LEAHY. But, Mr. Chertoff, don't you feel that most people see a big difference from—I mean, if you capture a number of Al Qaeda members or Taliban or others are captured, as have been by both the U.S. forces and those we have allied ourselves with in Afghanistan, nobody thinks that our special forces have to come in and before they grab somebody say I want to read you your rights. I mean, that is not the situation. We all understand that. We all understand that on the ground, in the battlefields, there are particular standards that are allowed by international law, by convention, and by just plain good sense on the part of the commanders there. But when you talk about bringing them back here and having these trials, then you raise an entirely different question.

For example, were you surprised at what Spain said, having grabbed a number of suspects that I think you and I would agree we would like to see, we would like to talk with, people that you and I would both agree are high on our list of suspects, but now they say they would not extradite these suspects if they are going to be tried before a military commission and they would insist on a civilian proceeding? Did that reaction surprise you at all?

Mr. CHERTOFF. Mr. Chairman, I think we all understand that when we deal with the issue of extradition from foreign countries, other countries sometimes lay down conditions which we have to satisfy before we extradite people. We have had that issue, for example, with respect to the death penalty, and it sometimes, frankly, caused a certain amount of discomfort on our side. So I think we are all well aware of that.

But I think, Mr. Chairman, I agree with your initial point. What this order does is it gives the President the flexibility to use all of his constitutional options when he is faced with the issue of a terrorist. If we were in the battlefield, if there is somebody caught in Afghanistan, the President should have the option not to bring that terrorist back in the United States and put them in a Federal court in New York or in Washington and subject those cities to the danger of having that trial. He should have the option to have those people tried in the field for violations of the law of war.

At the same time, the order leaves it perfectly free for the President to decide that, in order to accommodate extradition requirements of other countries, that we will try suspects in third-party countries in domestic Article III courts.

So nothing that has happened forecloses our options in terms of dealing with foreign governments or forecloses our options in terms of dealing with terrorists in the field. To the contrary, what the President has said is: I want to have the full menu, constitutional menu in front of me so that I can make a judgment based on all of these considerations, safety, relations with other countries, about the appropriate way to handle each individual case.

Chairman LEAHY. My time is up.

Senator Hatch?

Senator HATCH. Well, thank you, Mr. Chairman.

Mr. Chairman, I am a little bit surprised at your surprise regarding the President's issuance of the military tribunal order because you asked the very pertinent question of the Attorney General immediately after the September 25th hearing, which dealt specifically with the issue of military tribunals. In your question, which was fairly lengthy, you stated, "Some have suggested that those responsible for the attacks be treated as war criminals and tried by military tribunals."

In response to the question, the Attorney General pointed to the *Quirin* case, reminding you that in that case, the Supreme Court upheld the legality and constitutionality of military tribunals. And although the Attorney General did not commit at that time to creation of such tribunals, his answer plainly indicated that such tribunals were under consideration. And the Attorney General's responses are dated October 18.

Now, Mr. Chertoff, as you know, many of us on Capitol Hill, including a number of Senators in this room, spent an inordinate amount of time, a considerable amount of time and effort last month to pass the USA PATRIOT anti-terrorism legislation in an attempt to provide law enforcement with the tools it needs to effectively fight terrorism. Now, one criticism of the Department of Justice that I have read since the passage of that bill is that the USA PATRIOT Act has been of little help to the Department in the war against terrorism and, thus, that we should be skeptical when the Department again comes before us seeking additional powers.

Now, in your opening remarks, you briefly indicated that the USA PATRIOT Act had, in fact, been helpful in the war against terrorism. Could you give us a little better idea as to how the USA PATRIOT Act has been of use to the Department in the war against terrorism?

Mr. CHERTOFF. I would be delighted to do so, Senator, because we, in fact, moved literally within hours after the passage of the Act to start to implement it as part of our attack on terrorism.

First and foremost, of course, we have used it to start the process of sharing information between the intelligence side and the law enforcement side, which has been indispensable to satisfying our direction to protect the American people against future acts of terrorism.

We have used, for example, new Section 2703 of Title 18 to obtain information from a cable company that also provides Internet

services which we would not have been able to do under prior law without a specific court order.

We have used it more efficiently to obtain certain information via subpoena from Internet service providers. We have obtained court orders directed to out-of-district Internet service providers for logging information, which, again, has provided us with enhanced efficiency in terms of pursuing this investigation.

We have used the nationwide search warrant provision to obtain relevant information. We have used the emergency disclosure provisions to support our use of information that was provided to us by an Internet service provider.

So these are some examples of the specific ways we have actually deployed the new powers in the Act. In fact, I can tell you personally, not more than a few days ago a request came to me about whether we could get some information about addresses on the Internet, and it was information that was important that we might not have been able to get under the prior law. But because of the new law, I was able to direct people to go out and get an order and make sure we can get that information.

So we have absolutely made use of these tools and intend to continue to do so.

Senator HATCH. Thank you. I was particularly interested in the portion of your remarks in which you addressed the topic of those individuals who have been deterred in connection with the investigation into the events of September 11th. You mentioned an important fact that I think has gone unnoticed and underreported in our country, and that is this: All individuals being detained in connection with this investigation are alleged to have violated either the immigration laws of the United States, the criminal laws of the United States, or they are being held pursuant to the order of a Federal judge as a material witness to a crime.

Now, is that accurate?

Mr. CHERTOFF. That is accurate.

Senator HATCH. Could you speak at a little more length about these detainees, the basis upon which they are being held, and the procedural checks that are involved in the process? Because some of the criticisms I think have been unfounded, very unfair and have almost been hysterical. But the questions are important, and your answers are even more important.

Mr. CHERTOFF. Again, Senator, that is why I welcome the opportunity to testify here and try to set the record straight on some of these things.

First of all, we have the category of people—and they number 55 at this point—who are in custody under Federal criminal charges. They are treated like any other person charged under the Federal criminal laws. They are presumed innocent. They have a lawyer. They appear in open court. They know the charges against them. In due course, they will come to trial and, if convicted, they will be sentenced in accordance with the law.

Then we have a number of people who are held pursuant to material witness warrants for grand jury investigations. Again, the law provides for that. They have the right to a lawyer. They have the right to appear before a judge to have bond set and to argue

about whether they ought to be detained. So, again, that is part of the ordinary process of the law.

Finally, with respect to the immigration side of the house, there are people who are in custody, being detained pursuant to immigration violations. And let's be clear. Those are people who have essentially overstayed their welcome in this country. They don't belong here. They are charged with either having gotten here under false pretenses or having overstayed their visa or in some other fashion violated the immigration laws, which results in them being deportable.

And pursuant to the process that we have in INS, they go before an immigration judge. That judges makes a determination whether to keep them detained or not, and then it is reviewed, again, in the normal course.

So nothing that we are doing differs from what we do in the ordinary case or what we did before September 11th. And, importantly, nobody is held incommunicado. We don't hold people in secret, you know, cut off from lawyers, cut off from the public, cut off from their family and friends. They have the right to communicate with the outside world. We don't stop them from doing it.

And I hope that by putting this in perspective I can dispel some of the mystery that apparently has risen up in the press about what is actually going on.

Senator HATCH. Well, thank you. My time is up.

Chairman LEAHY. Thank you. Also, from just a housekeeping way, we are going to follow the early-bird rule, going from side to side. And on this side, the order of arrival, Senators Kennedy, Feingold, Durbin, and Feinstein; Senator Hatch on your side, Senators Specter, Sessions, Kyl, McConnell, and DeWine, in that order.

Senator Kennedy?

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much. Thank you very much for being here responding to these questions.

I think at the start of these oversight hearings, we are very mindful, all of us are, of the challenge that we are facing with terrorism. There is no monopoly of concern in trying to be effective in dealing with the problems of terrorism. And many of us believe in a comment about the effectiveness of the President in galvanizing not only a coalition but looking at a multidimensional approach in trying to deal with the terrorism. But we need, in this Committee that has special responsibilities, to have the steps that are being taken by our National Government, as you outlined, to be both constitutional and effective. And that is why we want to work with you and the administration to try and do that, not all powers are here, but at least these are matters that we have considerable interest in and have worked on.

I think it is against a background where we have seen this country pass an alien and sedition law, and John Adams now who was recently more acclaimed by David McCullough is the one that signed the alien and sedition laws. We were facing challenges at that time.

We see Abraham Lincoln, who is our most revered President, move ahead and abolish habeas corpus at the time of the Civil War. We saw the Palmer Raids after World War II, and we have just gone through in more recent times the internment—the review of the internment of the Japanese in World War II.

So we have seen many times when the Congress has had hearings, saying we are facing this terror and we are taking steps, and then we have looked back in terms of American history about what this was about, and then we say we should have taken some time and really thought these steps through.

Now we have seen in more recent times where, under our chairman and Senator Hatch, we did the anti-terrorism bill, which was worked out in a bipartisan way. And we have the airport security after a period of time included in the anti-terrorism legislation, with money laundering, which is important, changes in the intelligence worked out in sort of a bipartisan way, which the American people really had a sense that they are participating in. And we are making, I think, important progress in bioterrorism and also in trying to deal with national security on the immigration. And we are working that out with the Congress, and we want to work with you. It is in that framework that I think many of these questions have come and have to be raised.

Now, on the issues of the military courts, I am a member of the Armed Services Committee and they gave us absolutely no indication. We are going to hear in about this Armed Services, so I don't want to put words in your mouth, but they had indicated that they stated unequivocally that Defense Department didn't request the authority. They didn't even appear to have been consulted. That was my impression. Secretary Rumsfeld will have a chance to answer. Maybe you would want to make a comment in just a minute on this.

There are concerns that many of us have about the military tribunals. Many of us, including bipartisans have been critical of these military tribunals. We have been most particularly critical when it has involved Americans in Peru. There we found an American being tried, and the State Department, Republicans and Democrats all talked about the failure of the military courts in Peru intentionally for not meeting internationally accepted standards of openness, fairness, and due process. We have stated that military courts in Egypt do not even ensure civilian defendants due process for an independent tribunal. We have stated that military tribunals in the Sudan do not provide procedural safeguards. We have criticized Burma, China, Colombia, Malaysia, Nigeria, Russia, and Turkey on similar grounds.

Yet now we are calling for the use of military tribunals. The concern is: Aren't we doing exactly what we have criticized other nations for doing? That would be one question. Let me mention just three items.

The second is with regard to the monitoring of the attorney-client communications. We have a process that is already available for those that are being imprisoned that is being utilized by the Justice Department and taking on the tough issues, for example, in the Mafia and drug kingpins. And we haven't had testimony that hasn't been effective, and we have a process and procedure. And

you have outlined a completely new kind of way of dealing with it. And we are asking ourselves, well, why don't you use the one that has been tried and tested and has been effective? We didn't know that that wasn't effective and wouldn't be just as effective in dealing with the kinds of challenges that you are facing today. It would have been interesting to know why you need the extra kind of dimension when many of us feel and continue to feel that the problems of the Mafia and drug kingpins enormously important.

The final point I just want to mention deals with the questioning of the Middle Eastern detainees and the massive questions whether it is racial profiling or not racial profiling. We have seen where our profiling technique failed us abysmally with regard to the airlines. We were profiling the wrong people. And that is—I won't take the time to do it.

And now we have the criticism of the former leaders in the FBI that have had solid records of achievement and accomplishment in dealing with the problems of terrorism, men and women of distinguished careers and who are tough on these issues who make the comments that they think are not only guts the values of our society but is also extremely ineffective.

Could you—

Mr. CHERTOFF. Let me try, Senator.

Senator KENNEDY. Fine. Thank you. I know I have given you a lot, but—

Mr. CHERTOFF. I have taken notes, and I will try to deal with each of these in turn. Let me not venture into the field of what the Department of Defense will tell the Armed Services Committee. I think that really falls within their jurisdiction.

On the issue of military commissions, I think we are aware of the fact that there has been criticism of some tribunals overseas. The fact of the matter is, whether you have a civilian tribunal or military tribunal, it is possible to have a fair one and it is possible to have an unfair one. It is not how you characterize it. It is how you implement it.

This country does have a long tradition of using military commissions, and using them fairly. I was surprised to learn, as I did reading in this area, that the Nuremberg tribunal in the post-war period in 1945 was actually a military commission that was constituted under the laws of war. And I don't think anybody doubts that that was a fair tribunal.

So the fact that you have a military commission does not betoken any unfairness. To the contrary, I think the President has made it abundantly clear he expects that the procedures that will be written will require a full and fair hearing that comports with reasonable standards of what fairness are. And I think the Department of Defense is going to produce a set of rules that comports with those standards the President has laid down.

So I don't think that we need to be concerned that we are doing something here that we are criticizing others for doing merely because we are using the well-accepted constitutional power to have a military commission. I think we have to have confidence that the process of developing the rules will, in fact, meet the President's directive.

Let me then turn briefly to the issue of attorney-client monitoring, and, again, it is not a matter which I think we undertake lightly, as indicated by the fact that there are only 16 inmates in the country who are even eligible for this. And to my knowledge, nobody has at this point been subjected to this new rule.

But we are dealing with individuals who are sworn enemies of the United States, and I can tell you from my personal experience doing organized crime cases, I know that we had problems in the past with organized crime figures conducting business from jail and even using lawyers to do that.

But in those instances, to be honest, the worst that happened was they continued to conduct criminal activity, but they didn't pose an actual threat to large numbers of Americans. As bad as the Mafia is—and I take a back seat to no one in that respect—they weren't about the business of massacring hundreds of American citizens. So when we face that threat, the question is: Can we take steps as part of our management of the Federal prison system to make sure that people are not abusing their power and their right with respect to attorneys to communicate with the outside world, to initiate or encourage terrorist attacks that can cause massive damage to the United States?

What we have done, though, Senator, taking account of the law in this area, is to put in steps that afford the maximum amount of protection to the effective attorney-client relationship while allowing us in these rare instances to monitor in case there is information that relates to threats.

Nothing that comes through this monitoring process that is privileged is going to be retained under the regulation. Nothing that is privileged is going to be transmitted to anybody outside of the monitor and team, and it cannot be used by the prosecutors in the case. And we have experience using these kinds of devices in other situations, so I think we are confident we can make them work. And of course at the end of the day, if someone is prosecuted, a judge is going to have the opportunity to review whether in fact we have mishandled the information.

Let me finally turn to the issue of the interviews of detainees. Let me begin by saying, Senator, this is the least intrusive type of investigative technique that one can imagine. This is not rousting people. This is not detaining people. This is not arresting people. This is approaching people and asking them if they will respond to questions. So there is a minimal intrusion involved here.

We have emphatically rejected ethnic profiling. What we have looked to are characteristics like country of issuance of passport, where someone has traveled, the manner in which they have entered, the kind of visa they have come in on, and we have refined it based upon our experience gathered over the last several years in dealing with terrorists. And one measure of how precisely we have wielded the scalpel is the fact that we are talking about 5,000 people out of millions of people who come in and out of the country every year. So we have been careful in using this technique, and we have also been careful to make this a voluntary process.

Finally, I did read the article in the "Washington Post", and let me address it by saying this. I do not know where the people who were interviewed, how they get an understanding of what we are

doing. But I can make it clear that we are continuing to use the traditional techniques of investigation including long-term undercover operations, wiretapping, everything that we have been able to use in the past that has produced results. But we have also decided to use additional techniques, and one of the things we have done is we have imposed upon ourselves the discipline of asking: Is this investigation yielding fruit, or do we need to take the case down and now try to bring charges against somebody?

Again, my experience in the past is that sometimes these undercover operations or long-term wiretaps languish as the investigators wait for manna to drop from heaven that is going to be the smoking gun. We have to be disciplined enough to recognize there is a cost involved in protracting investigations, and we have to be disciplined enough to pull the trigger when the time has come to bring the case down. So that is what we are doing, we are using the old techniques, but we are using new techniques too. And we are not foreclosing things that have worked, but we are, again, creating the broadest range of options in being effective in fighting terrorism.

Senator KENNEDY. My time is up. Thank you.

[The prepared statement of Senator Kennedy follows:]

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Two months ago, the United States was attacked by terrorists who sought to disrupt our government and our way of life. They have failed. Americans today are more united than ever in our commitment to win the war on terrorism and protect the country for the future. An essential part of meeting this challenge is protecting the ideals that America stands for here at home and around the world.

Soon after the vicious attacks of September 11, Congress approved strong bipartisan legislation authorizing the use of force against the terrorists and those who harbor them. Congress also quickly enacted legislation to provide aid to victims and their families, and to rebuild Lower Manhattan. We enacted airport security legislation, and an antiterrorism bill that gives law enforcement and intelligence officials enhanced powers to investigate and prevent terrorism. I'm optimistic that Congress will soon approve bipartisan legislation to improve border security and to strengthen our defenses against bioterrorism.

As these examples demonstrate, our system of constitutional government has served us well in this time of crisis. Now is the time to defend our Constitution—not to undermine it.

At today's hearing, and at the hearings that will follow, the Committee will consider the policies and actions by the Administration since September 11 that have raised serious questions about basic liberties protected by the Constitution. Some of these policies may be justified, but they are difficult to evaluate, because of the Justice Department's failure to provide information requested by members of the Committee.

Many of us have serious doubts about both the constitutionality and the wisdom of the President's plan to establish military tribunals to try foreign suspects apprehended within the United States or overseas. The Constitution gives Congress the power to define and punish "offences against the law of nations," and to create courts inferior to the Supreme Court. Yet Congress has not expressly authorized the kind of military commissions contemplated in the President's order.

Advocates of military tribunals have argued that foreign terrorist suspects do not deserve the same constitutional safeguards—such as the right to counsel, proof beyond a reasonable doubt, and appellate review—that are given to U.S. citizens in normal criminal cases. These safeguards, however, exist to identify the guilty and protect the innocent. They are not luxuries to be dispensed with in times of crisis. Just this year, the Supreme Court re-affirmed the principle that non-citizens within our borders—whether lawful, unlawful, temporary, or permanent—are entitled to the same fundamental constitutional rights as U.S. citizens.

For many years, the United States has strongly criticized the use of military tribunals in other countries. If we engage in such practices now, it could undermine

our position of authority in the world, and limit our ability to extradite terrorist suspects apprehended by our allies.

In recent years, Congress has expanded the jurisdiction of federal courts to cover a wide range of terrorist offenses, and has implemented innovative court procedures to protect government secrets. International tribunals have been used effectively to try suspected terrorists, in the tradition of Nuremberg, Yugoslavia, Rwanda, and the Pan Am 103 bombing. The Administration has not adequately explained why secret, ad hoc military tribunals should be used, instead of established legal forums, either domestic or international, to bring the perpetrators of the September 11th attacks to justice.

I am also deeply concerned about the decision of the Department of Justice to monitor attorney-client communications. Detainees have long had a constitutional right to speak with their attorneys on a confidential basis. The Department's new policy allows monitoring to take place without judicial supervision and without even a showing of misconduct by the attorney involved. The Department bears a heavy burden to explain why existing procedures for investigating crimes and fraud by attorneys are inadequate, and why this unprecedented obstruction of the right to counsel is constitutional.

Similarly, many questions have been raised about the 1200 people or more who have been detained-since September 11. Few of these detainees have been linked to terrorist activities. Last month, I joined other members of the House and Senate Judiciary Committees in asking Attorney General Ashcroft about the status of these detainees. We also asked for a briefing. We have still not received a full accounting of everyone who has been detained and why.

Finally, many of us are also concerned about the Administration's decision to question 5,000 immigrants, almost all of whom are Middle Eastern, who recently entered the country legally.

Unfortunately, the Department has failed to provide Congress with sufficient information to perform its essential oversight role on each of these significant issues. I hope that Administration officials will be more forthcoming at these Committee hearings.

In a speech in 1987, Justice William Brennan observed that the United States had repeatedly failed to preserve civil liberties during times of national crisis—from the Alien and Sedition Acts of 1798, to the internment of Japanese Americans during World War Il—only to later realize "remorsefully. . .that the abrogation of civil liberties was unnecessary." As we face another crisis today, I am hopeful that we can avoid the errors of the past. To do this, the Administration and Congress must share information and work together, as we did in the weeks immediately following the September 11th attacks, to bring the terrorists to justice, to enhance our security, and to preserve and protect our Constitution.

Chairman LEAHY. Thank you. I would also note I will put in the record—because Senator Hatch had mentioned my question to the Attorney General on military commissions—actually in the hearing record I ask specifically and directly whether the President was considering this option, and the Attorney General answers, it would be inappropriate and premature basically to answer that. I will put that in the record, and of course, everybody can draw whatever conclusion they want.

Chairman LEAHY. Senator Specter.

STATEMENT HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you.

There is no doubt that the atrocious, barbaric conduct of the terrorists on September 11th require very, very strenuous response by the United States, and there is a very heavy burden on the Government today to do everything in its power to prevent a recurrence and to protect this country and its citizens from bioterrorism, and that is a very heavy responsibility which I believe the Congress is facing up to squarely with the very prompt enactment of the Resolution for the Use of Force two days after September 11th, the ap-

propriation three days after September 11th of $40 billion, and subsequent action in providing an antiterrorist bill.

The question arises as to the scope of what our response will be and that is a matter which the Constitution gives to the Congress, the exclusive authority to establish military tribunals. Now, Congress has delegated some authority to the President and it is cited in the President's Executive order, and it provides that there shall be, this is the statutory language, "procedures to be prescribed by the President, 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 United States District Courts."

So that is the President's authority to follow the regular rules of evidence unless it is impracticable to do so. And that is the issue which requires some analysis. It was surprising to me that the Attorney General did not consult with any member of this Committee. A year ago he sat on this side of the bar of this Committee. We have your statement that it is necessary to be aggressive and hard-nosed. I agree with you completely about that. On this dias you have quite a number of former prosecutors who have been charged with or perhaps complimented as being aggressive and hard-nosed.

Where you have the Executive order providing skeletal outline which authorizes conviction by a two-thirds vote of a quorum, in military court martial if you have a sentence of 10 years or more, requires a three-quarters vote. If you have the death penalty, it requires a unanimous verdict. And I do believe that the kind of conduct we are calling for here calls for the death penalty. There is no provision in the Executive order for a judicial review. The traditional lines of going into Federal Court have been eliminated with only review provided by the President or by the Secretary of Defense. The rules of evidence have been abrogated so that evidence may be admitted and if it is considered to have probative value by a reasonable person.

The sequence of proceedings under the detention line provided that a rule was signed into effect on October 26th. It went into effect on October 29th without any customary comment period, and then it was published in the "Federal Register" on October 31st. And here again a question arises as to consultation or at least notification of the Committee.

There is in the public media very substantial critical comment by former FBI Director Bill Webster and other FBI officials about the procedures which are being utilized, all of which leads to the thought that these really are vital matters. We want to be sure that no stone is left unturned, and that the Department of Justice or the Department of Defense have every tool available.

What I would like you to comment on is the sequence for the detention order, as to whether the rules were followed as to a comment period, and also as to the specifics on the Executive order as to certain key points. In your statement you say that the right to counsel is preserved. I would be interested to have you show me that in the Executive order.

The Executive order has a provision that the regulation shall provide as to the "qualifications of attorneys." I would be interested to see where in the Executive order there is a right to counsel, and

what you consider to be the area of need, because if you can show it, I am going to back you up all the way, but I would like to see what you consider to be the area of need for the two-thirds vote; for the absence of traditional judicial review; for the absence of proof beyond a reasonable doubt, the customary standard which is omitted; and the modification of the rules of evidence, as I have earlier noted, in the context that the statutory delegation by the Congress requires the customary rules of law and evidence as are used in the District Court unless there is a showing that it is impracticable, and that is what I would like to hear you describe.

Mr. CHERTOFF. I would be happy to, Senator, and again, I hope I will respond to all the issues you have raised, and of course, if I miss something and you remind me, I will address it.

First of all, let me say there is nothing about what the President has done or the Attorney General has done that is in any way, shape or form meant to suggest that Congress has been in any way remiss in being a full partner in this war on terrorism. Everybody is very mindful and appreciative of the diligent and speedy work—

Senator SPECTER. How can you talk about full partnership when nobody let us know that this Executive order was coming down?

Mr. CHERTOFF. At the same time, Senator, there are responsibilities which the President has as Commander-in-Chief, which if I can address briefly, may help put this in context. I think that the source of the President's power, as I understand it, to authorize military commissions comes from Article II of the Constitution. Interestingly, Congress itself recognized this preexisting source of power when it passed Title 10 U.S.C. Section 821, which embodies the Uniform Code of Military Justice. That provision says in relevant part, because it establishes courts martial, quote: "The provisions of this chapter conferring jurisdiction upon courts martial do not deprive military commissions of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions." And when the Supreme Court address that provision in the *Madsen* case at 343 U.S., the Court determined that the effect of this language was to preserve for commissions the existing jurisdiction which they had over such offenders and offenses based on the preexisting practice under the laws of war.

So I think that Congress itself, when it passed what is now codified in Section 821, recognized this inherent power of the Commander-in-Chief, and it has been recognized not only in international law but in our own practice literally since the days of George Washington, who authorized a military commission I think in the latter part of the 18th century to try Major Andre for espionage.

So in terms of the source of this authority, I think it is a constitutional source of authority.

Now, as far as the particular rules are concerned, I think there I have to point out that we are, that the Department of Defense is currently in the process of putting those rules together, and I have no doubt that in drafting those rules, the Department of Defense is going to be mindful of what Congress has prescribed, of what their own practices have been, of what the history has been with respect to the rules and—

Senator SPECTER. Is the Department of Justice involved with the drafting of those rules?

Mr. CHERTOFF. The President has committed the responsibility for drafting these rules in the first instance to the Department of Defense.

Senator SPECTER. So the answer is no.

Mr. CHERTOFF. At this point the answer is the Department of Defense is—

Senator SPECTER. It seems to me the Department of Justice ought to be involved. Yours is the department which has the traditional longstanding experience here.

Mr. CHERTOFF. Well, Senator, I can assure you that at any point in time that the Secretary of Defense requests the assistance of the Department of Justice, which he is of course entitled to do under the President's order, the Department of Justice will be more than happy to render any assistance that we can.

But let me also point out the President's order sets forth a minimum that has to be met, not a maximum. It is envisioned that the skeleton which the President set forth in this initial order is going to be fleshed out by the Department of Defense, that they are going to address issues such as what the burden of proof is going to be, precisely how the evidential rules will be implemented. In fact, even the provision that talks about conviction upon the concurrence of two-thirds of members of the commission sets a minimum requirement. Nothing in this precludes the Secretary of Defense from looking to traditional practice including traditional practices in courts martial, and determining that for certain types of punishment there should be a higher level of unanimity.

So none of this is foreclosed. And I think, frankly, Senator, one of the virtues of this hearing, and I envision other hearings, is that it will provide a further fund of information from which the people who are preparing the regulations can draw as they finalize what they are going to do. So this is merely a point of departure. This merely starts the process, and I think in so doing, it is consistent with the practice that Franklin Roosevelt used when he triggered the similar power in the mid 1940s in the *Quirin* case. He merely initiated the process with a bare-bones order, and then, as was customary practice, the military officers fleshed out the details and the actual procedures. So we are beginning the process. The process is under way. It is not concluded, at least as far as I understand it. And I think all of these matters, I am confident, will be considered by the people who are putting these rules together.

Senator SPECTER. Does that mean you are going to come back and consult with us before anything is implemented?

Mr. CHERTOFF. Well, I am hesitant to speak for the Department of Defense. I think they have the responsibility to carry forward with this, and I think for me to speculate about how they are going to do it or who they are going to consult really takes me out of my area of jurisdiction.

Chairman LEAHY. But the Senator from Pennsylvania raises a valid point, that you are and you represent the chief law enforcement agency of our Government and the one that has to eventually determine whether things are done legally.

Mr. CHERTOFF. There is no doubt about that, and as the President's order makes clear, the Secretary of Defense is authorized to draw upon our expertise or anybody else's.

Senator SPECTER. Mr. Chertoff, I would hope you would not wait for an invitation.

Mr. CHERTOFF. I think we are capable of making our voice heard when necessary.

Senator SPECTER. Well, this Committee did not wait for an invitation. We called for the hearings. We called you. Use your telephones. Call them up. Tell them you need to be involved. Tell them you have had a lot of experience as a tough hard-nosed prosecutor. We know your background. We also know your record for protecting constitutional rights.

Chairman LEAHY. You do not have to mail us. I am having a little difficult with my mail these days, but—

[Laughter.]

Mr. CHERTOFF. We can fax and e-mail as well.

Chairman LEAHY. Yes. In fact, I am urging the terrorists to fax their anthrax letters to me from now on. But you can assure the Attorney General that this question will be asked, if not by Senator Specter, but by others when he gets here.

Senator FEINGOLD.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you very much, Mr. Chairman. I want to thank you very much for scheduling this series of hearings. It is obviously an extremely important function of the Committee to engage in oversight of the Department of Justice, and it is particularly crucial now given the enormous effort that the Department is making to investigate the horrific attacks of September 11th, and also to prevent future acts of terrorism in this country, and I do want to thank the ranking member, Senator Hatch, for joining in the Chairman's request that the Attorney General appear before this Committee.

I do thank you, Mr. Chertoff for being here, and appreciate you coming. But I do think that the kinds of questions that are being raised about the Department's conduct are best answered by the person in charge, the Attorney General. I look forward to his appearance before this Committee next week, and I urge that that appearance be one where all members get a chance this time to ask questions for a reasonable period of time, which is not what happened when we considered, however briefly, the USA PATRIOT Act.

As many of my colleagues have suggested in their questions so far, there really are serious questions as to the legitimacy, the effectiveness, and even the constitutionality of several of the steps that the administration is carrying out with regard to this investigation. The one thing that is clear so far today is that this is a bipartisan feeling, that consultation with Congress on some of the more controversial matters has been woefully inadequate. This is particularly true in the wake of the lightning speed with which we passed, over my objection, the USA PATRIOT Act. I hope this hearing, and those to follow, will, as others have said, encourage more

consultation, more discussion, and more cooperation with Congress, and I also hope that these sessions will help us educate the American people, and members of Congress, about what is being done in their name and under the authority that they have granted their Government. Only by working together can we ensure the effective administration of justice and also the protection of our most sacred civil liberties.

I would like to follow, Mr. Chertoff, with something that Senator Hatch brought up. As you know, I and others have been seeking information concerning the individuals who have been detained during the investigation of the September 11th attacks. I want to be clear. I do not necessarily object to detentions, per se. I simply believe that the identities of the detainees should be made public. Otherwise I do not how to answer a couple of questions. How can we know whether they have access to attorneys or have, in fact, been held incommunicado? How do we assess whether the Government is acting appropriately in detaining these individuals if we do not have any idea who they are?

Thus far the Justice Department has refused to provide most of the information I have requested, and I have not found the justifications for not providing the information terribly convincing. I continue to be deeply troubled by your refusal to provide a full accounting of everyone who has been detained and why. Yesterday, the Attorney General cited concerns for not wanting to provide the Al Qaeda network with a list of their members that we have in custody as a reason for not disclosing the names of the detainees. But then he freely disclosed a sampling of the names who have been charged with Federal offenses. And I would add to that, that in fact the identities of 104 people have now been released, who are charged with Federal crimes. We requested this information in a letter dated October 31, and we can now determine, in those cases, the conditions of their confinement and whether they are being represented by counsel. So I am pleased that you have released this information. It is long overdue. But it does not seem consistent with the other statements that the Attorney General has made. We still do not know who is in custody for immigration charges.

And although you say that no one is being held incommunicado, we do know that Dr. Al–Hazmi from San Antonio was held incommunicado for a week and a half. We are also aware of a lawyer in New York who states it took over a month to locate her client. He had been picked up and sent to New York for questioning.

And so it is difficult for me to understand exactly where the administration is coming from with these inconsistent statements. I simply disagree with the Attorney General's assertion that disclosing the identities of detainees will bring them into disrepute. I think that just the opposite is true. By failing to articulate who is being held and why, the families, friends, co-workers, and neighbors of those detained are simply left to believe the worst, that the detainee is somehow linked to the September 11th attacks. By failing to say who is believed to be a suspected terrorist and who is not, the Justice Department tarnishes the reputation of all, including those who have already been or later will be found innocent.

It is my understanding that the identities of people who are in deportation proceedings are regularly made public. And so what I

would like to do in the remaining time is ask a question about that and two other questions in the Kennedy tradition, and then have you respond to all of them.

[Laughter.]

Senator FEINGOLD. The first is with regard to the detainees. The Attorney General has somehow suggested repeatedly that the immigration laws prevent him from disclosing the identities of the detainees. I would like to know precisely the authority for this claim.

Second, I would like some clarification of the summary numbers that the Attorney General provided yesterday. He announced that 55 individuals are in custody on Federal charges and 548 are being held on immigration charges, so that is a total of 600. But there are reports in recent weeks of more than 1,100 total detainees. We do know that some people have been released, but are we to conclude that nearly 500 people have been released recently, or are there people being held on state and local charges that the Justice Department is not taking responsibility for in these counts?

And finally, you have said that the questioning of 5,000 Arab and Muslim men is not an intrusive process, and the Attorney General said yesterday that people should just cooperate and not resist these questions. But I think you are aware, especially given your own background, regardless of what the Department says, that the communities involved perceive this program as very intrusive and very frightening. I understand that in fact you were involved with the New Jersey State Legislature's efforts to address racial profiling practices by New Jersey State Troopers, so you are well aware of the importance and significance of this kind of a concern. So two points there. What steps has the Justice Department undertaken since September 11th to reach out to the Arab and Muslim community in a way that would be less offensive and more constructive, and confidence building for both parties? And regardless of how justified and appropriate you believe this program of interviews to be, are you concerned at all about alienating the Arab–American and Muslim communities? Don't you want to do whatever you can to cultivate good relations with these communities in order to enhance the investigation and help uncover and prevent future terrorist acts?

Thank you very much.

Mr. CHERTOFF. Senator, I would be happy to answer those questions. Let me try to take them in turn.

With respect to the issue of disclosure of the names of the detainees, I think to be clear—and I do not remember the exact statement; I was not present when the Attorney General made his statement to the press—but I think to be clear, I do not know that there is a specific law that bars the disclosure of the names. There are laws that allow us, in response to FOIA requests, to voluntarily withhold the names, but I do think there are two considerations which are pertinent here. One is we really do not want to put out a list of people that we categorize as people who we think might be terrorists as a subset of people who are being held in INS detention.

And actually I think Senator Hatch reminded me that when we deal with the issue of what we call Megan's Law in my own state, which is people who have been convicted of sex offenses, there is

a great deal of sensitivity about keeping those Megan's Law hearings closed precisely for the reason that if someone has not been convicted of a crime we do not want to publicly stigmatize them. So I think there is a legitimate concern here not to label people against their will.

And in that regard, I think there is an important point that has been missed by a lot of critics. Everybody who is in detention as part of this 548 is absolutely free to publicize their name through their family or through their lawyers. There is nothing that stops them from saying, "Hey, I am being held in detention as part of this investigation." But they have the right to make that decision, rather than us make that for them.

Second, as I think the Attorney General points out, although it is true that people charged with Federal criminal offenses do have their names by public, and that is required not only by law but I think by the Constitution. Where we are dealing with the area of immigration, putting out a list of everybody that we have could be of aid and assistance to terrorists who want to know what the progress of our investigation is, where we are looking, have we picked someone up, have we not picked someone up. I can tell you from reviewing some of the materials that were seized when we did searches of Al Qaeda members overseas some years back, they are very sophisticated about our legal system. They actually have a manual with lessons, and the lessons include saying, "You should keep track of where your brothers are in the criminal justice system. You should be mindful of how the criminal justice system works."

So we are, I think, well advised, to the extent we can do so consistent with the law, not to assist them in tracking what the flow of our investigation is.

Let me now deal with the numbers. I think the numbers I think are pretty straightforward. There are 548 people that are in detention on immigration charges. There are 55 people who are in detention on Federal criminal charges. Now there is another number, 104, which relates to the total number of criminal charges that have been filed as a consequence of this investigation. The reason there is a difference is because 55 reflects those situations where we have apprehended the person, so we unsealed the charge. If we have not actually taken the person into custody on a criminal charge, the charge may be sealed, and that is why there is a difference between the 104 and the 55.

Finally, there is a number of people that reflects people being held on material witness warrants pursuant to a grand jury investigation. We cannot publicize that number. That is grand jury material that is covered by Rule 6(e).

The 1,100 number, which you made reference to, I think reflects a running tally that was kept in the early weeks of the investigation. It includes, in addition to INS detainees, people under Federal criminal charge and material witnesses. It also includes people who are held on state and local charges, and it includes a great many people who were briefly detained, questioned, released, and have now gone on their merry way without any further interaction with law enforcement. So that number does include a significant group of people that are no longer being detained or held as part of the—

Senator FEINGOLD. What is the breakdown of the different categories?

Mr. CHERTOFF. Well, the problem I have is this: I cannot give you the number relating to material witnesses on grand jury because I am forbidden by law. I do not know the number of people being held in state and local custody, because, frankly, we do not track that. And so without those two numbers, I cannot do the mathematics necessary to subtract from the 1,100.

Senator FEINGOLD. Is it your assumption, though, that the lion's share of that further category would be the state and local detainees, or not?

Mr. CHERTOFF. I would hesitate, Senator, to speculate about what the proportions are. I am sure there are some state and local people who are being detained on those charges. I cannot give you a number to that. I know there are some held on material witness warrants. I know there are a significant number of people who have been released. I think you made reference to one individual in San Antonio who was held on a material witness warrant and then ultimately released and went public. So clearly there are people in that category.

I should also make clear, and I think the Attorney General has said this on a number of occasions publicly, the 1,100 included pretty much anybody who was detained even for a brief period of time. As you know, for constitutional purposes even a 15 or 20-minute detention constitutes a detention under the Fourth Amendment. There are people who were stopped and may have been questioned for an hour or two. They may have been let go, and that was originally folded into that number. I think it turns out at this point that is no longer a useful number, and I think we have tried to furnish more precise numbers about people who are really being held.

Finally, let me turn to the third point. As you noted, Senator, I do have some personal experience with the issue of racial profiling, and I think everybody was exquisitely sensitive to the need not to do ethnic profiling, not to communicate or to suggest that people of a particular religion or people of a particular ethnic group are more prone to be terrorists than others. That would not only be wrong but it would be foolish because we would be deluding ourselves if we thought that we can limit ourselves by looking at a particular religious denomination.

On the other hand, we do know certain things about what the terrorists themselves have chosen to do. We know that, for example, bin Laden has chosen to recruit people from certain countries or to train people in certain countries, or to instruct people as to how to conduct themselves in terms of what kinds of visas to get or how to make their way into the countries which they have targeted. And we would be foolish not to look at those criteria as a way of culling through the pool of people who have come from overseas and deciding who might have useful information. I want to be quite clear, we are not in any way suggesting the people we are talking to are suspected terrorists. They may be people who may have encountered terrorists. They may know that. They may not know that. They may not even be aware that they have useful information. So we are trying to make it very clear that we are not targeting people in a particular community.

I know that U.S. Attorneys have both on their own initiative and under instruction reached out to members of the Muslim community and other ethnic communities to make the point that we are seeking their coordination, that we are not profiling, that we are not questioning the loyalty of all of the communities that make up America, that we understand they also lost people in what happened in the World Trade Center, and we are going to continue to do that, because I completely agree we cannot win this fight if we do not enlist everybody, all Americans, of whatever ethnic background, whatever race, whatever religion in the struggle, and we are going to continue to do that.

Senator FEINGOLD. Mr. Chairman, thank you for all the time. I would just add that one of the few advantages I can see in all these changes being directed by the Executive, without adequate consultation, is it may make the terrorist handbook about how our system works obsolete.

Mr. CHERTOFF. I hope so.

Senator FEINGOLD. Well, but that concerns me. That concerns me. And I say that, obviously, with a concern that if we are going to change our system in all these different ways without adequate consultation or oversight by Congress, that the very foundations of our system are threatened. People who are detained have a right to be able to believe that they get to operate based on the rules that we have traditionally followed and not on a whole new set of rules. And I do have serious concerns about the way this is being done, but I look forward to a continuing process of trying to elicit the information and work with you on this.

Mr. CHERTOFF. Thank you, Senator.

Chairman LEAHY. In fact, I would agree that if the handbook is being changed, it should be at our initiative and not at the terrorists' initiative.

Again, for housekeeping, the next Senator in the order, being Senator Sessions of Alabama, I would also note for members and for the witness, when Senator Sessions finishes his questioning and the witness finishes his answers, we will take a 5-minute break so that Mr. Chertoff can stretch his legs and everybody else can.

But, Senator Sessions, please go ahead, sir.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman. I think it is appropriate that the Department of Justice come before this Committee and explain what you are doing and why you are doing it, and what legal basis you believe you have for the actions that you have taken. There has been, as Senator Hatch noted, a bit of hysteria I think in some of the criticism of the Department, a real suggestion that things are going on that are not going on, a suggestion that laws are being violated that I do not think are being violated.

So I first would like to express to you, Mr. Chertoff, my appreciation for your candid and very effective testimony that I believe has rebutted already many of those charges that I think are incorrect. This is a great country. We have great affection and commitment to civil liberties, but we also are a country that provides for real-

istic efforts against crime and realistic efforts in a wartime situation.

Let me just ask you once more, and I would ask the other members of the panel to think on this: in your view, Mr. Chertoff, all the actions that have been taken by the Department of Justice are within the Constitution and laws of the United States and the laws of war recognized throughout the world?

Mr. CHERTOFF. Absolutely, and I think they are consistent with past practice when we have faced situations of comparable emergency.

Senator SESSIONS. I think that is an important thing for us. If somebody believes that we are violating the law, let us say specifically what law is being violated and how it is that it is being violated.

With regard to the military tribunals, that is a function of the President's war powers; is that correct?

Mr. CHERTOFF. That is correct.

Senator SESSIONS. So it is really not a Department of Justice, it is a military act primarily?

Mr. CHERTOFF. That is correct, Senator.

Senator SESSIONS. The question then is, I suppose, should we provide the terrorists who are attacking the United States more rights than the laws of the United States and the world provide them? And that is a question of policy. I suspect we will provide them, as we go forward through this process, more rights than they would get in other nations throughout the world, probably more rights than any other nation in the world would give them under the same circumstances. So the question really is: how much beyond what the legal requirements this country puts on the Department of Justice should be applied?

I know Senator Specter is such a fine lawyer and asked you some questions about the President's order, which I note is denominated a military order with regard to the trial by military tribunals, and on page 4, subsection (5), it says that it provides for modes of proof, issuance of process, qualifications of attorneys, which at a minimum should provide for, paragraph 5, conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order.

So it would appear to me, would it not, that the President's order pretty clearly did provide for appointment of counsel for the defense?

Mr. CHERTOFF. That is clear to me, Senator.

Senator SESSIONS. With regard to the attorney/client communications, now as a Federal prosecutor myself for 15 years, I am aware that drug dealers and Mafia people have utilized the freedom that we provide and the rights we provide to actually conduct criminal operations from jail. You have been a long-time Federal prosecutor. Is that not true?

Mr. CHERTOFF. Well, I actually convicted people of crimes committed when they spent—during a period of time they were mostly in jail, so it is certainly done all the time, unfortunately.

Senator SESSIONS. Hypothetically, if you did not have the kind of rule that the President has put here that provides at least the

potential to monitor communication between attorneys and clients, if bin Laden were in jail and he had a friendly attorney, he could actually conduct terrorist operations from a Federal jail; is that not correct?

Mr. CHERTOFF. That is correct, Senator, and I point out that it is not only in the case of an attorney who is willingly helping, but even an attorney unwittingly could be used as a tool for communicating.

Let me, if I can just take a moment to read from again the manual. This is from Lesson 18. They actually have these things in lessons. That instructs that if an indictment is issued and the trial begins, the member has to pay attention to the following rules. And it talks about taking advantage of visits to communicate with brothers outside prison and exchange information that may be helpful to them in their work outside prison.

Senator SESSIONS. Wait a minute. This is bin Laden's manual?

Mr. CHERTOFF. This is bin Laden's manual. This is what they instruct their terrorists. This is a kind of teaching tool for terrorism.

He says the importance of mastering the art of hiding messages is self evident here. So they are trained specifically in how to use the ability to communicate when they are in prison in order to further the goals of the terrorist organization, and woe until us if we do not learn the lessons from what they are teaching.

Senator SESSIONS. Well, now you have said that you have identified, what was it, how many thousand people in prison?

Mr. CHERTOFF. 158,000 approximately, I think.

Senator SESSIONS. And 16 individuals that might be subject to this kind of supervision or monitoring; is that correct?

Mr. CHERTOFF. That is correct. And I should make it clear that of the 16, 12 are terrorists and 4 are under these special administrative measures for espionage.

Senator SESSIONS. And so I think—and to your knowledge, none of that has occurred as of this date?

Mr. CHERTOFF. We have not, as of this date, actually initiated any monitoring pursuant to this order.

Senator SESSIONS. Well, I would just say this. I think you should be very careful not to overuse that privilege, but I think it would be a colossal error of monumental proportions if we were to allow a terrorist prisoner to be able to plan and conduct and order and direct additional terrorist attacks against people of the United States, when we have I think a legitimate basis for monitoring that. So I think you should do that. I hope it should not be abused, and I am glad to see that you have so few of defendants being looked at in that regard.

Mr. Chairman, my time has expired. I thank the Chair. I believe Mr. Chertoff's testimony has gone a great way to allay the concerns that many have expressed.

I thank you for it. I thank you for what the Department of Justice has done, the tireless effort, the many hours long days that you have put in, and Attorney General Ashcroft has, and we have not had an additional terrorist attack in this country to our knowledge, and I am confident had you not moved aggressively, that we may well have had additional Americans dead, maimed and wounded in

this country as a result of further terrorist acts. I salute you and thank you for your efforts.

Mr. CHERTOFF. Thank you, Senator. And I would be remiss if I did not make it clear this is really based on the fine work of all the men and women of the Department of Justice, including the FBI as well as state and local law enforcement and the other agencies of the Federal Government who are working tirelessly to defend this country.

Chairman LEAHY. Thank you, Mr. Chertoff. When you do go back to the Justice Department, you can assure them that while it might have been doubtful before, you do have Senator Sessions on your side in this regard.

[Laughter.]

Chairman LEAHY. We will take a 5-minute recess, and then we will go to Senator Durbin and Senator Kyl.

[Recess.]

Chairman LEAHY. Mr. Chertoff, your birthday celebration just never stops. [Laughter.]

I appreciate the one musician among us in not leading a resounding chorus of happy birthday.

Senator Durbin, just so everybody knows, it will be Senator Durbin, then Senator Kyl, Senator Feinstein, Senator McConnell, and then Senator DeWine, Senator Grassley.

So, Senator Durbin, please go ahead.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thanks, Mr. Chairman.

Mr. Chertoff, thank you again for being here.

I think it is fairly well known across this country that this Congress, since September 11th, has really made an extraordinary effort to cooperate with the President and the administration in this war on terrorism in so many different ways, providing the President with the resources and the authority with strong bipartisan votes.

I can tell you that the modestly titled USA PATRIOT Act was a struggle for some, including myself, to try to find the right balance between our constitutional responsibilities and our responsibility to protect and defend this nation. And I thought that after lengthy deliberation and refinement that we struck that balance, that we found an appropriate way to give new authority, appropriate authority to the Department of Justice and the President to deal with terrorism. I voted for it. Virtually all of my colleagues, but Senator Feingold, whom I respect very much for his own views on the subject, felt the same way. But it was a struggle. It was not easy.

And I think that is why you perhaps heard some frustration and disappointment from the Judiciary Committee today about the announcement concerning military commissions or military tribunals, because it seems to us that this is a rather significant departure from what we considered to be the opening statement here of our cooperation between the Legislative and Executive branch in dealing with terrorism. We felt that we had been asked for and had given to the administration the tools they needed to fight ter-

rorism. And then, to the surprise of many of us, came this new request for—perhaps not a request, but an announcement about military tribunals and commissions.

Let me tell you three specific areas of concern that I have on this issue. Number one. After the painstaking process which we went through for the antiterrorism legislation, we arrived at some very carefully worded definitions. The President's order relative to military tribunals virtually starts anew when it comes to many of these same terms. You have addressed your testimony, as you should, to the whole question of terrorism. The antiterrorism bill defines terrorism, goes through and catalogs the Federal laws that will be characterized as terrorism, an exhaustive list. And yet when we look at the President's order, it is a much different approach as to what will be considered terrorism when we are engaged in military tribunals.

We also have a standard that is in the President's order. It refers to a quote, "reason to believe standard", close quote, and that is not defined and it is not a common term of law so that you might be able to find precedent to explain what it means. So for those of us who felt that the process resulted in a good piece of legislation which we could support even with some reluctance, but realizing we need it to protect America, this new approach breaks new ground in definition on critical areas. What is terrorism? What is the standard for the President to convene a commission or tribunal?

Secondly, I had the good fortune to meet with now the U.S. Attorney for the Northern District of Illinois, Patrick Fitzgerald, who was a prosecutor in the Southern District of New York against the Al Qaeda terrorists, and a very well versed prosecutor on the subject. He talked to me about his successful experience about prosecuting terrorists for the embassy bombings and his involvement in the World Trade Center bombing in 1993.

The reason I think back on that is that at that point in time, facing the loss of American life from terrorism, we felt, as a Government, that our courts and our laws were adequate to the need to prosecute even those overseas who had been extradited to the United States. And now we have a new approach. Now, I will concede in a second that what happened on September 11th was a much different magnitude. But if you could please draw a distinction for me between what was clearly adequate and successful in the past in prosecution that the administration now believes is inadequate, even with the new antiterrorism law.

The third point raised by Senator Leahy, and one that troubles me is this. As a member of the Intelligence Committee I know that probably the greatest successes we have had since September 11th have not been reported. We have an exceptional cooperation now from countries around the world in gathering intelligence on terrorism. For the Spanish Government to announce to us that they will not extradite terrorists who could be of value to us in solving any of the mysteries or disarming the cells or finding the sleepers in the United States because of military tribunals and the death penalty, raises serious questions in my mind as to whether or not we are helping ourselves by adding a military tribunal into this mix.

I know that my time is coming to an end. As I mentioned to you at the break, I am going to use the Kennedy approach here, and just perhaps raise one other issue on detention. You have said in your testimony, and I quote, "Nobody is being denied the right to an attorney." Now, Senator Feingold made the point about the Saudi-born radiologist from San Antonio, Texas, Dr. Albida Al–Hazmi—I hope I have not mispronounced his name—who was arrested and detained after purchasing airline tickets. I read the story about this doctor in the newspaper, and the thing that struck me was not only what he went through but what he said afterwards. Afterwards he said, "I don't have any anger towards the United States. I understand. This is a very tough time, and I was ultimately released, and I think that says something good about the United States and the fact that I was able to return to my family and my community." And I think it does too. He seemed to be a man with no chip on his shoulder, no grudge, who went through a very harrowing experience but came out of it in a positive way.

But to the specific issue of his right to an attorney, he was held, according to the "Washington Post", incommunicado for two weeks, was transferred to more than one detention facility, each a significant distance from his home in San Antonio, and it took his attorney six days to find him and to have access to him. In your statement that no one is being denied the right to an attorney, do you concede the fact that even if Dr. Al–Hazmi had the right to an attorney, that the circumstances under which he was held and detained and denied access to an attorney, would raise serious doubts in the minds of many in the legal community as to whether he truly had access to an attorney when he needed it?

Mr. CHERTOFF. Let me try to deal with these questions in turn. And first of all let me reiterate again nothing about what the President has done with respect to invoking his power regarding military commissions is in any sense a reflection of anything less than great satisfaction with the steps Congress has taken to enhance the law enforcement element of our approach to terrorism.

But at the same time we have to recognize that there are—our domestic law enforcement can only prosecute domestic crimes. There is a separate category of crimes known as war crimes. There is some overlap. We can do certain things. We can prosecute certain types of acts both as domestic crimes and as war crimes, but traditionally and under the Constitution, the President has the choice as to which of those he wants to elect under the circumstances.

And so let me address your first question in terms of what is the standard that will be applied under the order in determining whether someone will be prosecuted under a military tribunal. The order lays out a series of elements which the President would consider in making a decision, but certainly one of those elements is that the person be triable by a military commission for the type of offense that is traditionally triable by a military commission. And that means we are talking about people who can be tried for committing crimes against the laws of war, meaning that the are enemy belligerants who have engaged in or supported hostilities against the United States through unlawful means, such as, for example, the deliberate targeting of civilians or undefended buildings,

or by hiding in civilian populations and declining to bear arms openly.

So there is in the law, over a long period of time, a fairly well-accepted definition of what a violation of the law of wars is.

Senator DURBIN. I just ask this question. In the two instances I mentioned, the 1993 World Trade Center bombing and the embassy bombings in Africa, would both of those qualify under that definition for trial by military tribunal?

Mr. CHERTOFF. I do not know whether the 1993 World Trade Center would have done so, because I do not know whether one could reasonably have said at that point that we were in a state of armed conflict. It might very well be that the 1998 bombing would have put us in that state of armed conflict. There is no doubt that now, as we sit here, we are certainly in a state of armed conflict. And I do not mean to suggest that we cannot prosecute these cases domestically under domestic laws that we have had for some period of time and that have been recently enacted, but there may be policy reasons in some instances to choose the alternative approach of a military commission.

And without in any sense suggesting the President is limited, let me give you one example. If it were to turn out that we apprehended 50 Al Qaeda terrorists in the field in Afghanistan, the President might well wonder whether it made sense from the standpoint of our national security to bring those people back to the United States, put them in a courtroom in New York or in Washington or in Alexandria and try them. I think as we sit here now there is still a conflict going on in a prisoner-of-war camp in Afghanistan, where some of the people who have been apprehended apparently seized the camp and are now trying to fight with the Northern Alliance. So plainly that is an instance in which the President could well determine that while we have jurisdiction to bring these people back and try them domestically, it makes no sense to do so when we can also try them for violation of the laws of war under the well-accepted principle of military commissions.

So I am the last person to say that we cannot adequately prosecute terrorists under our laws, but I am also quite ready to say that while our legal system is terrific and can handle these cases, it may not be the appropriate tool in every case, and the Constitution gives the President the ability to use other tools, and I think what he has done here is simply taken all of those tools out of the constitutional cupboard, so to speak, and now laid them on the table so that he has them all available.

Let me deal with the issue of international cooperation. I read the newspaper articles. I do not think there is anything about what the President has announced that in any way, shape or form interferes with our ability to have international cooperation. Again, plainly, the President can consider, in deciding whether he wants to invoke a military commission in an individual case or the traditional Federal courts, whether that is going to have an impact on our ability to extradite someone from overseas, in much the same way as we often have to consider whether we will forego the death penalty as a condition of getting an extradition. So there is nothing about this that in any way, shape or form interferes with our ability to cooperate with our allies, and I must say, my understanding

is that the Spanish authorities have been quite cooperative with us in this investigation. So I do not think, again, this option forecloses international cooperation.

Let me finally deal with the issue of detention. I completely agree that it is not acceptable to have a situation where someone gets lost in the system for a few days and their attorney cannot get in touch with them. I have to say prior to September 11th we all know of instances where, through accident, people wind up not being in contact with their lawyers and a period of time may go by in which they really do not have access to counsel. We try to correct those things. Certainly it is not the policy, as I understand it, of the Government to try to interfere with that communication. It may very well be that in the time compression of the early parts of this investigation, as people were moved around, there was some slippage. But it is certainly not the policy to try to interfere with that kind of communication. We want everybody to have access to their lawyers and we want to play by the rules.

Senator DURBIN. Thank you. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator KYL.

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you, Mr. Chairman.

First of all, let me say that some of the questions that have been asked today I think really have elucidated the situation, and hopefully will answer a lot of the questions that I have seen asked on various talk shows and so on. I think every one of the questions, for example, that Senator Durbin just asked were appropriate. I was curious about some of the same things, and I think the information you have provided to us is very useful to be able to answer legitimate questions that have been asked.

But having said that, it also seems to me that we have to put into context what the President has done here. We have charged the President with the conduct of a war. The Congress helped to give him certain tools that he asked for some of the warriors in that fight, our intelligence officers, our law enforcement officers and so on, just as we have tried to provide the military support that our men and women in the service have. But it seems to me that in some cases we should provide the benefit of the doubt to the President here when he tells us that he is going to act in a certain way with respect to our enemies. We do not question his operational plans. We do not know all of the facts and circumstances. I think healthy skepticism is good. This Committee's tradition of healthy skepticism has certainly helped to ensure that the United States maintain its preeminent position in the world I applying the rule of law.

But in view of the demonstrated evil of those who carried out the attacks on Americans, and their absolute disregard for any semblance of civilized behavior, and in view of the long record of the United States in advancing the rule of law, not just adhering to it in this country, but certainly being the most liberal country in the world I think in ensuring every conceivable right for the accused. And in view of the type of situations that I think we are likely to

find, especially abroad where our military is going to be confronted with situations and military tribunals would most likely be used, it seems to me that the benefit of the doubt should go to the President here.

And I am a little bit disturbed by the criticism implied by some of the questions, not seeking information, as some of the questions have, but almost implicitly a criticism that regardless of the answer, there is going to continue to be skepticism and doubt. And as a Senator concerned about the safety of my citizen constituents, as well as upholding the laws and the Constitution of the United States, as they protect United States citizens, I am going to listen very carefully to the answers of the questions, and I think will give the benefit of the doubt to the President rather than inferring criticism of the President's order even after the questions have been answered.

Mr. Chertoff has very forthrightly answered all of the questions he can. And he said there is certain grand jury information he cannot provide, and there are some things he does not know because it is a matter of local law enforcement. But I think no one would question his forthrightness and the completeness of his questions.

And so I think we have an obligation as Senators, not just to question, not just to be devil's advocate—and by the way, this gives devil's advocate I think a whole new meaning, because we are questioning on behalf of people who, as I say, have not followed civilized behavior themselves. But after we have done that, I think we also have another obligation, and that obligation is to do everything we can to support the President, the Attorney General, the Secretary of Defense and others, who are attempting to ensure the safety and security of our citizen constituents.

And while I am on that, Mr. Chairman, if anyone here doubts that terrorists use their ability to communicate through counsel about future plans while they are in jail, I invite you to conduct closed hearings on that subject. There is subject matter which could be discussed in that regard.

And this raises another point. There are a lot of things that, you know, a lot of folks really are not aware of unless they serve on the Intelligence Committee or have had special briefings about threats that have been invoked against citizens, and that is another reason to give the President the benefit of the doubt here. You know, he has access to a lot of information that some of us are aware of, some of us are not, but we should not infer that he has some kind of evil intent. We should infer that his is an intention to protect the citizens of this country. So I think that should be our underlying assumption.

Finally, with regard to the death penalty, remember that one of the—and there are a lot of European countries that will not extradite because they have a rule against applying the death penalty. We have the death penalty. It has been enormously helpful, especially in the spy cases, where in order to plea bargain for life, spies, "A", tell us a lot of things, and "B" preclude the necessity of a trial which could give a lot of information about sources and methods that we do not want to give. So there are a lot of reasons for a lot of these things that I think need to be discussed.

Just one question, Mr. Chertoff. There has been a suggestion that there has to be a declaration, a formal congressional declaration of war for the President to have the authority that you have noted in here the Executive branch has, to invoke military commissions. Is there any legal authority to back up that proposition?

Mr. CHERTOFF. Senator, I think the law is actually clear there does not need to be a formal declaration of war. Going back to the so-called Prize cases, which were decided in 1862, which dealt with President Lincoln's power to impose certain restrictions and blockades at the beginning of the Civil War, the Supreme Court noted that a conflict, quote, "becomes a war by its accidents, the number, power and organization of the persons who originate and carry it on." And the Court has also noted on other occasions that the President has the power to take account of those factors and make a determination that we are in a state of armed conflict.

In this instance, this is not a close call. I mean, we have been the subject of an unprovoked wanton attack which was designed to inflict maximum harm on American citizens. Unless there be a doubt about whether it is an isolated instance or whether those who are within our country who are terrorists believe they are at war, let me again quote from the manual here. This is the fourth less, where they define military bases for the terrorists, for Al Qaeda. And the definition of a military base to the terrorists is: these are apartments, hiding places, command centers, in which secret operations are executed against the enemy. These bases may be in cities, and are then called homes or apartments. So, again, this is not my language. This is the language of bin Laden and bin Laden's henchmen.

They perceive their apartments as military bases. They call us the enemy. Under these circumstances, we have not sought war, but it has been thrust upon us, and it is for us to finish it.

Senator KYL. I thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. I would note, Mr. Chertoff, I just want to make sure I understand, that terrorist manual you speak about is the one that was discovered in 1998, 3 years ago—

Mr. CHERTOFF. That is correct.

Chairman LEAHY. —in the American Embassy bombings in Kenya and Tanzania. Well before September 11th, it was entered publicly into the record in trials, and I would just note, having already had that a matter of public knowledge, a matter of knowledge of the Justice Department for years, something that has been looked at to successfully stop a number terrorist actions before they happen, you can understand my concern, having had that all the way through, why you never asked for these extra powers at the time when you were asking for extraordinary powers in the Terrorism Act that this Committee and the Senate gave you. That is why I am concerned.

You had this for 3 years. We have all seen it, everybody on this Committee, it has been in the newspapers well before September 11th. Every quote you made from it is accurate, but it has all been in the papers. It has all been public. Our concern is, having known all that, having known that before September 11th, when your Department was charged with helping for our security, having been

known at times when, without going into classified matters, when we have stopped terrorist acts over the last several years, that is why we are a little bit concerned. Nobody asked us during the time we were negotiating the Terrorist Act.

Mr. CHERTOFF. Well, Mr. Chairman, I wish I could rewrite history. We cannot, and I certainly do not want to engage in any finger-pointing about things that might have been done. We face what we face now. We certainly had about as brutal a wake-up call as you can have, and I think it behooves us now to look at everything, things that we recently discovered and things we have had in hand for a long time, in reflecting on what we can do to protect Americans within the Constitution.

Chairman LEAHY. I am not taking from Senator Feinstein's time. She has probably spent as much time and effort on this whole subject as anybody on this Committee, and I yield to her.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thanks very much, Mr. Chairman.

Mr. Chertoff, I would just like to add my view that I would hope that in the future the administration would consult on these matters, particularly with the chairman and the ranking member. I think that is really important. I think one of the problems that we have is not the military commission, because most people understand why, if and when Osama bin Laden is caught, that it might not be to the Nation's security interests to have him tried in this country under our normal procedures. I think people understand that, and I think they are supportive of it.

I think one of the problems with this and that I want to ask you about is its timing because Osama bin Laden is not caught, major perpetrators are not caught. Those 19, of course, are gone from the scene, but anyone else, in terms of a major planner, is not caught. Yet the administration came forward with this order, which by my reading is a very broad order, and therefore causes a lot of concern as to who is this going to be applied to.

Why did the administration not wait until the standard of proof has been worked out, the details have been worked out, the military campaign was more advanced and then announce this? You must have some reason for announcing it at this point in time, and I would like to ask what that reason is.

Mr. CHERTOFF. Let me see, Senator, if I can allay your concern. As I understand the process, in order to invoke the President's power under military commissions, at least as it has been done based on the precedent in 1942, I guess it was, the President had to issue an order setting this in motion and delegating to the Department of Defense or, as was the case in the past, to actually generals in the field the order to then develop the appropriate procedures.

I suppose that the President could have issued the order secretly and had the procedures developed. Perhaps some might think that would have been a better approach, some might think this was actually a better approach in that it put on the table the fact that this process was going to begin. As to why it had to happen now, though, I think that, frankly, we do not know the course the war

will take. I remember several weeks ago there were predictions in the press this was going to be a very arduous campaign, we were going to get bogged down in Afghanistan. It has seemed more recently that things proceeded perhaps more quickly than we anticipated. That may yet change.

I think it is understandable, again, that one would want, at the earliest possible time, to begin the process of developing the full set of options that you might need to invoke should we encounter somebody that is a terrorist who has both violated domestic law and violated the laws of war. By publishing the order, what the President has, in fact, done is surfaced it and put it out in public so that there can be public debate about it, and of course this is while there is a process underway of having the Department of Defense develop the specific rules and procedures that will be implemented.

Let me finally say, in case I had not made it clear earlier, we should not look at the fact that the Department of Defense's involvement in this is somehow treating this as kind of an inferior form of justice. There are very capable and honorable lawyers at the Department of Defense who are working on this, who are well versed in the laws of war, who we have every reason to believe are going to be as dedicated to the Constitution as lawyers in any other department and are going to be attentive to the views of scholars and the views of members of this Committee as anybody else.

So I think the process is going forward.

Senator FEINSTEIN. If I understand you then, you are saying the rationale for the timing of this was simply to give the Defense Department the time it needs to work out the standards of proof and other criteria under which the order would be carried out; is that correct?

Mr. CHERTOFF. I do not know, Senator, that I want to presume to articulate what the President was thinking. What I was trying to express was I think what was achieved initially in the order now. You needed to get the order out in order to start this process.

Senator FEINSTEIN. All right. Because let us say you have 500 to 600 people now being detained, of course, no one knows who or how many or if any of those people will be subject to this order, and in Section 2, where it defines individuals subject to the order, it mentions the usual "engaged in, aided or abetted, harbored, et cetera, planned carried out," and then the next section it says, "It is in the interest of the United States that such individual be subject to this order."

What exactly does that mean and how many people under detention at the present time do you have reason to believe would be subject to this order?

Mr. CHERTOFF. Let me, Senator, direct your attention as well to Section 4 because I think it is important to read the order in its entirety.

As I understand the order, the order applies to people who could be prosecuted in a military commission for a war crime. That means, for example, that people who can be indicted for immigration violations or false documentation are simply not eligible under this order. They are not people who committed war crimes, and

therefore they will be dealt with if they have committed domestic crimes in the ordinary way that people under Article III are.

In order to be full within the scope of this order, you would have to be someone who could be tried for committing crimes against the laws of war; meaning being an enemy belligerent who has engaged in or supported hostilities against the United States. So that is a fairly high standard, I would think, and it does not apply to people who are in custody for garden-variety criminal offenses.

In terms of asking how many people are currently in custody who could conceivably eligible for this order, I think I am limited because I do not think I am in a position at this point to identify the state of our investigation with respect to particular individuals or to disclose whether there is anybody we have identified that we have in custody that is someone that we would consider to be an active terrorist who has violated both domestic terrorism laws and the laws of war.

So I do not know that I can give you that, but I can tell you that people who are found in the commission of garden-variety crimes are not people who violated the laws of war, and therefore by its terms would not fall under this order.

Senator FEINSTEIN. Just one quick follow-up. Is it fair to say that there are some now in detention that would be subject to this order?

Mr. CHERTOFF. Senator, I do not feel that I can, at this point in time, make a statement as to the status of anybody in terms of whether we have a level of proof about their activities that would rise to what you would need in order to prosecute them for a war crime.

Senator FEINSTEIN. Thank you.

Thanks, The CHAIRMAN.

Chairman LEAHY. Perhaps the time to do this would be after the Attorney General's testimony, but if there are issues that should be addressed only in a closed session, and if the Senator from California wants one, I am sure that the Senator from Utah and I requested under the normal procedures this Committee does.

Senator McConnell?

Senator MCCONNELL. Thank you, Mr. Chairman. This has been a very interesting hearing. I want to congratulate Mr. Chertoff on an excellent presentation.

We have been talking about what kind of due process rights we are going to provide to a universe of people who I believe, am I not correct, are 100-percent noncitizens?

Mr. CHERTOFF. That is correct.

Senator MCCONNELL. So this whole discussion is about a universe of people who are not citizens of the United States, and I think it is important to remember that.

Let us then confront a potentially perverse result that could occur. An American serving in the United States Army in this country could conceivably end up with fewer safeguards because he would be subject to a military trial; would he not, Mr. Chertoff?

Mr. CHERTOFF. My understanding is, yes, under the Uniform Code of Military Justice.

Senator MCCONNELL. Right. So you could have the perverse result in which an American citizen who happened to be a member

of the U.S. military being tried in a military court, not a military commission, such as we are talking about here, but a military court having fewer sort of generally recognized due process safeguards than a foreign terrorist captured either here or overseas and brought here and tried, such as the terrorists were tried after the 1993 World Trade Center bombing; is that not correct?

Mr. CHERTOFF. Well, Senator, I am not an expert in military justice. It is my understanding, although the system of rights under the Uniform Code is different, it actually does afford servicemen a considerable degree of protection in terms of their rights. There are some differences. I would not want to, though, suggest that it is an inferior form of justice. It is a different form of justice.

Senator MCCONNELL. But many would suggest that the reason for having a military tribunal in the first place is that the procedures are somewhat more efficient, shall we say, and maybe—

Mr. CHERTOFF. There are protections, for example, for handling classified evidence I think that are somewhat different than—

Senator MCCONNELL. Let me try again. Would it be correct to assume that it is possible, under the scenario that seems to have been suggested here this morning, that you could have a foreign terrorist tried in a civilian trial in the United States with a lesser standard of what is generally believed to be due process than an American citizen serving in the U.S. military here? For example, they do not get a jury trial.

Mr. CHERTOFF. Well, again, and I do not want to venture into talking about the Uniform Code because I really do not know very much about it, my understanding is in some circumstances you do get a jury.

Senator MCCONNELL. Let us assume that you do not get a jury trial in the military—

Mr. CHERTOFF. Then that would be a—

Senator MCCONNELL. Just assume that for the sake of discussion. Would it not be safe then to conclude that an American citizen in the military who has to go to trial without a jury would have less sort of generally recognized due process rights than a foreign terrorist brought to the United States and tried in a regular civilian court?

Mr. CHERTOFF. I think, if one were to assume that is true, then it would be the case that the terrorist would have an additional—

Senator MCCONNELL. Which is totally, let me suggest, is a totally perverse potential result of what we are discussing here this morning, completely absurd. It would be further incentive to foreign agents to be sure they got caught here, would it not?

Mr. CHERTOFF. Yes. I think there is no doubt that one thing that this order operates to do is remove the assurance that a terrorist might have that there is a safe haven. The last thing we want to do is create the perverse incentive for terrorists to feel they ought to come into this country, because then they are home free, and get a higher measure of protection than they would get if they are caught in the field.

Senator MCCONNELL. Which leads me to my next question. In effect, we would have the potential of a repeat of the O.J. Simpson trial, complete with grandstanding by defense lawyers, in a trial of Osama bin Laden or his henchmen, with the potential to be set

free. Because, let us just take a hypothetical, let us assume that the case was about an anthrax attack, that there was not a pristine, perfectly established chain of custody for anthrax, you could have these people being set free.

In fact, what I would like you to do is just sort of give us a litany of things that could go wrong that would compromise our effort to fight terrorism if such trials were held in a U.S. civilian court, if you could just sort of give us a litany of all of the things you can think of that could go wrong that would compromise sources, methods, that allow us to conduct a war on terrorism, hopefully, in an effective way.

Mr. CHERTOFF. Well, let me begin, Senator, by saying this. I do not want to be taken as suggesting that I have any lack of faith in the ability of our domestic criminal courts to trial terrorist cases. I have to say that the history of this Government in prosecuting terrorists in domestic courts has been one of unmitigated success and one in which the judges have done a superb job of managing the courtroom and not compromising our concerns about security and our concerns about classified information.

That being said, we are in a different situation, both as to the scope of the challenge we face and as to the nature of the challenge we face. There are certain considerations that in the individual case could wisely counsel for the President not to pursue the domestic criminal route. Certainly, for example, we would not want to bring people into this country in significant numbers to be present in American cities where they pose a danger to the populace. It is a fact that in past cases involving terrorists tried in this country, the judges have had to be under guard, and some of that requirement for security—

Senator MCCONNELL. And what about the jurors? What about the threat to jurors?

Mr. CHERTOFF. Jurors as well, and that has persisted for a period of time, even after the trials are over. It may not be fair—

Senator MCCONNELL. What about the reporters covering the trial?

Mr. CHERTOFF. Well, I probably would not venture there with the reporters.

Senator MCCONNELL. And the judge.

Mr. CHERTOFF. But the judges, there are judges who are still under protection as a consequence of that. So, plainly, the President could consider those factors.

It is the case that up to now we have been successful in dealing with classified information, but clearly in the current environment, we may have some situations where there are individuals that we need to prosecute, where a large bulk of the information is classified, and we would not want to be in the position that we are in the domestic courts of having to drop the case because we cannot sacrifice confidentiality.

And there may be technical problems, in some instances, given the far-flung nature of the investigation and the fact that we are accumulating evidence on the ground, presumably, in Afghanistan, where the need to have somewhat more streamlined procedures would commend itself to the President.

I also want to be careful not to suggest that our domestic courts are incapable of doing these cases.

Senator MCCONNELL. I am not suggesting that you are suggesting that, but it is a practical result of this, would it not be the case, that jurors who were called could possibly look forward to having to have security for the rest of their lives.

Mr. CHERTOFF. I do not know that we have had a case where the jurors have had to have security for the rest of their lives.

Senator MCCONNELL. But they might desire it as a condition for even participating.

Mr. CHERTOFF. I think there can be concerns in some instances about juror security, judge security, security of witnesses, and that is certainly an important consideration.

Senator MCCONNELL. Obviously, some of these things are on the mind of the President or he would not have suggested that we wanted to have this option in the first place.

Mr. CHERTOFF. I think that is quite true.

Senator MCCONNELL. Thank you, Mr. Chertoff.

Chairman LEAHY. Thank you.

Senator Kohl?

Senator KOHL. Thank you, Mr. Chairman.

Mr. Chertoff, since the events of September 11th, the President and the Justice Department have commanded the trust and the support of the American people and the Congress more than ever as they prosecute the war on terrorism, and we are proud to provide that support. However, with that trust comes, as you know, responsibility. The fabric of our society is built upon the rule of law, and the expectation that our civil liberties will be protected as much as possible, even in extreme situations.

When changes are made to our laws in the name of security or terrorism or war, in an effort to safeguard Americans, we are understanding, and yet we deserve to be told how these changes are being made and why. This does not indicate a lack of trust or patriotism; rather, it demonstrates the strength and the vitality of our democracy.

With regard to the use of military tribunals, the curbs placed on the attorney-client privilege, and the detention of hundreds of people, we are suggesting to the administration to do the rule of law a great favor and prevent a clearer picture of what this all about; explain to us why all of these hundreds of people need to be detained and who they are; tell us your reasoning for the changes to the attorney-client privilege and what you hope to get from it; and detail for us who will likely be prosecuted in military tribunals and what the rules governing these trials are going to be.

We trust the administration when they tell us that these measures will be used only infrequently. Nevertheless, it is our responsibility to verify that when they are used, it is for good cause and as fairly as possible.

It causes a great deal of consternation in our country when we hear that Americans abroad will be subject to foreign military courts. We worry whether the Americans on trial will be afforded an attorney, an impartial jury and a fair chance to defend themselves. Just, for example, take the case of American Laurie Berenson, accused of treason in Peru back in 1996.

We were justifiably angry when she was secretly convicted before hidden judges in Peru's supreme military justice commission, without any explanation of the verdict. Americans were upset that she did not receive a public trial, and therefore questioned the legitimacy of the verdict. When Peru relented in the year 2000 and agreed to hold a public trial, our State Department was vocal in support of the open and the fair proceeding, even though she was convicted a second time.

So the same holds true when are the ones holding the secret trials. It demonstrates uncertainty about the strength of our democracy to try suspected terrorists without the same protections we want for our own citizens abroad. William Safire wrote in the New York Times this week that, in its present form, the military tribunal "cedes to other nations overseas the high moral and legal ground long held by U.S. justice, and on what leg," he says, "the U.S. does now stand when China sentences an American to death after a military trial, devoid of counsel chosen by the defendant."

These, I believe, are fair concerns and ones that need to be addressed, and we are suggesting to the administration that it is not too late to provide these answers.

Mr. Chertoff, would you please respond to the idea that the perception, both at home and abroad, with regard to our dedication to the rule of law and our judicial system, is tarnished. How would you suggest we correct that without ceding the moral high ground held by our justice system?

Mr. CHERTOFF. Well, Senator, I reject the notion that our moral high ground has been tarnished. I think, again, I begin with the fact that what the President has done is, as I said earlier, opened the constitutional cupboard and taken out his traditional constitutional power to authorize military commissions, and he has taken the first step in that direction, and he has directed the Secretary of Defense now to devise principles and rules that will, in the words of his order, provide for a full and fair trial.

Now we have not seen those yet. They are in the works. To presume, somehow, that the Department of Defense and the lawyers there are going to come up with a kangaroo court procedure I think is to do them an injustice, and still less would I presume the President would countenance that. He has made it very clear he wants to have a full and fair trial.

The presumption that we are going to hold secret, hidden commissions I think is an unfounded assumption. The order specifies that the rules are to be developed, paying due regard to the need to protect classified information, but I do not read in the order some mandate that everything has to be done in secret. I think, in fact, the President's counsel indicated publicly, shortly after the order was issued, that there was a general desire to be open, consistent with the needs of security and classified information.

So that I think to presume the worst, and to assume that the procedures that will be written will be unfair or create a drumhead court martial is to do a disservice, frankly, to the men and women of the Department of Defense who are in the process of writing rules. If, when the rules are written there are matters to be criticized, I am sure there will be ample time to criticize them, but I think that the President has made it clear that what he wants is

a full and fair trial. He has made a specific indication that he wants there to be defense counsel present.

And we have a history of dealing with military commissions, under Article II, that is faithful to the Constitution and faithful to our values. Absent evidence to the contrary, I see no reason for anybody in any part of the world to assume we are going to depart from that.

Senator KOHL. Well, I would like to hope that what you say is, in fact, going to pass, and I will assume it is. I believe that in hearings such as this, and the things that have been written in the press, the concerns that people have expressed about what these military tribunals will, in fact, be and how they will occur, has an effect on you.

So that as you go forward and implement this, you will take into consideration, I am assuming, and I believe, the full concerns of people in this country, whether they be from the left or the right, about our civil liberties and how precious they are to us.

Mr. CHERTOFF. Senator, let me say I am sure everybody's concerns will be taken into account. As Thomas Jefferson said in his inaugural, "In this, you know, we are neither of one party nor another, we are all Americans," and I think that is our spirit.

Senator KOHL. I thank you.

I thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Kohl.

Senator DeWine has been waiting very, very patiently.

Senator DEWINE. Well, and Mr. Chertoff has been very patient. We thank you, sir, very much for your good testimony this morning. I am going to say you have given us a lot to think about, and I am going to think about it.

Let me ask, you have gone through and cited some historical precedent for the President's order in regard to the military tribunals. What is the best historical precedent? What is the closest?

Mr. CHERTOFF. Well, I think the closest in time is probably the *Quirin* case, which is the trial of the saboteurs in I think 1942, which was initiated by the President, pursuant to his residual power to create military commissions.

But I was also interested to learn, when I was reading in this area that, for example, the Nuremberg tribunal was a military commission that was initiated by the four powers who were the principal combatants in the war on the victorious side. Likewise, there were military commissions that followed the main trial in Nuremberg that everybody knows about that tried hundreds of other Nazis for war crimes, and there were acquittals in that case and all kinds of different verdicts.

So those are the most recent in time. They go back through the Civil War, even onto the trial of Major Andre at George Washington's direction.

Senator DEWINE. President Roosevelt's proclamation, though, was certainly more limited than this; is that—

Mr. CHERTOFF. Actually, I believe the proclamation, in many respects, is virtually identical to this. This obviously is broader in the sense that it is not directed just at a single group of saboteurs, but it is directed more generally at a potentially larger class of people.

One thing I should point out, Senator—

Senator DEWINE. Say that again.

Mr. CHERTOFF. I say, unlike the *Quirin* order, which was directed at a particular set of saboteurs, this does not have a specific identifiable set of defendants. This defines a class of defendants.

Senator DEWINE. So it is broad.

Mr. CHERTOFF. It is broader in application.

I should point out, Senator, though, and I think it may be unclear, that it is consistent with the language that President Roosevelt used in *Quirin* to the effect that, as interpreted by the Supreme Court in that case, any application of this in the United States would be subject to habeas review by the Federal courts.

Senator DEWINE. Do you want to tell us how your local task forces are working out. These are the task force, the idea of putting obviously local law enforcement, and I am familiar with this by talking to U.S. attorneys in Ohio, but—

Mr. CHERTOFF. We have had a history, Senator, as you know, going back some years in the creation of what we call joint terrorism task forces, and I think there were approximately 20 prior to September 11th, and they were efforts to really bring together Federal, State and local law enforcement in a task force concept to deal with terrorism.

After September 11th, shortly thereafter, the Attorney General directed that every U.S. Attorney's Office create a task force, if there was not one in existence already, which would bring together State and local officials with the U.S. attorney and the FBI to work together on formulating a plan to combat terrorism, and that is useful in a number of respects. It is useful in terms of communication of information from us to people in the various States; it is useful in terms of developing information from the field that can be sent back up to our terrorism prosecutors and investigators in Washington; and it is useful in coordinating an antiterrorism program in each district.

These are comparatively new. I think they are working very well. Part of what we are trying to do, and the Attorney General has been very emphatic about that, is to open the doors to State and local law enforcement. We realize this is a team effort. Some of our most productive cases in the terrorism area have been generated because of leads and tips generated by local law enforcement. So this effort is designed to encourage that, to make our cooperation more seamless, and to make our protection of the public more efficient.

Senator DEWINE. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Senator Schumer?

Senator SCHUMER. Thank you, Mr. Chairman. Thank you for holding these hearings and letting us air some of these issues which are really important.

I want to thank you, Mr. Chertoff, for being here and for serving your Government as well as you have for many, many years.

I would like to ask a couple of questions about the tribunals. As you know, they have brought up a lot of concern. I have not made up my mind where to go on these. I think there is a need for secrecy. I think those who say we should just have a regular trial, as if was someone who held up a candy store, that does not make

much sense. On the other hand, I do think that when you are dealing with issues like this, in terms of due process and everything, secrecy, right to counsel, there ought to be discussion. It ought not just to come down after—there may have been elaborate discussion within the administration about this. I do not know, but we do not have the benefit of that discussion. It just sort of comes down, and I am getting lots of questions on it. I think lots of us are.

So I guess my first question really is this: Most of this, as you said earlier, I saw a little bit of it, came out of DOD. Has DOJ been involved in any discussions with DOD or were you involved in any discussions with the Department of Defense before Attorney General Ashcroft talked about this and made it public?

Mr. CHERTOFF. I think, actually, Senator, the President issued it, and I think when he issued the order, he directed the Department of Defense to put together the rules that would actually be used to implement the order, and that process, as I understand it, is underway in the Department of Defense now.

My understanding is that, prior to the issuance of the Order, the President did consult with senior officials from a number of departments, including the Department of Justice, so there was some consultation.

Senator SCHUMER. Was it extensive? I mean, did DOJ have different views than DOD on this?

Mr. CHERTOFF. I am not in a position to characterize the discussions as being extensive or not, and I do not think it is appropriate for me to communicate what the particular advice might have been from senior officials to the President on a matter of presidential decision-making.

Senator SCHUMER. Then let me ask you now, now that the rules are being formulated, have there been discussions with the Department of Justice? I mean, you folks are the experts on trials. I understand there has been a system of military justice for a long time, but these are sort of hybrid. That is the whole reason we are not just saying court martial or some other form that way. Has there been any discussion at all, to your knowledge? Has DOD or people in the White House who were involved in this reached out to DOJ and asked for your input?

Mr. CHERTOFF. Again, I am limited by own knowledge. My understanding is that the President directed the Department of Defense to put these together, but also the order makes clear that the Department of Defense has the ability to call upon other departments, including obviously the Department of Justice, for assistance and advice in terms of this process. To my knowledge, that has not happened yet. Obviously, at such time as there is a request made for us to participate or to assist the Department of Justice, like any other department, we will be more than happy to participate.

Senator SCHUMER. That has not happened yet.

Mr. CHERTOFF. To my knowledge, that is correct.

Senator SCHUMER. Do you think you would be helpful?

Mr. CHERTOFF. I think that everybody in the Government will do everything they can to help with this process.

Senator SCHUMER. How about on this, do you know if there was any consultation, when the President issued the tribunal executive

order, was there consultation with your Department on whether there was a need for an express authorization by Congress to do this?

Mr. CHERTOFF. Again, I am not in a position, both because of lack of knowledge and also because I do not want to get into confidential advice given to the President by his principal officers.

There was consultation with the Department of Justice, but I think the details are something I am not in a position to get into.

Senator SCHUMER. Let me then ask you a judgment question from your many years in various places in the Justice Department. I thought that the outcome of the antiterrorism debate on the antiterrorism bill was a good one. I thought there was give-and-take. There was public vetting. There was no attempt by those who did not completely agree with the initial proposal by the administration to be dilatory, but rather to make some changes, and I was sort of in the middle. There were some places where I was closer to the Attorney General and the Justice Department, there were some places where I was closer to our chairman and others.

But one thing I am convinced of, that having a debate, having a discussion produced not only a better product, but something that was regarded as more legitimate, something that created greater consensus, something that not only people in this country, although that is first and foremost, but even people around the world could say this worked out pretty well, and the ultimate product to me was a good one. I did not vote for it reluctantly. I thought it was a good product.

Why would that not be a better process, in terms of some of the things we are discussing here, particularly the tribunals? Would it not be better for the administration to bring a proposal before Congress, to not have Senators Leahy and Hatch have to make the request, make the request, for this to happen? We are going to have other needs and other changes. We, certainly, if I had to pick a word, it would be "recalibration," we do have to recalibrate, in every aspect of American life and in this one, too, where you balance liberty and security.

Why is it not better to vet these things through a discussion process that we usually have through the Congress, rather than just issue fiats for the sake of a better product, for the sake of legitimacy, for the sake of the constitutional checks and balances which have seemed to serve us so well for these 200-some-odd years?

Mr. CHERTOFF. Senator, I think all I can say is, again, the President's order is the process by which he initiates the use of this time-tested constitutional power. It, by its very terms, it is not the end of the process; it is the beginning of the process, and it directs the Department of Defense to take the responsibility to now flesh it out.

I am confident that the people who are doing this are going to be receptive and interested in all of the relevant information, all of the relevant considerations in putting this together. Of course, the Department of Defense also appears before Congress and has interaction with Congress as well. So I do not want to presume to predict exactly the way in which the Department of Defense is going to go about doing its business, but I think that, again, we have seen what the President has done has been to initiate this

process, to authorize it to be taken underway, but it is not a completed process yet.

Senator SCHUMER. So you believe there will be more consultation than say there was up to now?

Mr. CHERTOFF. I do not know that I am in a position to speak for the Department of Defense. I can tell you where the situation is now. The Department of Defense obviously interacts with Congress as well, but it is a matter that has properly been committed to their discretion because, after all, we are dealing with a power that the President is exercising that comes from his status as Command-in-Chief and not his status as head of the law-enforcement function.

Senator SCHUMER. Although I would say some of these areas do shade into both. I mean, you have talked with some others, not just on the tribunal issue, but on others, where they are law-enforcement functions, and there seems to have been the same sort of "We will figure it out quietly behind the current, and then we will issue something."

I would just urge greater consultation with us for the good of the country and for the good of the product.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Schumer.

In fact, I could not help but note, Mr. Chertoff, when you say that there is nothing in the President's order that the military commission be held in secret, I would disagree. It gives the Secretary of Defense the authority to keep the proceedings secret if he wants. The Justice Department is briefed by saying the proceedings may be completely secret, even with no notification to Congress. I believe it was in the New York Times, where a military official as quoted as saying, "The proceedings may be kept from the public view for years, even decades."

I mean, it is the kind of things, your own Department's briefings to us, the way it is worded, these are the reasons why there has been concern about the secrecy aspect. Whether the secrecy is a good idea tactically or not, the fact is that most people here feel that that is a plan that they may be kept secret and may be kept secret, as they have said, even for decades.

Mr. CHERTOFF. Mr. Chairman, again, I can only rely upon the text of the order. The order plainly directs the Secretary to consider the conduct, closure of an access to proceedings in a manner consistent with the protection of classified information. But as I observed earlier, I think the President's counsel has indicated a general preference to be as open as one can, given the exigencies of the circumstances.

Chairman LEAHY. You should talk to those who speak about it being decades and also talk to those in your own Department who say it could be kept in secret for a long, long, long time.

Senator Hatch, did you have anything further or should we go to the next panel?

Senator HATCH. I think we should go to the next panel because we have got a number of very important witnesses. I just want to compliment you, Mr. Chertoff. I do not think anybody could have been any more straightforward and articulate about these issues than you. I believe that we are very fortunate to have you in the

position that you are in. I just want to compliment you for all of the hard, difficult and good work that you have done. It has meant alot to me, and I think it means a lot to our country. Thank you so much.

Mr. CHERTOFF. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. You can go have your birthday lunch now.

Mr. CHERTOFF. I will. Thank you very much.

Chairman LEAHY. Thank you for coming.

Just so we understand, all members understand, please, give to either Senator Hatch or myself, any follow-up questions which will be delivered to Mr. Chertoff by the end of business today, and we would ask you to respond to those by the end of the week, so that we can have them in hand and prepared prior to Attorney General Ashcroft next week.

Mr. CHERTOFF. I will do that.

Chairman LEAHY. I thank you.

Mr. CHERTOFF. Thank you, Mr. Chairman.

Senator SPECTER. Mr. Chairman?

Chairman LEAHY. Yes.

Senator SPECTER. I was asked if I wanted to have a second round, and I said yes.

Chairman LEAHY. Oh, I had asked the ranking member if he wanted further.

Senator HATCH. If I could, I really believe that we need to get to that next panel. I know that they are pressured on their time. That is one reason why, you know, I do not make the determination, but I suggested that we should move to the second panel.

Senator SPECTER. Well, the second round is 5 minutes.

Chairman LEAHY. If the Senator from Pennsylvania wants 5 minutes, it is fine with the chairman.

Senator SPECTER. Yes.

Chairman LEAHY. Go ahead, but let us see if we can keep it 5 minutes.

Senator SPECTER. Mr. Chertoff, as a follow-up to the questions that I had posed earlier, you have said that the President is relying on his Article II powers in the promulgation of the executive order, and he does refer to the authority, as Commander-in-Chief, which obviously is a very generalized authority.

The Congressional Research Service, which has done extensive research on this question, comes down flatly with the statement that the Constitution empowers the Congress to establish courts with exclusive jurisdiction over military offenses, and cites as the authority Clause 14 of Section 8 of Article I, which says that "the Congress has the power to declare war, grant letters of marque and reprisal and make rules concerning captures on land and water."

And there is the express grant of authority for Congress to make the rules concerning captures on land and water, which would certainly encompass everybody in the military tribunal.

In the President's executive order, he then cites specific statutory authority, which I quoted earlier, saying that unless impractical, the rules in the United States District Courts, as to evidence and law shall apply.

Now, as a matter of constitutional interpretation, you say that the generalized authority as Commander-in-Chief gives the President the authority over the Congress on this issue in the light of the specific authorization of Article I, 8, 14?

Mr. CHERTOFF. Actually, Senator, what I think I am saying is that we do not need to get there. Because, as I understand Section 8–21 of Title 10, Congress chose not to occupy the field, so to speak, and create exclusive jurisdiction, whether it could do so or not is a matter I understand has been debated by various people.

Senator SPECTER. Where do you derive the conclusion that Congress chose not to occupy the field?

Mr. CHERTOFF. Section 8–21 is entitled, "Jurisdiction of Court Martial Not Exclusive," and says, "The provisions of this chapter conferring jurisdiction upon court martial do not deprive military commissions, ellipsis, of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions."

Now that provision was addressed by the *Madsen* case by the Supreme Court at 343 US, at Page 352, where the Court indicated that that language preserved for such commissions the existing jurisdiction which they had over such offenders and offenses.

Senator SPECTER. But, Mr. Chertoff, that case does not involve the constitutional authority of Congress. When you talk about occupying the field, you are talking about legislative intent to have exclusive control over a subject or whether the States may legislate or whether there may be other authority, but occupying the field does not go to constitutional authority. The Constitution is fundamental and is not a matter of legislative interpretation as to what is occupying the field.

Mr. CHERTOFF. I think, to try to be a little more clear, Senator, what I am saying is that, regardless of how one weighs the debate over whether the President could authorize these tribunals, even in the face of an explicit grant of exclusive jurisdiction to the Federal courts, and I understand there is a debate about that both ways, and I do not portray myself as an expert in that, the Courts have interpreted this section as indicating that Congress has not reserved exclusive jurisdiction over military—

Senator SPECTER. But you are talking about a section of a statute—

Mr. CHERTOFF. Correct.

Senator SPECTER. You are not talking about a constitutional provision and the application of occupying the field.

Mr. CHERTOFF. I think what I am suggesting—

Senator SPECTER. Let me just—I think, really, the answer may be in a little comity back and forth to try to work it out. We want you to have the authorities you need, but where Congress has said that the regular rules apply unless it is deemed impracticable, I think that is what we need to get to.

In your statement where you talk about the need for secrecy, if there were will be a disclosure of matters, that is a cogent reason if it comes up in a specific case.

Let me come back to a question which I have broached, but there was not time, on the Attorney General's rule establishing detention. Did the Attorney General meet the statutory requirements for

an opportunity to comment on his rule? He put it into effect before it was even published in the Federal Register. Was there compliance with the provisions that there had to be an opportunity, a notice and an opportunity for comment?

Mr. CHERTOFF. Is this the rule with respect to the monitoring of attorney-client communications?

Senator SPECTER. No, it is the rule with respect to detainees, which was put into effect, which was written on the 26th, put into effect on the 29th, and not even published in the Federal Register until the 31st, without any opportunity for comment. I just want to know if the Attorney General complied with the applicable law on that subject.

Mr. CHERTOFF. I have to say, Senator, not being familiar with the promulgation and the process by which the rule was promulgated, I would certainly be happy to get back to you with an answer to that question.

Senator SPECTER. I would appreciate it if you would. The red light is on, and I know we have to move on. So, if you would provide that in writing to the Committee, we would appreciate it.

Mr. CHERTOFF. Sure. I would be happy to.

Senator SPECTER. Thank you very much.

Mr. CHERTOFF. Thank you.

Chairman LEAHY. Thank you. Thank you, Senator Specter.

Thank you, Mr. Chertoff.

Mr. CHERTOFF. Thank you, Mr. Chairman.

Chairman LEAHY. If we could bring the next panel up, please. They have been waiting very, very patiently. We have tried to accommodate the administration and my colleague, Senator Hatch, by having Mr. Chertoff first, and it was worthwhile.

We will put in the record a number of press accounts and also leave the record open for any statements of any Senators.

[The prepared statements of Senator Grassley and Senator Thurmond follow:]

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Thank you Mr. Chairman for holding this timely hearing.

The past two and half months since September 11th have been trying times for all Americans. At the same time, we are a nation united against the terrorist threat-both at home and abroad-with greater strength and resolve than at any time in our history. I had a chance to see this first hand during the past Thanksgiving break in meetings with first responders back home in Iowa. In these meetings with firefighters, police, emergency and HAZMAT officials, and public health officers, there was a broad consensus that the battle against terrorism be waged aggressively, but that we do so without sacrificing those principles that make our nation unique.

That's why we made every effort to ensure that the antiterrorism proposal submitted by the Administration and the Department of Justice fit well within the bounds of the Constitution. After all, these are the values that we hold dear and what defines us as a nation. Throughout this process, the Attorney General and the Department of Justice worked with both sides of the aisle to produce a consensus package that would give our law enforcement community the tools they need to keep this nation safe against terrorists. That bipartisan package, the USA/PATRIOT Act, passed overwhelmingly by a vote of 98–1.

Since then, the Administration and the Attorney General have sought to further strengthen their battle against terrorism with additional law enforcement tools. Many, including the Chairman, have questioned these initiatives.

I understand and appreciate those concerns. It's the job of Congress, and this Committee, in particular, to ask the questions about the appropriateness of these

policies. So, I'm pleased that we are having this hearing today to make sure that we appropriately balance the real and pressing need for enhanced national security after the September 11th attacks with the protection of our civil liberties.

I look forward to today's testimony.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Mr. Chairman:

I appreciate your concern for the protection of civil liberties while our Nation fights a war against terrorism. We must not violate our Constitution in the name of extinguishing terror, or we will endanger the very freedoms that make our country great. We must not sacrifice our liberties in attempting to bring our enemies to justice. In our struggle against terrorism, it is important that we protect America by enacting reasonable and measured law enforcement initiatives that also respect individual liberties.

The Bush Administration is employing a variety of tools in the fight against terrorism, such as the use of military tribunals and the current detention of suspected terrorists. Some groups claim that these tools are unconstitutional. However, I believe that the Bush Administration is pursuing initiatives that are consistent with the Constitution and do not endanger American freedoms. When exploring the constitutionality of any law enforcement initiative, it is important to ask whether the proposal is reasonable. I think that these hearings will bring to light the reasonableness of the Administration's actions.

President Bush's military order provides for the trial of foreign terrorists by military commissions. Not only is the President's order historically based, but it was made pursuant to current law. Military commissions are rooted in American history, from the trial of deserters in the Mexican-American War to the trial of President Lincoln's assassins. Moreover, in *Ex Parte Quirin*, 317 U.S. 1 (1942), the Supreme Court unanimously upheld President Roosevelt's use of a military commission to try Nazi saboteurs during World War II. In addition to historical precedent, Congress has approved the use of military commissions under the law of war (10 U.S.C. § 821).

It has been suggested that the President does not have authority under 10 U.S.C. § 821 because we are not officially in a state of war. However, the murderers who flew commercial airliners into the World Trade Center towers and the Pentagon perpetrated nothing less than acts of war. The unimaginable destruction in New York and the damage done to the symbol of American military power are sobering reminders of the acts of war committed by terrorists.

At this moment, American forces are engaged in a war against terrorism. It is a unique war because al Qaida is a loosely organized group spread throughout many different countries. In these unique circumstances, it is unreasonable to insist that an official declaration of war be made because the enemy is a shadowy network of international terrorists.

Military commissions are also good ideas as a matter of policy. These commissions would allow for the use of classified information. If such information were easily disclosed in a civilian court, intelligence operations could be seriously endangered. Military tribunals would also better protect witnesses and other trial participants. Additionally, more flexible rules would allow for the use of evidence collected during war. Rules governing the gathering of evidence for use in trial courts in the United States do not necessarily translate to evidence gathered on the battlefield.

Another action taken by the Bush Administration is the current detention of alien suspects. While it is important that we release individuals in a timely manner, we must also take national security concerns into account. In *Zadvvdas* v. *Davis*, 121 S. Ct. 2491 (2001), the Supreme Court held that aliens under a final order of removal from the United States may be held for up to six months, and that longer periods may be justified in certain circumstances. The Court also noted that there may be special circumstances justifying the detention of especially dangerous individuals in cases presenting national security implications. In my view, deference should be given to the executive branch in situations involving national security. While we should continue. to practice oversight, we should not jump to hasty conclusions. It is important to note that because the terrorist attacks occurred in September, no person has been held for the presumptively reasonable time period of six months.

Mr. Chairman, I am pleased that we are carefully considering the President's efforts to fight terrorism. While I think that much of the criticism directed towards the Administration is inaccurate, it is important that we fully discuss these issues. I think that the Administration has done a good job of developing ways to bring terrorists to justice, and I find them to be reasonable tools in the fight against international terrorism. I hope that my colleagues will join me in supporting the Administration's efforts to combat terror.

Chairman LEAHY. We have on the panel former Attorney General William Barr. Mr. Barr it was, as always, good to be with you last week. I enjoyed our conversations and a chance to get caught up on a lot of subjects; and Professor Heymann, who is the former Deputy Attorney General of the United States and one who has spent a lot of time in this room before the Committees; former Attorney General Bell from Duke University; Scott Silliman, who is no stranger to the members of this Committee. He is the executive director of the Center on Law, Ethics and National Security, Duke University; Kate Martin, who is the director of the Center for National Security Studies; and Neal Katyal, a visiting professor, Yale School, who is now a professor of law at my old alma mater, Georgetown.

Attorney General Barr, if you would like to—first off, I want to thank all of you for staying. This has been a long morning. Those of you who have been in the administration know that when we accommodate the requests of the administration and the senior member of the President's party to have an administration witness come, that they get a chance to go a little longer than we thought.

General Barr, good to have you here.

STATEMENT OF WILLIAM P. BARR, FORMER ATTORNEY GENERAL OF THE UNITED STATES

Mr. BARR. Thank you, Mr. Chairman, Senator Hatch.

I would like to briefly touch on the legality or the constitutionality of the military tribunal order of the President, and then recognize that there are really two issues beyond that, and that is whether it is prudent and advisable in a particular circumstance to use those procedures or whether greater rights and procedures should be given, in a particular case, given to a foreign national who is at war against the United States.

And then, finally, the so-called civil rights concerns, and the understandable concerns that may emerge if these things were to be applied to people within the United States.

I think there is no doubt that the President was well within his constitutional authority to promulgate this order, as his predecessors took similar steps. It is important to recognize we are talking here about two distinct realms.

There is a fundamental difference between the Government, when it is acting in a law-enforcement capacity, that is, when it is acting within the framework of civil society, regulating civil society, setting up procedures, processes, rights, levels of appeal, and so forth, the rules of the game within society, and the realm, when the Government is acting in national defense, that is, when that society comes under attack by foreign adversaries.

They are wholly different, and the relationship between the Government and the individual changes radically once there is a state of armed conflict from a foreign or armed adversary. In that case,

where there is a state of armed conflict, as the Supreme Court has recognized, we are now dealing with the national defense power of the United States, the law of war applies and tribunals are part of the war power.

Whether or not a combatant is engaged in military operations or has been captured, the relationship between the sovereign Government and that individual is the relationship of us exercising national defense power against that individual. That is what military tribunals involve, the exercise of military or, that is, the war power as to those individuals. It is not the judicial power of the United States.

Now no war need be declared for this power to come into being. It is an adjunct of any lawful use of force by the Government. And the Supreme Court and Congress have recognized repeatedly that the country can exercise its powers of national defense and engage in armed conflict without a formal declaration of war. And, indeed, from the very foundation of the Republic, it was recognized, particularly where the United States is attacked and the President is responding to attacks, there is no requirement for a declaration of war for there to be the lawful use of the war power.

The question has been raised whether Congress has to authorize the use of military tribunals. The answer is obvious. Congress does not have to authorize it because it is an incident of the war power. As the Supreme Court has repeatedly said, it is just like the President moving a division from Point A to Point B. It is incident to the war power just like hearings and subpoenas are incident to the legislative power, and therefore it does not require any specific authorization.

So, even if there was nothing in the U.S. Code or in the laws, the Commander-in-Chief could constitute military tribunals to try cases that arise under the laws of war. But, of course, the fact is that Congress has sanctioned them and specifically recognized their jurisdiction in 10 U.S.C. 1821.

Now one of the problems arises because people naturally feel concerned when these tribunals would be used against people in the United States. I think there seems to be a visceral understanding that overseas, where we apprehend people on the battlefield, it does not make much sense to bring them back and try them in our civil courts for violations of the laws of war, but there seems to be a concern that, gee, what happens when someone comes into the United States?

From a legal standpoint, there is no geographical limit to the principle that when the Government is defending the country and exercising its war powers against armed foreign nationals who are waging war against the United States, it does not matter whether those nationals are overseas or where they have successfully entered the United States.

The last time that an armed adversary came into the United States abiding by the rules of war was, I think, in 1814, when the British came in their red coats openly bearing arms. They were not entitled to our constitutional protections. They are not entitled to due process. Their rights as combatants come from the laws of war, not our Constitution.

The fact that a foreign adversary enters the United States successfully does not mean that all of a sudden he becomes invested with constitutional rights. If he robs a bank, he breaks the civil order and we proceed against him, he gets the same rights as a citizen. If he is bearing arms against the United States and waging war against the United States, he gets no right under the Constitution. His rights arise under the laws of war.

Now here we have a different kind of entry, surreptitious entry by an enemy, which is itself a violation of the laws of war. They did not come in uniform, they did not come openly bearing arms, and they came with the intent of destroying civilian targets. For the same reason that a uniformed adversary who sets foot in this country is not entitled to constitutional protections, the same is true, if not more so, for someone who violates the laws of war by entering surreptitiously, which the Supreme Court has repeatedly held and has averted to numerous times.

Nevertheless, that does raise the issue, when you start using military tribunals against people who are present in the United States, there may be an understandable concern that, in theory, this is a device that could be abused and taken too far. The question really is, is it being taken too far here, and there is no evidence at all that it is. In fact, we have a very clear objective, events that establish that this is not being used as a pretext.

We are in a very dangerous situation of unprecedented and kind of war we are waging. It has to be predicated on the President's determination that this is triable, these individuals have committed violations of the law of war that are traditionally triable in military tribunals, it applies only to noncitizens, and notwithstanding some of the hysterical commentary, the Supreme Court has not been stripped of habeas corpus jurisdiction over individuals who are in the United States. This language was in President Roosevelt's executive order. It follows President Roosevelt's executive order and *Quirin* shows that the Supreme Court could exercise habeas corpus to ensure that there was no abuse.

Thank you.

[The prepared statement of Mr. Barr follows:]

STATEMENT OF HON. WILLIAM P. BARR, FORMER ATTORNEY GENERAL OF THE UNITED STATES

Mr. Chairman, Senator Hatch and the Members of the Committee, I am pleased to provide my views on the important issues surrounding our response as a Nation to attacks against our homeland and the continuing national security threat posed by al Qaeda. By way of background, I have previously served as the Assistant Attorney General, the Deputy Attorney General, and the Attorney General of the United States. I have also served on the White House staff and at the Central Intelligence Agency. The views I express today are my own.

President Bush's decision to authorize the use of military tribunals against members of al Qaeda is not only well within his constitutional authority, but is supported by ample historical precedent and practical common sense. Al Qaeda is an armed foreign force that is waging war against the United States. In confronting such an enemy, the President is acting as Commander-in-Chief of our armed forces—he is exercising the war powers of the United States. Our national goal in this instance is not the correction, deterrence and rehabilitation of an errant member of the body politic; rather, it is the destruction of foreign force that poses a risk to our national security. It is anomalous to maintain that the President has constitutional authority to order deadly bombing strikes or commando raids against such an enemy, while at the same time maintaining that, if the enemy surrenders or is captured, the President is suddenly constrained to follow all the constitutional

protections applicable to domestic law enforcement. Foreign nationals who are in a state of armed conflict with the United States do not enjoy the same constitutional rights as American citizens. Since before the Revolutionary War, it was recognized that those who violate the laws of war during an armed conflict have the status of "unlawful belligerents" and are subject to military trial for their offenses. Whether they pursue their deadly purpose in a training camp in Afghanistan or a flight school in Florida, al Qaeda members are unlawful belligerents and, under clear Supreme Court precedent, are entitled only to treatment consistent with the laws of war. Having cast their lot by waging war against the United States, they are properly judged by the laws of war.

1. THE PRESIDENT HAS CONSTITUTIONAL AUTHORITY TO ORDER THE TRIAL OF AL QAEDA MEMBERS BY MILITARY TRIBUNAL.

On September 11, 2001 this Nation was attacked by a highly-organized foreign armed force known as "al Qaeda." The attack cost more American lives and caused more property damage than the Japanese sneak attack on Pearl Harbor. This same organization has declared itself at war with the United States and has stated its intention to use any weapons at its disposal—including weapons of mass destruction—against both civilian and military targets. Prior to September11, 2001, al Qaeda acknowledged perpetrating armed attacks on our military personnel, our naval ships, and our embassies. al Qaeda operatives and their supporters are presently engaged in the field against our own military forces in Afghanistan. They have personnel in over 60 countries, where they are undoubtedly poised to attack United States interests. There can be little doubt that "cells" of this organization remain in the United States, ready to carry out further attacks.

It is clear that a state of war exists between the United States and al Qaeda. Al Qaeda has openly proclaimed a war against the United States and has repeatedly carried out attacks against us. The President, as Commander-in-Chief, is empowered to take whatever steps he deems necessary to destroy this adversary and to defend the Nation from further attack. As the Supreme Court recognized in The Prize Cases, 67 U.S. 635, 668 (1862):

> If a war be made by the invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "unilateral."

In this case, the President's judgment that a state of armed conflict existed is confirmed by the actions both of the Congress and our allies. By its Joint Resolution of September 18, 2001, Congress recognized that the attacks of September 11th "render it both necessary and appropriate that the United States exercise its rights to self-defense. "Authorization for the Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224, (2001). Congress authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. "*Id.* § 2(a). The Joint Resolution expressly recites that it constitutes a specific statutory authorization for the use of military force within the meaning of the War Powers Resolution. *Id.* § 2(b). Obviously, the President does not need a joint resolution of Congress to enforce our domestic criminal laws, and those laws are not generally for the "self-defense" of the Nation. Similarly, our NATO allies have recognized that the attacks of September 11th constitute acts of war by invoking the mutual self-defense provisions of Article 5 of the North Atlantic Treaty.[1]

When the United States is engaged in an armed conflict and exercising its powers of national defense against a foreign enemy, it is acting in an entirely different realm than the domestic law enforcement context. The Nation, and all those who owe her allegiance, are at war with those foreign enemies. That is not an analogy or a figure of speech—it describes a real legal relationship and one that is fundamentally different from the government's posture when it seeks to enforce domestic law against an errant member of society. When we wage war, the Constitution does not give foreign enemies rights to invoke against us; rather, it provides us with the means to defeat and destroy our enemies. As President Lincoln understood, and

[1] Article 5 of the North Atlantic Treaty can only be invoked in the case of an "armed attack" against a NATO member.

repeatedly said, maintaining the security of our Union is the sine qua non of all civil liberties. It is the basis upon which the exercise of all other civil rights depends.

Much of the criticism of the President's Executive Order authorizing the use of military tribunals stems from a fundamental confusion between the realm of domestic law enforcement and the realm of military defense of the Nation. This is not a confusion that has been shared by past Presidents, past Attorneys General, or the United States Supreme Court. Since the Revolutionary War, this country has used military tribunals to punish violations of the laws of war by our enemies during armed conflicts. Congress has consistently confirmed the jurisdiction of these tribunals by statute and the Supreme Court has recognized that military tribunals lie outside the judicial power and the constitutional norms that must attend a civilian trial. Military tribunals constitute part of the executive function of the actual prosecution of war—they are an instrument at the President's disposal as part of the overall war effort. The President's decision to use them in our war against al Qaeda is supported by historical precedent, Supreme Court decisions, and common sense.

American history is replete with examples of the use of military tribunals to try foreign combatants for violations of the laws of war. The legitimacy of their use does not depend upon the nature of the armed conflict, whether a formal declaration of war has been made, or whether the unlawful belligerent committed the violation here or abroad. Thus, in 1780, George Washington appointed a "Board of Commissioned Officers" to try Major John Andre, a British spy who was accused of receiving strategic information from Benedict Arnold. In 1818, then-General Andrew Jackson ordered two British citizens tried by a military tribunal for inciting Seminole Indian attacks against American civilians in Georgia. Military tribunals were used extensively during the Civil War to try confederate soldiers and spies who acted out of uniform to attack Union ships or industrial plants. See *Ex Parte Quirin*, 317 U.S. 1, 31 n. 9 (1942) (listing examples). Indeed, a military tribunal, known as the Hunter Commission, was empanelled to try those responsible for the assassination of President Lincoln. In opining on the constitutionality of such a commission, Attorney General Speed wrote: "The commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the law and usage of war. "11 U.S. Op. Atty. Gen. 297, 305 (1865). He further opined that the laws of war provided for military trials for "secret participants in hostilities, such as banditti, guerillas, spies, etc. "*Id.* at 307.[2] Attorney General opinions have also recognized that military tribunals could be used to try Indians for crimes against civilians where a state of open hostility between an Indian tribe and the United States existed. See, e.g., 14 U.S. Op. Atty. Gen. 249 (1873) (Modoc Indian prisoners accused of crimes against civilians during hostilities with the United States could be tried by military tribunal). *See also* 13 U.S. Op. Atty. Gen. 470, 471 (1871) (noting that war need not be "formally proclaimed" for the laws of war to apply to military engagements with Indian tribes).

The most recent and most apt example of the use of military tribunals is the trial of the eight Nazi saboteurs that took place before seven military officers here in Washington, D. C. in July of 1942. These foreign operatives were trained in what the Supreme Court referred to as a "sabotage school" near Berlin. *Ex Parte Quirin*, 317 U.S. at 21. They entered the United States surreptitiously, moved about in civilian dress, and were trained and equipped to attack civilian targets such as roads, bridges and industrial plants. They were initially arrested and detained by civilian authorities. President Roosevelt determined that they should be tried for violations of the laws of war before a special military commission, composed of seven United States army officers.

In *Ex Parte Quirin*, a unanimous Supreme Court upheld the jurisdiction of the military commission to try these individuals for violations of the laws of war. Echoing Attorney General Speed, the Supreme Court found that the military tribunal was "an important incident to the conduct of war," that allowed the President "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." 317 U.S. at 28–

[2] Attorney General Speed's opinion has stood the test of time. Recently, a federal district court rejected a challenge to the jurisdiction of the Hunter Commission in reviewing the denial of a request to correct military records pertaining to Dr. Samuel Mudd, the medical doctor who aided John Wilkes Booth and David Herold after the assassination. *See Mudd* v. *Caldera*, 134 F. Supp. 2d 138 (D.D.C. 2001). Relying upon the Supreme Court's *Quirin* decision, the district court found that "persons such as spies or combatants not wearing uniforms or in disguise, who may come secretly across enemy lines for the purpose of robbing, killing or destroying bridges, roads, canals, etc.," are "unlawful belligerents" subject to military trial for violations of the laws of war. *Id*. at 145.

29. Thus, these tribunals were part and parcel of the Commander-in-Chief's prosecution of the war effort. The Supreme Court held that military tribunals were not an exercise of the judicial power conferred by Article III of the Constitution, and therefore were not subject to constraints imposed upon civilian criminal process by the Fifth and Sixth Amendments. *Id.* at 38–39. The Court noted that unlawful belligerents had been subject to military trial since before the framing of the Constitution, and that Congress had authorized the trial of alien spies by military tribunal shortly after the adoption of the Constitution. *Id.* at 41. The Supreme Court also noted that anomaly that would be created by a contrary ruling—our own soldiers would be subject to military trial for violations of the laws of war while enemy aliens charged with such violations would receive all the constitutional protections of a civilian trial. *Id.* at 44.[3]

The Supreme Court's ruling in *Quirin* makes clear that unlawful belligerents cannot invoke the constitutional guarantees applicable to a civilian trial and are not entitled to judicial review of the results of a military tribunal. Indeed, *Quirin* reserved the issue whether unlawful belligerents were entitled to a trial at all before the President could subject them to "disciplinary measures. "*Id.* at 47. *Qurin's* holding does not turn on location within or outside the United States, the potential applicability of civilian crimes, the availability of civilian courts, or even the citizenship of the individuals involved. Rather, *Quirin* turns entirely on status as "unlawful combatants" under the laws of war. It is this status that entitles the President to exercise military power against such persons—including the use of military tribunals.

Nor need we examine the issue reserved in *Quirin* of the Executive's authority to establish military tribunals absent legislative mandate. Congress has authorized the use of military tribunals consistent with the laws of war in the Uniform Code of Military Justice. Title 10, United States Code, Section 821, provides that: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." The President is also given authority to prescribe the rules for all military tribunals, including "pretrial, trial, and post-trial procedures" and "modes of proof." *See* 10 U.S. C. § 836. In *Application of Yamashita*, 327 U.S. 1, 7–8 (1946), the Supreme Court held that, by enacting the precursors to these provisions in the Articles of War, Congress had "sanction[ed] trial of enemy combatants for violations of the laws of war by military commission," and had "adopted the system of military common law applied by military tribunals."

The President's judgment that members of al Qaeda and those who knowingly give them aid and comfort are subject to military justice is clearly supported by the facts and the law in this case. The very raison d'etre of al Qaeda is to violate the laws of war by targeting innocent civilians in order to create a state of terror. As the Supreme Court noted in *Quirin*, never in the history of our Nation have foreign enemies who infiltrated our territory been accorded the status of civilian defendants with all the rights enjoyed by citizens of the United States. *See* 317 U.S. at 42 ("It has not hitherto been challenged, and, so far as we are advised, it has never been suggested in the very extensive literature of the subject that an alien spy, in time of war, could not be tried by military tribunal without a jury.") (footnote omitted). If armed al Qaeda members had made a military landing on Manhattan Island and began attacking civilians, few would argue that they were not combatants subject to the laws of war. How does the fact that they instead infiltrated the United States surreptitiously with the same evil purpose *somehow give them greater constitutional rights*? By such logic, Nazi war criminals could have avoided military justice simply by sneaking into the United States and invoking their "right" to a jury trial in civilian court.

2. Domestic Criminal Justice Procedures Will Frustrate Our Fight Against al Qaeda.

In addition to its sound constitutional and statutory basis, the President's Executive Order establishing the option of military tribunals makes good sense. It will allow for a more effective response to the al Qaeda threat, while at the same time

[3] In *Quirin*, the Supreme Court reserved the constitutional issues of whether the President needed any legislative authorization to empanel military tribunals, *see* 317 U.S. at 29, and whether Congress could "restrict the power of the Commander in Chief to deal with enemy belligerents," *id.* at 47, because it found that Congress had approved the use of military tribuanals in the Articles of War.

not insisting upon the application of constitutional and statutory rights in a context where they are inapposite and where their wooden application could lead to their erosion.

The constitutional protections applicable to a domestic criminal trial, such as trial by jury in the district where the crime occurred, the right a grand jury indictment, and the right to confront and cross examine witnesses are designed to protect our citizenry from the power of government. They have no logical application to the exercise of military power to protect our citizenry and our government from an external foe. Indeed, these rights can be exploited by a foreign enemy to learn about our defenses and intelligence methods and make future attacks more likely to succeed.

Civilian criminal defendants have the right to obtain any statements they have made that are recorded by the government (including electronic surveillance tapes), *see* Fed. R. Crim. P. 16, prior written statements of government witnesses who testify at trial, *see* 18 U.S.C. § 3500, and any material that might impeach the credibility of government witnesses. *See Giglio* v. *United States*, 405 U.S. 150 (1972). These rights are inimical to the successful confrontation of a foreign foe. Indeed, one of the key factors in the success of the attacks of September 11th was the operational security practiced by the al Qaeda members in the United States. Information disclosed during civilian trials regarding our law enforcement techniques and capabilities could assist al Qaeda in evading detection in future attacks. Moreover, a public trial can be used by civilian criminal defendants to practice what is known as "graymail. "The defense claims the necessity of revealing national security information during the trial, thus gaining significant leverage over the prosecution. We should not even allow the possibility for such an occurrence in our pursuit of al Qaeda.

Civilian criminal defendants have the right to challenge the seizure of evidence under the Fourth Amendment. They can also challenge the authenticity of physical evidence by demanding that a chain of custody be established. These rules cannot logically be applied to "evidence" uncovered in a military theater such as Afghanistan. Our military forces are rightly concerned with winning the war—not securing crime scenes and careful documentation of chains of custody.

Finally, civilian trials in this context are not safe for grand jurors, judge, petit jurors or civilian witnesses. In the aftermath of these attacks and our military response, a prolonged civil trial would make the federal courthouse itself and all trial participants clear targets for al Qaeda reprisals. Military trials held on military installations—whether here or abroad—will be safer for all concerned.

In closing on this issue, let me say that all power is subject to abuse. But neither our constitutional law nor our policy toward terrorism should be made by parade of horribles. The President has limited the application of his order to foreign nationals who: 1) are al Qaeda members; 2) commit acts of international terrorism against the United States; or 3) knowingly aid and abet acts of international terrorism against the United States. As cases like *Quirin* and *Yamashita* make clear, the writ of habeas corpus is always available to test the jurisdiction of military tribunals in Article III courts. Moreover, our courts martial and military tribunals have a long history of rendering impartial justice. Many Nazi and Japanese combatants were acquitted of war crimes by military tribunals. The President's Executive Order promises "full and fair trials" under procedures to be promulgated by the Secretary of Defense. I have no doubt those procedures will, consistent with 10 U.S.C. § 836, incorporate as many aspects of civilian procedure are practicable under the circumstances. We should not pass judgment on these military tribunals until they themselves are allowed to operate and pass judgment. We insult our military by comparing these tribunals to those established by foreign dictators or by slighting them as "Kangaroo courts" before they have even been convened.

3. The Attorney General May Lawfully Withhold Operational and Other Details Regarding an Ongoing Criminal Investigation.

The Committee has also expressed some concern over the fact that the Department of Justice has declined to release statistical data regarding its continuing investigation into al Qaeda activities and operatives here at home. In my view, this criticism is unfounded. The Sixth Amendment guarantees a criminal defendant "a speedy and public trial. "In addition, the Supreme Court has found that the public has a common law and First Amendment right to access to proceedings central to the criminal process, such as pretrial hearings. *See generally Richmond Newspapers* v. *Virginia*, 448 U.S. 555 (1980). These rights have never been interpreted to extend to operation details of the investigative stage of criminal law enforcement. Our laws provide for strict secrecy of grand jury proceedings, both for the protection of individuals called before the grand jury and the integrity of the government's investiga-

tion. See Fed. R. Crim. P. 6(e). Affidavits in support of arrest and material witness warrants as well as indictments are often filed with the court under seal in cases where they may contain information that could compromise ongoing criminal investigations. In its Exemption 7, the Freedom of Information Act expressly recognizes that information that "could reasonably be expected to interfere with enforcement proceedings," including compromising confidential sources or law enforcement "techniques or procedures" is exempt from public disclosure. See 5 U.S.C. § 552(b)(7).

That is undoubtedly the case here. Information about who is presently detained by the government, when and where they were arrested, their citizenship and like information could be of great value to criminal associates who remain free. First, it would provide al Qaeda with information regarding what "cells" or operations have been compromised and which "cells" or operations are still intact. Equally dangerous, it could allow al Qaeda to extrapolate the kind of criteria and sources of information law enforcement was employing in attempting to locate al Qaeda operatives and thereby tailor their activities to avoid further detection. These are exactly the kinds of harms that FOIA Exemption 7 is designed to protect against.

Finally, as Attorney General Ashcroft has noted, there may be significant privacy and even due process concerns with the wholesale release of the names of those detained in this investigation. A government "blacklist" naming individuals suspected of connections with al Qaeda could seriously affect the reputation, employment prospects, and even physical safety of the individuals involved. Moreover, such a list would be compiled based upon mere suspicion, without an opportunity for those named to marshal evidence of their innocence of the charge. *Cf. Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123 (1951). For these reasons, I believe the Department of Justice has acted properly in refusing to release operational and statistical information that could compromise ongoing law enforcement operations and violate the rights of the individuals involved.

4. THE ATTORNEY GENERAL'S INTERIM RULE AUTHORIZING THE MONITORING OF ATTORNEY CLIENT COMMUNICATIONS IN LIMITED CIRCUMSTANCES IS CONSTITUTIONAL.

In my view, the Attorney General's rule regarding the monitoring of attorney-client communications, given the limited and unique circumstances to which it applies, is constitutional under the analysis set out by the Supreme Court in *Weatherford* v. *Bursey*, 429 U.S. 545 (1977). Three factors lead me to this conclusion. First, the monitoring is undertaken for the lawful purpose of frustrating further criminal activity that threatens innocent human life. The Supreme Court has recognized that this is a legitimate law enforcement interest that must be balanced against Fifth and Sixth Amendment rights. *See New York* v. *Quarles*, 467 U.S. 649 (1984) (recognizing "public safety" exception to Fifth Amendment requirement of Miranda warnings). Second, as in Bursey itself, the prosecution team will not learn of any conversation regarding legal strategy that might prejudice the defendant or benefit the government. *See Bursey*, 429 U.S. at 557–58 (holding that unless there was "a realistic possibility of injury to Bursey or benefit to the State, their can be no Sixth Amendment violation"). Third, the requirement that both the detainee and his attorney receive notice of the monitoring eliminates the need for prior judicial intervention under the doctrine of "implied consent. "*See, e.g.*, *McMorris* v. *Alioto*, 567 F. 2d 897, 900–01 (9th Cir. 1978 (Kennedy, J.) (applying doctrine of implied consent to searches of persons entering a federal courthouse).

The Attorney General has carefully limited his rule to prisoners who are already under Special Administrative Measures, see 28 C.F.R. § 501. 3(a), and for whom he further finds there is "reasonable suspicion exists to believe" that attorney client communications may be used to "facilitate acts of terrorism. "*Id.* § 501. 3(d). The Attorney General has indicated that he will interpret the term "reasonable suspicion," as the Supreme Court has in the case of police stops, *see Terry* v. *Ohio*, 392 U.S. 1, 27–28 (1968), to require objective facts from which a reasonable person could draw an inference that criminal activity was afoot.

This rule is a necessary prophylactic measure designed to allow the Attorney General to take appropriate action in the face of the kind of massive danger to innocent human life posed by attacks such as those perpetrated on September 11th. Faced with this kind of threat, we cannot require the Attorney General to prove to a court that the attorney client privilege has already been abused to further criminal activity. By the time the Attorney General has marshaled such facts and presented them to a court, it could well be too late. In these unique circumstances, where law enforcement acts not to gather evidence but to prevent an imminent and potentially devastating public harm, it is appropriate that the Attorney General make the initial determination without judicial intervention. Because both the detainee and his

attorney are given notice of the monitoring, they may challenge the Attorney General's actions in federal court after the fact.

CONCLUSION

The actions of the President and the Attorney General have, in my view, been measured and prudent in light of the threat to American lives and liberty posed by al Qaeda. Our Constitutional scheme contemplates that the powers and duties of the Executive Branch of government will expand in a time of national crisis or armed conflict. The swiftness and unity of purpose with which the Executive can act to defeat foreign threats to our liberty has proven an indispensable bulwark in securing our freedoms throughout our history. In perilous times, as the Framers envisioned, it has been both the energy and wisdom of a strong Chief Executive (uniquely accountable to all the people) that has ultimately protected our liberty, not undermined it. We owe our freedoms today in no small measure to the decisive actions of Abraham Lincoln and Franklin Roosevelt, taken in the face exigent danger. In the current circumstances, the real threat to domestic liberties is the artificial restriction of our powers of national defense by gratuitously expanding constitutional guarantees beyond their intended office. I have every confidence that the President and the Attorney General will protect our Nation and the liberties we hold dear. I welcome the Committee's questions.

Chairman LEAHY. I have always enjoyed having your testimony. I hate to be a bit of a bear on the light. Unfortunately, we have other constraints that require that.

Mr. Heymann?

STATEMENT PHILIP B. HEYMANN, JAMES BARR AMES PROFESSOR OF LAW, HARVARD LAW SCHOOL

Mr. HEYMANN. How long would you like me to restrict myself to, Senator Leahy? Seriously.

Chairman LEAHY. I thought the panel had been told 5 minutes.

Mr. HEYMANN. Five minutes is just fine.

I would like to explain that I think of myself here and I would like to speak today as a terrorism expert whose book is doing surprisingly well since September 11th. I don't want to focus on the constitutional issues because you have lots of other people to focus on them. I don't agree with Mr. Barr. And I would like to say as to that only that when asked what was the nearest precedent, Mike Chertoff said *Ex Parte Quirin*. *Ex Parte Quirin* is a case about eight identified people, indisputably Nazis, indisputably from Germany, sent to a military trial, a single military trial, on the charges of espionage, being behind enemy lines without uniform, which had been traditional since the Revolutionary War. Very traditional.

It is a long way to go from that to an order that covers 20 million people in the United States, lasts forever, covers any act of terrorism, whether connected to Al Qaeda or not, covers any aiding, abetting, or conspiracy towards any act of terrorism, covers harboring anybody who aided or abetted ever in the past somebody who ever in the past was a terrorist, and forever henceforth. That is a long way from *Ex Parte Quirin*, so I don't share Mr. Barr's confidence that the Supreme Court will sustain that order.

Let me go to the policies of counterterrorism. The first lesson there that everybody who has studied terrorism learns is a military lesson, and that is, after you get your gun, try very hard not to shoot yourself in the foot. Or if you are going to bomb the enemy, try not to bomb friendly forces at the same time.

The President's order on military detention, the military order which authorizes both detention and military tribunals, shoots us in the foot in a major way for no good reason.

I have to step back for one second. I feel a little bit like there are two totally different orders being discussed. Most of the hearing before the Committee was a discussion with Mr. Chertoff of the handling—nobody limited it this way, but in the back of our minds was—the handling of Al Qaeda terrorists seized in Afghanistan, where there are no courts, and subject to military trial there, and, indeed, as Mr. Chertoff said he hoped, subject to very fair trials under regulations that we have not yet seen by the Department of Defense. The trials, he suggested, may very well be public, although keeping them private is probably the primary purpose of having military tribunals in this case.

The order I am talking about doesn't have to do with a handful of people or 20 people or 40 people in Afghanistan. It covers 20 million people living in the United States, most of whom—15 million of whom—are legal residents, and their children. It says that there can be indefinte detention or a military tribural whenever the President suspects that one of this multitude is or may have been a terrorist in the past or has aided or harbored a past or present terrorist. And it makes those consequencies possible whether the terrorism involved was a large terrorist event or a trivial terrorist event—and there are terrorist events as trivial as the September 11th occasion was massive and horrible.

Whenever that takes place, the President has the extraordinary power have described. Mr. Chertoff assures us the President won't exercise the power wrongly. I believe he will do his best. But I don't think the Constitution gave the President there powers—and I don't think the President can take it and I don't think Congress should give them to President when their reach is to any of 20 million people in the United States, plus anyone else outside the United States, whom he reasonably suspects falls in those categories. A secret trial before three colonels sounds to much like Paraguay in the 1970's. We don't know whether there is to be proof beyond a reasonable doubt. We don't know whether all the evidence that the colonels see will be made available to the defense. You don't do that if you are interested in effective counterterroris unless there is a real necessity. There is lots of evidence that it is not necessary.

Now, number one, Britain hasn't found it necessary to do without judges. Germany didn't find it necessary to do without judges. Italy had a terrorist group, the Red Brigades, that numbered fully as many as Al Qaeda, and it was all in Italy. It didn't find it necessary to do without judges. We are the first ones to find it necessary to do without judges.

What I think the Congress must do, what I think is the only intelligent thing to be done, is to look at both the benefits and the costs of what is being proposed. There are two powers the President wants over every non-citizen he suspects aiding, other having aided, any form of terrorism. The first is indefinite detention. Senator Hatch made the point earlier today that everybody who is now detained is detained either as a violator of immigration laws or as somebody arrested for a crime. It is a reassuring point until you

realize that the President's order gives the Secretary of Defense power to detain anybody, without any of those protections. Second, also gives the military the power to try anyone in this cateory before military tribunals without well-specified law because there is no law of war at the moment on terrorism.

Well, what is the case for it? Now, my successor as head of the Criminal Division, Michael Chertoff, in remarkably honest and straightforward testimony, insisted that these matters could be tried properly before civilian courts. The United States has succeeded in every terrorist case, that it had to. We have extra-territorial statutes. We have the Classified Information Protection Act. We have the Foreign Intelligence Surveillance Act. We have ways of protecting witnesses. It is very hard to imagine why we wouldn't be able to try in our federal courts any of those 20 million people now living in the United States.

Michael Chertoff was arguing, well, maybe you should, maybe you shouldn't, the President should decide. The costs are immense: the foreign policy costs, the sense of insecurity of people who aren't citizens of the United States, the sense of insecurity of citizens who know that *Ex Parte Quirin* allows exactly the same thing to be done—by a Presidential order for citizens. Being unnecessary in light of the proven capacities of our prosecutors, courts, and law, the proposal has no compensating benefits.

I have 12 other points. Please get them out of my paper.

[The prepared statement of Mr. Heymann follows:]

STATEMENT OF DR. PHILIP B. HEYMANN, JAMES BARR AMES PROFESSOR OF LAW, HARVARD LAW SCHOOL

Mr. Chairman, Members of the Committee:

I am pleased to testify because the Committee is reviewing what I regard as one of the clearest mistakes and one of the most dangerous claims of executive power in the almost fifty years that I have been in and out of government. I do not say that as a civil libertarian; I have always considered public safety to be fully as relevant as democratic traditions when they really are in conflict. So my advice to members of your staff and the House Judiciary staff on the Administration's bill revised as the PATRIOT statute, was that, with some exceptions, the provisions were reasonable and often overdue. I do not have the same reaction to the President's order on military trials.[1]

At the same time I reject as "knee-jerk" the security reactions of columnists such as George Will or the law professors he quotes, including my good friend and admired colleague, Larry Tribe.[2] They are at least as dangerous as the thoughtless objections of those on the opposite side. I have personally seen and studied the effects of military courts in Guatemala where I later worked, and in Argentina, Paraguay, and the People's Republic of China. I have seen the fear and hatred they engender in a population and compared that to the immense appreciation and respect both our military and our courts have long enjoyed. I have watched the strained identification with us that the leaders of Zimbabwe and Egypt have based on our "shared" recourse to military courts, a step rejected by Britain, France, Germany, and Italy when they were under sustained terrorist attacks. (See Appendix A.) Knee-jerk reactions are no safer on one side of these issues than on the other.

We have a deep tradition—expressed powerfully in the Declaration of Independence—of confining military courts and secret proceedings to as small an area of necessity as possible.[3] Only in the following circumstances have our courts allowed

[1] Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831 (November 16, 2001).

[2] George F. Will, *Trials and Terrorists,* WASHINGTON POST, Nov. 22, 2001, at A47.

[3] The Declaration of Independence notes: "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). "[The King] has affected to

military tribunals to try citizens and aliens alike: where in a wartime situation there are no operable civilian courts; where, before peace is declared, there is to be a trial of wartime atrocities against the internationally recognized laws of war; where spies attached to a belligerent nation have been caught behind our lines. In all other situations they have refused, in inspired language, to depart from a legal tradition so old, so important, and so much a part of what we stand for.

There is, in short, a high Constitutional presumption of civilian trials, except in a few identified situations during quite traditional wars, recognized as such by the Congress, where we could lose our freedoms to another nation. I will not argue today whether a war on many forms of terrorism continuing until this century-long modern phenomenon is ended will, unlike a war on the murderous Colombian cartels or the Mafia, qualify as a war for the Supreme Court's jurisprudence on military trials. I doubt it. In any event, the detention provisions of the same Presidential order clearly do not satisfy the specified Constitution criteria for extra-judicial detention: "invasion or rebellion" leading Congress to suspend habeas corpus.

I don't need the heavy presumption, captured by Jefferson in the Declaration of Independence, to make my case. Nor need I refer to the last six words of the pledge of allegiance. Like almost everyone else who has studied how nations have handled terrorism, I ask only that the government consider and specify openly what are the costs and benefits of any change in democratic traditions it proposes. If Attorney General Ashcroft or President Bush had done this with regard to the importance and scope of their prospective change from civilian courts to secret military tribunals, the public would not accept the change. Certainly the Congress would not agree to it.

Let me review the benefits, costs, and inflammatory breadth of the President's order.

The benefits. The proposal will help solve whatever problem remains after more than two decades of legislation and proud law enforcement experience in dealing with the difficulties of civilian trials of terrorists and spies. The Congress has passed "extra-territorial" criminal statutes that apply stern measures to terrorism committed abroad against Americans.[4] It has passed statutes allowing special electronic and physical searches of spies and terrorists from other countries and has just extended, in a very sensible way, their scope.[5] Two decades ago I helped author a statute to allow trials while protecting national secrets.[6] The intelligence investigators and prosecutors have used it with immense success. We have decades of experience in protecting witnesses. There is precedent, from the United Kingdom, that allows the conviction, as a conspirator or accomplice, of someone who has aided terrorists without proof that he had to know of the specific crime.[7] We have on several occasions flown back to the U.S. for trial terrorists arrested by U.S. intelligence or law enforcement half-way around the world.[8] In our courts there is no available exclusionary rule or other defense for a non-American searched or captured abroad, even if the search or arrest did not comply with the requirements of the Fourth (or any other) Amendment for searches and seizures in the United States.[9]

Using these well-developed capacities, we have had remarkable success in trying and convicting the terrorists responsible for the bombings of the World Trade Center in 1993 and our embassies in Kenya and Tanzania. I have a hard time thinking of the prosecutorial benefits of military tribunals over civilian tribunals so fully empowered as ours, except that the military tribunals could, by selection or message from higher authority, use their secrecy, their lesser burden of proof, and the possibility of conviction by a two/thirds vote to convict without even the evidence that a jury of angry, patriotic Americans would demand.

The costs. What then are the costs of authorizing for all non-citizens indefinite detention without trial or, alternatively, a secret military trial with secret or untested evidence before a military panel chosen and evaluated by their commander, without

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render the military independent of, and superior to, the civil power." Id. at para 14. "He has made judges dependent on his will alone, for the tenure of their offices, and the amount of payment of their salaries." Id. at para. 11.

[4] *E.g.*, Hostage Taking Act, 18 U.S.C. § 50 U.S.C. §§ 2331–2332 (2001) (killing of U.S. citizens abroad).

[5] Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801–1811 (2001).

[6] Classified Information Procedures Act, 18 U.S.C. §§ 1–16 (2001).

[7] Director of Public Prosecutions for *Northern Ireland* v. *Maxwell*, [1978] 3 All E.R. 1140. See also *Regina* v. *Bainbridge* [1960] 1 Q.B. 129.

[8] *E.g.*, *U.S.* v. *Yunis*, 924F.2d 1086, 1089 (D.C. Cir. 1991); Christopher Drew, *FBI Captures Lebanese Hijacking Suspect at Sea*, CHICAGO TRIBUNE, Sept. 18, 1987, at 1.; Christopher John Farley et al., *Going Without a Prayer: An Inside Look at How the FBI and CIA Nabbed an Infamous Suspect After a Global, Four-Year Manhunt,* TIME, June 30, 1997, at 34.

[9] *U.S.* v. *Verdugo-Urguides*, 494 U.S. 259 (1990); *U.S.*

judicial review of the adequacy of the evidence. To these must be added a possible death sentence for any of about 18 million non-citizens living in the United States (about one-third of whom may have violated their terms of entry)[10] whenever the executive decides they have engaged, or are engaged, in terrorism related or unrelated to al Qaeda. I will list only a dozen such costs.

(1) The authorization claims the critical powers—executive detention unreviewable in any court and secret military trials—of a police state, at the unreviewed discretion of the executive, over millions of individuals lawfully living in the United States, based on an unreviewed suspicion of unidentified forms of support of undefined political violence with an unspecific international connection. In doing so it will undermine the support and loyalty of many millions here in the U.S. and their relatives abroad.[11] At the same time it will stifle speech and legitimate dissent among those covered.

(2) If sustained by Congress and the courts, it would create a precedent very likely to be applicable to citizens. The Supreme Court declined to draw any distinction between citizens and aliens in *Ex Parte Quirin*. The "military order" itself is careful to preserve the "lawful authority of the Secretary of Defense. . .to detain or try any person. . .not subject to this order."

(3) It relegates the Congress as well as the courts to a position of impotence in addressing one of the most fundamental questions about how much of our democratic tradition we will preserve. Nothing in the joint resolution of September 18, 2001, that authorized the use of "necessary and appropriate" force, remotely considers (approves or rejects) military detention and secret trials in the United States.[12]

(4) It deprives the U.S. of its historic claim of moral leadership among the world's nations in matters of fairness to individuals, leaving us in the position of encouraging the outrages of dictators like President Mugabe.[13] It will make more difficult future efforts at military coalition-building.

(5) It has denied us, and will deny us, the benefits of legal cooperation with our closest allies in the form of extradition and mutual legal assistance.[14]

(6) It will create resentment, fear, and suspicion of the military, our most respected profession, undoing much of the benefits of more than a century during which the Posse Comitatus Act has protected the military from public fear and resentment.[15]

(7) It will end a twenty-year successful effort to win respect and trust for a long-ridiculed military justice system.

(8) It undermines public confidence in the ability of our law enforcement to handle cases of international terrorism—confidence hard-earned with the patient, intelligent legislative help of the U.S. Congress.

(9) It will leave lasting doubts about the honesty of convictions in the wake of secret trials with secret evidence.[16]

(10) It will teach American children, particularly the children of immigrants, that this is not a nation "with liberty and justice for all."

(11) If we are at "war," the President's order directly conflicts with our obligations under Article 102 of the Geneva Convention on Prisoners of War that requires trials of prisoners of war, even for war crimes, only under "the same procedure" as we use in Courts Martial of our own soldiers.[17]

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[10] The 200 census counted 28.4 million foreign-born residents of whom 37.4% were citizens. We had 24 million vists from tourists in 1999 plus 6.5 students, business, and worker visits.

[11] Greg Winter, *Some Mideast Immigrants, Shaken, Ponder Leaving U.S.*, N.Y. TIMES, Nov. 23, 2001, available at *www.nytimes.com:* Jodi Wilgoren, *Swept Up in a Dragnet, Hundreds Sit in Custody and Ask, 'Why?',* N.Y. TIMES, Nov. 25, 2001, available at *www.nytimes.com.*

[12] Unlike the "military order," the joint resolution is also limited to those thought to be involved with the attacks of September 11th.

[13] Fred Hiatt, *Democracy: Our Best Defense*, WASHINGTON POST, Nov. 19, 2001, at A21.

[14] Sam Dillon & Donald G. McNeil, Jr., *A Nation Challenged: The Legal Front; Spain Sets Hurdles for Extractions,* N.Y. TIMES, Nov. 24, 2001, at A1.; William Safire, *Essay: Kangaroo Curts*, N.Y. TIMES, Nov. 26, 2001, at A17.

[15] Posse Comitatus Act, 18 U.S.C. § 1385 (2001).

[16] C.f. Boris I. Bittker, The World War II German Saboteurs/Case and Writ of Certiorari before judgment by the Court of Appeals: A Tale of None Pro Tone Jurisdiction, 14 Const. Commentary 431, 451 nl. (1997) (citing Eugene Rachlis, *They Came to Kill: The Story of Eight Nazi Saboteurs in America* (Random House, 1961, 156–159)). In 1942, eight Nazi Saboteurs were arrested on U.S. soil and tried before a Military Commission. The FBI attributed the unmasking of the Saboteurs to the extraordinary sleuthing of its agents althought the proximate cause of the capture was the defection of one of the saboteurs.

[17] For a Court Martial, as well as for any other properly authorized military tribunal, he is directed—by the very statute on which the claimed authority for the "military order" of November 13, 2001 is based—to "apply the principles of law and the rules of evidence generally recog-

(12) Unless a secret military tribunal whose personnel are chosen and later evaluated by the executive is an "independent and impartial tribunal," it also violates Article 14 of another treaty we have signed and ratified (The International Covenant on Civil and Political Rights). A non-independent tribunal is legal only if the President determines and announces that we are in a situation "which threatens the life of the nation."[18]

The drafting. Bypassing Congressional and judicial review, the order is drafted with an appalling carelessness as to its over-broad scope. Most citizens and commentators think that it applies only to military or terrorist leaders captured abroad who have violated the laws of war. At the President's discretion:

1. It applies within the Unites States to 18 million non-citizens and it applies throughout the world to the citizens of every nation.
2. It applies to acts committed decades ago and to persons only remotely connected to those acts.
3. It allows indefinite discretionary detention without plans for any trial, even before a military tribunal.
4. It attempts to suspend habeas corpus without Congressional action or compliance with the Constitutional requirements of "invasion or rebellion."
5. It has many applications the Supreme Court will not permit under the Court's requirement, where civil courts can operate, of a violation of the law of war. For example, harboring an ex-terrorist is not a violation of the law of war (or else our officials who have hosted leaders of other nations who fall in this category are war criminals.)
6. It allows the President to decide when a threatening form of group crime becomes a war justifying detention and military tribunals, and to exercise that authority, without Congressional sanction. Using language with the sweep of the commerce clause of our Constitution, he has exercised that judgement by applying the order to relatively minor acts of terrorism (any act that carried "adverse effects on the U.S.. . .economy ") and not just to massive attacks such as those of September 11, 2001.

My conclusion is simple. It should be a proud and patriotic responsibility of the Congress to protect the people of the United States against the unnecessarily dangerous path of recourse to military tribunals and detention without trial which the President has taken in response to public fears. President Bush has said that it is our traditional freedoms that al Qaeda, and its like, fear and envy. We must be prepared to fight for these traditions admired around the world. We must not surrender any fundamental liberty without manifest necessity and Congressional review. There is no such necessity and there has been no such review in the case of President Bush's "Military Order" of November 13, 2001.

APPENDIX A

Western European countries have taken cautious steps to eliminate the risks of intimidation. Germany centralized the prosecution and adjudication functions in the case of terrorism, providing special protection for those responsible. For terrorist trials, France eliminated the participation of a majority of lay individuals who act as fact-finders in felony trials, substituting a panel of judges all but one of whom is anonymous. More dramatically, trials of narco-terrorists and other terrorists in Colombia take place before a single judge whose identity is carefully hidden.

Closest to the U.S. common law tradition was the situation of Great Britain in Northern Ireland. The British ?Diplock Courts? are perhaps the most famous of the special anti-terrorism courts in operation. Lord Diplock headed a Commission to evaluate the operation of the Northern Ireland justice system when opposition to internment without judicial trial had led the government to seek alternative ways of processing court cases involving paramilitaries. He concluded that intimidation of jurors by the defendants and their colleagues and ?perverse? verdicts rendered by jurors sympathizing with the cause of the government?s opponents made jury trials impractical.

The Diplock Commission recommended implementation of special "Diplock" courts for the trial of specified offenses such as murder, weapons offenses, bombings, and the like. Such courts are presided over by a single judge but without the normal jury. The trials have been public; defendants have had legal representation and

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nized in the trial of criminal cases in the United States district courts "so far as he considers practicable."

[18] Article 14, *International Covenant of Civil and Political Rights*, 999 U.N.T.S 171, entered into foce Mar. 23, 1976; United National General Assembly Resolution 2200A [XX1]. 16 December 1966.

could cross-examine witnesses against them. The standard for conviction has remained guilt beyond a reasonable doubt. Defendants have an unfettered right to appeal if found guilty. Judges are required to provide a written opinion regarding their views of the law and the facts of the case when rendering a verdict. Their reasoning can be challenged on appeal.

Britain's attorney general is empowered to decide, at the request of defense counsel, if specific cases involving scheduled offenses should be "certified out" as not being political in nature. Cases that are "certified out" revert back to the regular jury trial courts. In 1995, the attorney general approved 932 of 1,234 applications for removal from Diplock Court. In that year 418 people were tried for scheduled offenses in Diplock Court and 395 were convicted (360 of these pleaded guilty). Of the 58 defendants who pleaded not guilty, 23 (40%) were found not guilty at trial.

These uses of special courts have been careful and their purpose, avoiding intimidation of fact finders, is important. But special courts always create special fears because the motivation for special courts has not always been merely to deal with intimidation. Secret courts, instituted by the military to further its purposes have been used in Guatemala, Argentina, Chile, and elsewhere. The purpose was less to deal with threats than to assure that the fact finders would be sympathetic to the views of the government.

Chairman LEAHY. We are going to ask some questions and give you a chance to give us more.

Mr. Bell?

STATEMENT OF GRIFFIN B. BELL, SENIOR PARTNER, KING & SPALDING, AND FORMER ATTORNEY GENERAL OF THE UNITED STATES

Mr. BELL. I have filed a statement, so I am just going to be very short. I am posing it by trying to answer questions that have been raised in the public arena.

Did the President have power to issue this order setting up military tribunals? I don't think there is any doubt that he had power. I don't think there is anything irregular about it. I don't think there is anything illegitimate about it.

I picked out three cases. First, in the Revolution, Major John Andre was tried by a military tribunal. He was the negotiator with the traitor Benedict Arnold. After the Civil War, the commander of the Andersonville Prison camp, Captain Wirtz, was tried by a military tribunal in Washington, although he lived in Georgia, and was executed. We tried the German spies that everyone has been talking about, but we also tried General Yamashita after World War II ended in a military tribunal convened by General MacArthur, not by the President but by General MacArthur. So military tribunals are not uncommon in time of war.

Now, is the focus of the President's order too broad? I think not. First, it has to be—what he does, if he puts someone under this order, it has to be in the interest of the United States. He has to have reason to believe that the person is a member of Al Qaeda or is engaged in international terrorism acts or has harbored someone who did.

What procedures are to be followed by the military court, a tribunal? We don't know yet because they haven't been promulgated, but there are some things in the order that tell us some elements of due process. The order says that the defendant will be afforded counsel, there will be a record made of the trial, and that the evidence will be that which has probative value to a reasonable person. Incidentally, the same standard that was set out by General MacArthur when General Yamashita was tried.

Will the trial be without a jury? Yes. This is true with our own soldiers who are prosecuted under the Code of Military Justice. There is no jury. It is hard for me to understand why we would want to give someone charged with international terrorism a jury when our own soldiers would not have a jury if they were being prosecuted.

We can assume that military officers serving on the military court martial or tribunal would be no less fair than a civil jury. I read a comment by Secretary of War Stimson who said during World War II in a biography of General Marshall on that very subject, when he said, "All the civilians wanted to shoot the Germans after the war, but the military wanted to have fair trials." So I think we shouldn't assume that juries somehow or another are fairer than military officers.

Will the trial be secret? No, and I think it is nonsense to contend otherwise. The order does not say so. The order protects classified information. When I was Attorney General, we began to prosecute spies or espionage cases again after a long period of time, and we had to deal with courts on how to try cases where we had to protect sources and methods and foreign intelligence, and we were able to do that. And the idea was that lawyers every day tried trade secret cases, and you don't make the trade secrets public. So we found ways to do that. We tried people who, for example, had stolen plans from the CIA and sold them to the Russians for satellite plans, and we tried a jury trial without making the plans available to the public. So we know how to try cases of this kind. I think that is what it means, but the Secretary of Defense might very well spell out what that means.

What of the conviction by a two-thirds vote? If we were trying one of our own servicemen, everything would be by two-thirds vote, every crime, except life, which would be three-fourths, and death, which would be unanimous. That is a debatable question, a fair question to debate, and the Code of Military Justice might very well be considered by the Secretary of Defense.

What is the burden and quantum of proof? I would say it would be reasonable to follow what was used in General Yamashita's trial.

Lastly, what of the right to appeal? In military tribunals, there is no general right of appeal, but this order does not preclude writs of habeas corpus, and it is beyond my imagination that you couldn't use a writ of habeas corpus if someone was tried in the United States. I think you cannot use a writ on a decision by Justice Jackson for non-resident aliens or a case tried in some other country. I think that is settled. But in this country, no.

I would like to suggest one thing to the Committee. I have high regard for the Judiciary Committee. I have appeared here many times. I think it would be well to wait until the Secretary promulgates these orders, rules, and regulations before you finally conclude this matter. Some of these questions probably will be cleared up at that time, and I think we need to give the Secretary of Defense a chance to allay a lot of the worries that people have.

Thank you.

[The prepared statement of Mr. Bell follows:]

STATEMENT OF HON. GRIFFIN BELL, SENIOR PARTNER, KING & SPALDING AND FORMER ATTORNEY GENERAL OF THE UNITED STATES

I. SUBJECTING TERRORISTS TO TRIAL BY MILITARY TRIBUNAL IS COMPLETELY CONSISTENT WITH THE UNITED STATES CONSTITUTION AND WITH THIS NATION'S HISTORICAL PRECEDENT.

As I wrote in an editorial that appeared in the Wall Street Journal two weeks after the September 11th attacks, the President's responsibility to protect our citizens from foreign terrorists implicates very different concerns from those raised by our standard law enforcement process as administered by our civilian courts.

There can be no doubt that the perpetrators of the September 11th attacks are more than simple criminals. By their level of organization, their access to vast reservoirs of foreign resources, their professed dedication to the destruction of the United States, and their strategy of targeting and slaughtering our civilian population, it is plain that these terrorists, and those who support them, are nothing less than combatants engaged in an armed conflict with the United States.

Congress has acknowledged the existence of this armed conflict, passing on September 18, a joint resolution authorizing the President to use armed force against the perpetrators of the September 11th attacks, in light of the "unusual and extraordinary threat to the national security and foreign policy of the United States."

In this context, when fulfilling his responsibility to protect our citizens from armed combatants against the United States, the President's authority flows, not from his role as the nation's chief law enforcement officer, but rather from his role as Commander-in-Chief of the nation's Armed Forces.

In exercising his authority as Commander-in-Chief, the President is not bound to afford captured combatants the same protections afforded to criminal defendants by the Bill of Rights.

It is absurd to suggest that the U.S. military must observe the same civil liberties in its interaction with foreign soldiers that our law enforcement agents must observe in their interactions with common criminal defendants. While a U.S. serviceman must abide by certain domestic and international rules of engagement when conducting a war, he is certainly not responsible for conforming his actions to the U.S. Constitution. A U.S. soldier need not obtain a search warrant prior to entering an enemy building, nor must he advise a captured soldier of his right to retain an attorney.If an enemy combatant is taken into custody, there remain domestic and international norms that must be observed in the treatment of that prisoner. However, trial by jury in a civilian court is not a right enjoyed by such a prisoner. Neither the United States Constitution, nor any international treaty, imposes the incongruous obligation that a captured combatant must receive a trial in a civilian court.

Nor has it been our practice, at any time during the history of this country, to attempt to provide trials for captured combatants in our civilian courts.

Military tribunals, such as those authorized by the President's recent Executive Order, are the traditional means by which foreign combatants, including terrorists, have, historically, been brought to justice.

Military tribunals were used extensively by this country during and after World War II. Hundreds of German and Japanese prisoners were tried by military tribunals for violations of the law of war following the end of that war. In 1942, President Franklin Roosevelt convened a military tribunal in Washington, DC, to try eight Nazi saboteurs who were arrested in New York and Chicago after embarking on our East Coast from German submarines.

During and after the Civil War, military commissions were used to try war criminals, including the individuals who participated in the assassination of President Lincoln.

Military tribunals were used to try war criminals during the Mexican-American War, various wars against the American Indians, and the American Revolution.

The Supreme Court has consistently approved of military tribunals, explaining in one case, "Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war." [*Madsen* v. *Kinsella*, 343 U.S. 341, 346–47 (1952)]

Congress has expressly authorized the use of such tribunals in Title 10 of the United States Code [10 U.S.C. § 821], and has provided that the President shall have the power to prescribe the procedures to be used [10 U.S.C. § 836].

There are some critics who have argued that certain rights, such as the right to a trial by jury and the right to indictment by grand jury, are essential elements of the "American Way," and must be provided in all contexts, even to enemy prisoners of war. To these critics, I say that our own servicemen are subject to the Uniform

Code of Military Justice, which does not provide for such rights. It would indeed be peculiar to insist that captured enemy combatants are entitled to greater rights than those provided to our own soldiers.

Other critics have predicted that the procedures established for these tribunals may amount to little more than a "kangaroo court," with rules that are so slanted against a defendant that justice will not be served. To these critics, I say your criticism is, as of now, unfounded. The Secretary of Defense has yet to issue a code of procedures for these tribunals. This nation has, in the past, conducted trials by military tribunal that meet all reasonable standards of both substantive and procedural due process. Such tribunals have, in the past, resulted in both convictions and acquittals of the individuals charged with violations of the law of war. There is no reason to believe that our Secretary of Defense will establish patently unfair procedures for trials pursuant to the President's directive.

II. CONSIDERATIONS OF NATIONAL SECURITY SHOULD PROPERLY BE WEIGHED AS THE GOVERNMENT DETERMINES WHETHER TO DIVULGE THE IDENTITIES OF INDIVIDUALS WHO HAVE BEEN DETAINED IN CONNECTION WITH THE INVESTIGATION INTO THE SEPTEMBER 11th ATTACKS.

There have been allegations that the Justice Department has acted improperly in failing to divulge publicly to the press the identities of all persons being detained in connection with the investigation into the September 11th attacks.

I have seen no evidence to suggest that the Justice Department has acted improperly in this respect.

In his capacity as Commander-in-Chief of the armed forces, the President and his cabinet must retain the right to designate certain information as classified in order to protect our national security and to preserve the integrity of ongoing criminal investigations.

The Freedom of Information Act, which is the primary vehicle for ensuring the openness of our democratic government, expressly recognizes the government's authority to withhold certain information to protect national security and to preserve the integrity of ongoing criminal investigations.

It is perfectly reasonable to expect that releasing the names of those individuals being detained in connection with this investigation would have a negative impact on our efforts to track down other terrorists and to protect against further terrorist attacks. While I am not privy to the details of the current investigation, my experience as Attorney General leads me to believe that such information would be extremely useful to those terrorists who remain at large.

The fact that the Justice Department has not provided this information to the press does not mean that the detainees are powerless to vindicate their rights. It is my understanding that each of the detainees in question is either believed to be here in violation of our immigration laws, or is being held on a material witness warrant. The Attorney General has represented that each of these detainees has had access to legal counsel should they wish to challenge the basis for their detention. Presumably, counsel for any one of the detainees could contact the press if it were in the interest of that detainee to do so. Moreover, as with any case in this country in which a person has suffered a deprivation of liberty, each of these detentions is subject to judicial review.

Also, it would seem to me that our government would be committing a serious violation of the privacy of these detainees if, for example, the Justice Department published a list of the detainees in the Washington Post or the New York Times.

In sum, I have no reason to believe that the Justice Department has acted improperly in declining to release to the press the identities of the detainees in connection with this investigation. The decision not to release such information appears to have a sound basis grounded in the operational necessities of conducting this war on terrorism.

SUMMATION

1. The President has acted under the common law of war. Although we have not declared war since World War II, war has been authorized by the Congress through the authority to use armed forces as they are now being used in Afghanistan. Public Law 107–40. Congress authorized military tribunals in Sections 821 and 836 of Title 10 of the United States Code. Military tribunals have been used throughout the history of our nation. Major John Andre was executed after trial by a military commission during the Revolutionary War; Captain Wirtz, the Commander of Andersonville Prison, was tried by a military tribunal following the Civil War and was executed. Such tribunals were used in the Civil War and in World War II. President Roosevelt convened a military tribunal to try the German spies and General Yamashita was

tried at the end of the war by a military tribunal constituted by General MacArthur. It is simply incorrect to say that there is anything irregular or illegitimate about President Bush constituting military tribunals in the current war on terrorism.

2. Is the focus of the Order too broad? I think not. It applies only to non-citizens selected by the President. The President determines from time to time in writing that it is in the interest of the United States that an individual be subject to the Order if there is reason to believe that he or she is or was a member of the al Qaeda or has engaged in, aided or abetted or conspired to commit acts of international terrorism or acts in preparation therefor that have caused, threatened to cause or have as their aim to cause injury to or have adverse affects on the United States, its citizens, national security, foreign policy or economy or has knowingly harbored one or more individuals described in Paragraphs (i) or (ii) of Section 2(a)(i) of the President's order. This seems to me to be a narrow focus.

3. What procedures are to be followed by the military court? These are yet to be promulgated by the Secretary of Defense. The terms of the order are such that we can be sure that any defendant will be afforded defense counsel, that a record will be made of the trial, that evidence will be limited to that which has probative value to a reasonable person.

4. Will trials before the military tribunal be without a jury? Yes. That is true also when our own soldiers are tried under the Code of Military Justice. There is no jury. We can assume that military officers serving on a military court martial or tribunal would be no less fair than a civil jury. See Comment of Secretary Stimson, Paragraphs 467 and 468 in Pogue's George L. Marshall: Organizer of Victory.

5. Will the trials be secret? No. It is nonsense to contend otherwise. What the Order provides is that classified information will be protected. We have been doing this for many years in espionage cases, which are tried in the federal courts. Classified material is protected without the denial of rights to defendants. It is in the interest of the nation to protect sources and methods in foreign intelligence. We await the procedures to be promulgated by the Secretary of Defense; it may well be that there will be procedures for protecting classified information as it is contemplated by the President's Order.

6. What of the conviction by a two-thirds vote? In the Code of Military Justice, which applies to our own servicemen, a two-thirds vote of those constituting a general military court martial applies in any sentence less than life imprisonment or death. In the case of life imprisonment, the Code provides for a three-fourths vote for conviction, and for death there must be a unanimous vote. Has the President abused his authority as Commander in Chief by providing for a two-thirds vote in the case of life imprisonment or death? I think not, although it can fairly be argued that the Code of Military Justice standard is a precedent to be considered.

7. What is the quantum of proof? In the trial of General Yamashita following World War II, the burden and quantum of proof for the tribunal constituted by General MacArthur was evidence proving or disproving the charge which, in the opinion of the tribunal, would have probative value in the mind of a reasonable person. Here, again, we should await the quantum and burden of proof that is set out in the procedures to be established by the Secretary of Defense.

8. Lastly, what of the right of appeal to the courts? The Order provides an appeal to the President or, by his order, to the Secretary of Defense. The Order purports to take away the jurisdiction of all other courts, state or federal, for these convictions. The President's order contains no reference to the writ of habeas corpus, and I believe that there is no basis for construing the order as an attempt to suspend that right. The Constitution (Article I, Section 9) provides that not even Congress can suspend the Writ of Habeas Corpus unless, when in cases of rebellion or invasion, the public safety may require it.

9. There have been a number of cases in the Supreme Court considering whether Writs of Habeas Corpus will lie from military tribunals to federal courts. In some cases, the order constituting the tribunal was silent as to the use of the writ, but Justice Jackson for the Court in *Johnson* v. *Eisenstranger*, 339 U.S. 763 (1950), dealt extensively with the question of whether non-resident enemy aliens could even use the writ. As to those cases which involve U.S. citizens, or aliens on U.S. soil, the case of *In re Quirin*, 317 U.S. 1 (1942), plainly established that habeas corpus review was an appropriate means for defendants to test the jurisdiction of military tribunals.

With due deference to this important Committee carrying out your oversight function and your legislative function, I suggest that it would be well to adjourn this hearing pending receipt of such orders and regulations by the Secretary of Defense, as are contemplated by Section 4(b) and (c) of the President's Order as well as the meaning of the provision in Section 4(a) of punishment "in accordance with the penalties provided under applicable law."

Chairman LEAHY. Thank you, General Bell. I appreciate your being here, and you bring back memories of my early days in this Committee where I think my seat was probably so far back that you never even noticed me because I was probably behind you. I didn't care much for the seniority system back then. Now that I have studied it 25 years, I like it a lot better.

Professor?

STATEMENT OF SCOTT L. SILLIMAN, EXECUTIVE DIRECTOR, CENTER ON LAW, ETHICS AND NATIONAL SECURITY, DUKE UNIVERSITY SCHOOL OF LAW

Mr. SILLIMAN. Mr. Chairman, Senator Hatch, Senator Specter, the President's order cites as one of its legal predicates Article 21 of the Uniform Code of Military Justice. That provision, I submit, creates no new authority in the President as to military commissions. It merely acknowledges that in establishing the jurisdiction for courts-martial, Congress did not deprive these commissions, another type of legal tribunal, of concurrent jurisdiction with respect to offenses which, by statute or by the law of war, may be tried by these commissions.

As to statutory offenses, Congress clearly has the authority under Article I, section 8, clause 10, to define and punish offenses against the law of nations, of which the law of war is a subset. But it has done so only in a very restricted manner, notably, in the War Crimes Act of 1996, none of whose provisions are applicable to what we are dealing with in this instance. So we must, therefore, look to the law of war for the predicate authority for military commissions.

Customary international law recognizes the right of a military commander to use military commissions to prosecute offenses against the law of war, offenses which, by definition, must take place within the context of a recognized state of armed conflict. I maintain that shortly before 9 o'clock in the morning on Tuesday, September 11th, we were not in a state of armed conflict and we did not enter into a state of armed conflict until some time thereafter, certainly on or after the 7th of October.

Some argue that the events of that horrendous Tuesday demand a reappraisal of customary international law concepts regarding the distinction between state and non-state actors and that, irrespective of whether the attacks were carried out by one, 19, or a greater number of terrorist non-state actors, that they should nonetheless be considered acts of war. I cannot agree in that. The answer lies in legislation rather than an instantaneous sweeping aside of traditional customary law concepts.

Articles 18 and 21 of the Uniform Code of Military Justice could be amended to allow for the use of military commissions or even courts-martial to try offenses, not just against the law of war but against the law of nations, and could include the broader category of offenses such as we are dealing with on September 11th.

A word about the much cited case of *Quirin* involving the eight German saboteurs. Although the Supreme Court did sanction the use of a military commission in that instance, it did so in the clear context of a formally declared war, saboteurs entering this country surreptitiously and illegally at a time frame only 7 months after

the attack on Pearl Harbor, where the vulnerability of this country was shockingly realized. That realization of vulnerability also gave birth to the infamous internment camps for Japanese Americans sanctioned by the Supreme Court in the *Korematsu* case. The *Korematsu* case is a precedent, Mr. Chairman, that I suggest few would want to bring forward. I suggest that *Quirin*, like *Korematsu*, can be extended too far beyond its context.

I, therefore, see a weakness in the legal predicate for using military commissions to prosecute offenses occurring on September 11th, and I believe that that weakness could result in a finding that such commissions would not have jurisdiction over those offenses, the September 11th offenses.

I also have policy concerns, Mr. Chairman. I acknowledge the convenience and perhaps the prudence of commissions sitting overseas for terrorists captured incident to combat in Afghanistan and the Supreme Court opinions can be read as precluding judicial review in those cases. That is the *Eisentrager* case. But as to military commissions sitting in this country prosecuting resident aliens, I see not only an adverse impact upon our international credibility, but also a potential tarnishing of a proud heritage of 50 years of military justice under the Uniform Code of Military Justice.

Senators Kennedy and Kohl have both mentioned the Berenson case, 1996, in Peru. I would suggest that there appears to be little difference between the lack of protections afforded her in Peru and the minimal due process standards set out in the President's order.

We should expect a reproach from the international community for hypocrisy since we continually tout ourselves as a nation under the rule of law. I believe such a criticism could result in a fracturing of the disparate coalition that has been forged to wage a long-term campaign against terrorism worldwide, a campaign which must necessarily go farther than just the use of military force.

Secondly, many in this country do not accurately perceive the distinction between courts-martial under the Uniform Code of Military Justice and military commissions to be empaneled under the President's order. On Sunday's televised news program "Face the Nation," former Deputy Attorney General George Terwilliger stated that "there is a fundamental misconception that somehow a military court cannot be just. Our own soldiers and airmen are subject to military justice on a regular basis. The military can provide fair trials."

That implies, Mr. Chairman, that military commissions will generally follow the same rules of procedure and modes of proof of courts-martial. As this Committee knows, that is not the case. Regrettably, this confusion is widespread, and I have a great concern that in pursuing the use of military commissions, especially in this country, this blurred distinction could sully the image of military justice under the code, a very fair and impartial system of which we have always been proud.

I look forward to answering any questions you might have, Mr. Chairman.

[The prepared statement of Mr. Silliman follows:]

SCOTT L. SILLIMAN, EXECUTIVE DIRECTOR, CENTER ON LAW, ETHICS, AND NATIONAL SECURITY, DUKE UNIVERSITY SCHOOL OF LAW

Mr. Chairman, Senator Hatch and members of the Committee. My name is Scott L. Silliman and I am the Executive Director of the Center on Law, Ethics and National Security at the Duke University School of Law. I am also a senior lecturing fellow at Duke and hold appointments as an adjunct professor of law at Wake Forest University, the University of North Carolina, and North Carolina Central University. My research and teaching focuses primarily in the field of national security law. Prior to joining the law faculty at Duke University in 1993, I spent 25 years as a uniformed attorney in the United States Air Force Judge Advocate General's Department. During Operations *Desert Shield* and *Desert Storm,* I served as the senior Air Force attorney for Tactical Air Command, the major command providing the majority of the Air Force's war-fighting assets to General Schwarzkopf's Central Command.

I thank you for the invitation to discuss with the Committee some of my concerns with respect to the inherent tension which exists in successfully defending against terrorism while at the same time preserving our freedoms. In the event that members of al-Qaeda are captured or surrender incident to the military campaign in Afghanistan, or if individuals suspected of complicity in the attacks of September 11th are arrested in this country or elsewhere, there are several prosecutorial options available to the government. These are (1) trial in the federal district courts, as was done with regard to those responsible for the initial attack upon the World Trade Center in 1993 and upon our embassies in Kenya and Tanzania in 1998; (2) trial in the courts of any other country, under the principle of universal jurisdiction; (3) trial before some type of an international tribunal, either one currently in being or one to be established in the future; or (4) trial by military commission or other military tribunal established by the President in his capacity as Commander-in-Chief. None of these approaches is optimal; all have problems and limitations associated with their use. The President, however, has indicated his intent to pursue the use of military commissions and, accordingly, my comments will be restricted to the military order issued on November 13th which authorizes the detention, treatment and trial of certain non-citizens in the war against terrorism. In particular, I will discuss what I consider to be a weakness in the Administration's argument regarding the President's legal predicate for authorizing the use of military commissions with respect to the terrorist attacks on September 11th, a weakness which I believe needs to be remedied by the Congress through legislation. I will then discuss my policy concerns as to the overall breadth of the current order and how I believe it could adversely impact our international credibility as a nation under the rule of law.

AUTHORITY OF THE PRESIDENT TO AUTHORIZE MILITARY COMMISSIONS

The military order of November 13th lists three statutory provisions which, in addition to the President's constitutional powers, are cited as authority for the order. These are the Authorization for Use of Military Force Joint Resolution, signed by the President on September 18, 2001, and Articles 21 and 36 of the Uniform Code of Military Justice. As to the Joint Resolution, the key operative language is contained in Section 2(a) which authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on Sept 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Section 2(b) declares that Congress, through this resolution, is satisfying its own requirements under the War Powers Resolution of 1973 regarding the need for a specific statutory authorization approving the use of our armed forces in this regard. There can be no doubt that the Joint Resolution is meant to buttress and affirm the President's right as commander-in-chief to use force in self-defense against a continuing threat, either from a state or a non-state actor. This inherent right of self-defense, clearly recognized in customary international law and codified (but not supplanted) by Article 51 of the United Nations Charter, was reiterated in United Nations Security Council resolutions 1368 of September 12th (Security Council Res. 1368, UN Doc. SC/7143) and 1373 of September 28th (Security Council Res. 1373, UN Doc. SC/7158), both of which referred directly to the attacks of September 11th. It should be noted, however, that although there are frequent references in the text of the Joint Resolution to "terrorist acts" and "acts of international terrorism", nowhere in the resolution, or in the presidential signing statement, is there any mention or characterization of the attacks of September 11th as acts of war. They are clearly denoted as *terrorist* acts.

Under the Constitution, Congress was granted authority to make rules for the government of the land and naval forces (Article I, Section 8, Clause 14). It did so most recently through enactment of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801 et seq., in 1950. Article 21 of the Code, cited in the President's military order, mentions military commissions but does so only in acknowledging that the Code's creation of jurisdiction in courts-martial to try persons subject to the UCMJ, does "not deprive military commissions...of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals" (10 U.S.C. § 821). A corresponding provision in Article 18 of the UCMJ, although not cited in the military order, provides that "(G)eneral courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war" (10 U.S.C. § 818). Articles 18 and 21 can only be read as reflective of Congress' intent, by enacting statutory authority for trials by courts-martial and providing for the concurrent jurisdiction of courts-martial with military commissions, not to divest the latter of the jurisdiction that they have by "statute or by the Law of War". The other provision of the UCMJ specifically cited in the military order is Article 36, 10 U.S.C. § 836, which is a general delegation of authority to the President to prescribe trial procedures, including modes of proof, for courts-martial, military commissions, and other military tribunals. This provision states that the President shall, "so far as he considers practicable, apply the principles of law and the rules of evidence" as generally used in criminal cases in federal district courts (10 U.S.C. § 836). In the military order, the President makes a specific finding that using those rules would not be practicable in light of the "danger to the safety of the United States and the nature of international terrorism" (Section 1(f), Military Order of November 13, 2001). This provision, therefore, has relevance only to the rules for the conducting of military commissions, rather than to the authority for establishing them.

Has Congress legislated as to war crimes, other than in the UCMJ? Although the Constitution grants Congress authority to define and punish offenses against the law of nations (Article I, Section 8, Clause 10), it has done so only in a very limited manner through the War Crimes Act of 1996 (18 U.S.C. § 2441). That statute makes punishable any grave breach or violation of common Article 3 of the Geneva Conventions, any violation of certain articles of Hague Convention IV of 1907, or a violation of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, when either the perpetrator or the victim is a member of the United States armed forces or a national of the United States. None of these treaty provisions, violations of which are proscribed under the Act, appear to be applicable with regard to the terrorist attacks. Therefore, since the only relevant statutory references to military commissions are contained in the UCMJ, and those only recognize jurisdiction with respect to offenses proscribed by statute (of which none apply here) or the law of war, a subset of international law, it is the law of war to which we must now turn.

Customary international law clearly recognizes the authority of a military commander to use military tribunals to prosecute offenses against the *jus in bello* occurring during an armed conflict. The *jus in bello*, regulating how war should be conducted, differs from the jus ad bellum, which governs when the use of force is permissible by one state against another. Our history is replete with instances of military tribunals being used to deal with violations of the *jus in bello* in times of armed conflict, with the trials of General Yamashita and the German saboteurs during World War II being the most recent examples.

My concern with regard to the legal predicate for the application of the President's military order is that violations of the law of war—the *jus in bello*—do not occur within a vacuum; they must by definition occur within the context of a recognized state of armed conflict. I maintain that at shortly before 9:00 am on the morning of September 11th, we were not in a state of armed conflict and we did not enter into such a state until sometime thereafter. Therefore, with regard to the attacks of September 11th, the principal event prompting our armed response in self-defense against Osama bin Laden and the al-Qaeda organization in Afghanistan, these are clearly acts of terrorism in violation of international law, but not necessarily violations of the law of war. If my premise is correct, then it presents an impediment to using military commissions for the trial of those charged with or complicit in those particular attacks, as distinguished from charges relating to later events. Some may argue that the events of September 11th demand a reappraisal of existing customary international law concepts with regard to the distinction between state and non-state actors and that, irrespective of whether the attacks were carried out by one, nineteen, or a greater number of terrorist non-state actors, these attacks should be considered, at the instant they occurred, as nothing short of an act of war.

I am unwilling to concur in that argument and, as will be discussed later, I believe the answer to this problem lies in legislation rather than an instantaneous sweeping aside of longstanding principles of customary law.

In many of the Administration's pronouncements in support of the military order of November 13th, the Supreme Court opinion in *Ex Parte Quirin*, 317 US 1 (1942), is mentioned. I submit that *Ex Parte Quirin*, the case involving the eight German saboteurs who, in 1942, landed on our shores in Florida and Long Island with intent to do damage to our defense facilities, bears closer scrutiny than it has been given by military commission proponents. The Supreme Court sanctioned the use of a military commission to try the saboteurs, but did so in the context where there was a formal declaration of war by Congress and the individual saboteurs had entered this country surreptitiously. Even though one of them, Haupt, claimed to be an American citizen by virtue of the naturalization of his parents while he was still a minor, the Court determined that such citizenship did "not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war" (*Ex Parte Quirin*, 317 U.S. 317, 37 (1942)). Throughout Chief Justice Stone's opinion, there are references to the power of the President as Commander-in-Chief *in time of war*. Ten years later, Justice Robert Jackson, in his concurring opinion in the *Steel Seizure Case*, would develop his oft-quoted analysis of presidential powers in relation to those of Congress and determine that the President's authority is at a maximum when he acts pursuant to an express or implied authorization of Congress (*Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 US 579, 592 (1952)). The Congressional declaration of war against Germany was just such a mandate for President Roosevelt, especially bearing in mind that the eight saboteurs breached our shores just seven months after the attack on Pearl Harbor where the vulnerability of this country to attack was shockingly realized. That realization of vulnerability also gave birth to the infamous internment camps for Japanese Americans which were established during this very same period and which were sanctioned by the Supreme Court in *Korematsu* v. *United States*, 323 US 214 (1944), an opinion which virtually no one claims has continued precedential value. Thus, I suggest that to draw authority from *Ex Parte Quirin* for the military order of November 13th is to take the case out of the context of the very specific circumstances in which it was decided, a declared war and a Supreme Court desiring to maximize the President's authority to act to defend our shores against an attack from state actors. No such context exists now, no matter how much we proclaim the "acts of war" of September 11th and try to make terrorists into state actors.

In conclusion of the first part of my statement, dealing with what I consider a weakness in the argument for the President's legal authority to use military commissions to prosecute terrorists for offenses against the war of war occurring on September 11th, I submit that this weakness can be remedied, certainly as to future acts of terrorism which do not reach to the level of being offenses against the law of war. If Congress were to enlarge the scope of Articles 18 and 21 of the Uniform Code of Military Justice by either changing the words "law of war" to "law of nations", thereby incorporating acts such as those of September 11th, or by inserting additional language setting forth specifically denoted acts of terrorism, such an amendment would empower military commissions (Article 21) and courts-martial (Article 18) to prosecute acts of terrorism outside the context of a recognized state of armed conflict. As to the use of courts-martial, however, this would necessitate pretrial, trial and post-trial procedures, including modes of proof, as prescribed in the Manual for Courts-Martial, Exec. Order 12960, 63 Fed. Reg. 30065 (June 2, 1998), unless the President, acting under the Congressional delegation of Article 36 of the Code, were to modify those procedures, as he has done in the November 13th military order.

POLICY CONCERNS REGARDING THE USE OF MILITARY COMMISSIONS

Mr. Chairman, my comments to this point have reflected a specific legal concern regarding the Constitutional predicate for the President to authorize the use of military commissions. I would now like to share with the Committee my more general policy concerns regarding the choice of military commissions as against other prosecutorial forums. I should say at the outset that my area of greatest concern is with respect to military commissions sitting in the United States and prosecuting resident aliens who entered this country legally and whose only offense might be that they are, or were at some time in the past, members of al-Qaeda. I acknowledge the convenience and possible prudence of commissions sitting in overseas areas, especially in a theater of military operations, for the prosecution of those members of al-Qaeda who are captured incident to combat in Afghanistan, and I think an argument could certainly be made that the Supreme Court's opinion in *Johnson* v.

Eisentrager, 339 U.S. 763 (1950) would preclude judicial review by the Article III courts over such commissions held overseas. The concept of military commissions sitting in this country is another matter.

The administration has evidenced frustration with what it perceives to be restrictions and limitations that seemingly hinder prosecutors in attempting to bring terrorists to trial in our federal district courts. Mention has been made of the rules governing disclosure which would compel release of sensitive intelligence information. The lengthy trials of those convicted of the 1993 bombing of the World Trade Center and the 1998 attacks upon our embassies in Africa are cited as examples of the inability of the federal district courts to adequately cope with trials of terrorists. Further, it is argued that a criminal justice system which incorporates rehabilitation and reincorporation into society as part of the sentencing process is ill-suited to deal with those whose zealous religious beliefs idealize martyrdom. I suggest that these arguments are not necessarily persuasive. Congress has provided tools for prosecutors to deal with classified information in criminal trials, notably the Classified Information Procedures Act, 18 U.S.C. App § 1 et seq. (1980), and the two prior successful convictions of al-Qaeda terrorists are indicative that it can be done, no matter how problematic for prosecutors the trials may be.

As to the option of using international tribunals, I concede that no existing tribunal has jurisdiction over the terrorists. Neither the ad hoc tribunal for the former Yugoslavia, nor the one for Rwanda, could prosecute terrorists without the United Nations Security Council having to make specific amendments to either of their respective charters. The International Criminal Court, a UN sponsored treaty-based tribunal, is not yet in existence and, even if a sufficient number of states were able to quickly ratify the Rome Treaty, that tribunal has only prospective jurisdiction. Lastly, although the United Nations Security Council could create yet another ad hoc tribunal for the specific purpose of dealing with terrorist acts, any such attempt would surely founder because of the inability of the international community to agree upon a definition of "terrorism"—a flaw that greatly restricts the feasibility of using any international tribunal for this purpose. Thus, international tribunals do not provide us with a current, viable forum for prosecuting terrorists.

The third option, trials by other countries under the jurisdictional principle of universality, is not well-suited to the United States for policy reasons. I agree with critics of this option that America needs to be directly or at least indirectly involved in the prosecution because the attack upon our people and our facilities occurred within our country and we clearly have the greatest interest in prosecuting those responsible for or complicit in the attacks. Further, the opportunity for capital punishment, and its arguable deterrence value, is greatly diminished when other sovereigns conduct the prosecutions within their own countries. This potential choice of forum is the least practical.

Acknowledging that none of the prosecutorial forums is optimal, but that the two most feasible are trials in our federal district courts and trials by military commission, the President clearly signaled his intent on November 13th to use the latter. I suggest that this choice may entail costs which outweigh the benefits, notably with regard to commissions sitting in this country. I believe we should be cognizant of a potential adverse impact upon our international credibility, as well as a tarnishing of the image of 50 years of military Justice under the UCMJ.

It was but five years ago that the United States roundly condemned the conviction by a military tribunal in Peru of New York native Lori Berenson on charges of terrorism. Through official channels, we requested that she be retried in a civilian court because of the lack of due process afforded her in the tribunal. Our cries of unfairness were echoed by United Nations officials who openly criticized Peru's anti-terrorism military courts. There seems little difference in the measure of due process afforded Berenson in Peru and what is called for under the President's military order, and I believe this opens us to a charge of hypocrisy from the international community. The force of this criticism could be lessened if those who advise the Secretary of Defense counsel him to ensure a high level of due process in the regulations establishing the commissions, but the charge laid against us can never be totally ameliorated. Consequently, I believe our use of military commissions may result in a fracturing of the large and disparate coalition which has been put together to wage the long-term campaign against terrorism worldwide, a campaign which must necessarily involve far more than the use of military force. As to my second point, my sense is that the American people do not accurately perceive the distinction between courts-martial under the military justice system and military commissions which could be empaneled under the President's order. I have heard it said on radio talk shows that if military commissions are good enough for our servicemen and servicewomen, then they are certainly good enough for terrorists. Even former Deputy Attorney General George Terwilliger, on this past Sunday's news program

Face the Nation, said that "there is a fundamental misconception that somehow a military court cannot be just. Our own soldiers and airmen are subject to military justice on a regular basis. The military can provide fair trials." This suggests to me that a segment of the American people, having perhaps become acquainted with military justice through the portrayal of courts-martial on television or in the movies, believe that military commissions will generally follow the same rules of procedure and modes of proof. This Committee knows that is not so. There is a marked contrast in the protections afforded our service personnel under the military justice system, and the lack of due process in military commissions. To illustrate, there is a guarantee of judicial review under the former; that is specifically denied under the latter. Although courts-martial may, under certain circumstances be closed to the public, the evidentiary rules and burden of proof required for conviction are virtually identical to those in our federal district courts; that is not the case in military commissions. In other words, the two systems have little in common, and this must be made clear as the debate on the propriety of using military commissions continues.

In the final analysis, the decision is one for the President to make, and he has already indicated the probable path he intends to pursue. I believe, however, that hearings such as are being conducted by this Committee will allow for a broad and balanced airing of views on this issue, not only to hopefully better inform the Members in both chambers, but also to give the Administration the benefit of additional voices in the debate. This should, and must, be done before the first terrorist is brought to trial.

Mr. Chairman, Senator Hatch and members of the Committee, thank you again for inviting me to share my concerns with you. I look forward to answering any questions you might have.

Chairman LEAHY. Thank you very much, Professor. I appreciate that, and I also appreciate very much you making that very needed distinction between these tribunals and our well-established—you were a colonel in the military, and you know the well-established rules of military tribunals.

Ms. Martin, thank you very much, and, again, I appreciate you spending so much time here with us today. Please go ahead and testify.

STATEMENT OF KATE MARTIN, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES, WASHINGTON, D.C.

Ms. MARTIN. Thank you, Mr. Chairman, and I thank the Committee for the opportunity to appear today, and I particularly want to thank the chairman for convening this extraordinarily important series of oversight hearings.

The Government's efforts to identify the perpetrators of the terrible attacks on September 11th and to prevent future attacks before they occur could not be more crucial. But we have become increasingly concerned that, instead of conducting a focused and effective law enforcement investigation, the Government has turned instead to a number of radical and overly broad measures that threaten basic rights without in turn providing any increased security.

While some have cast the terrible situation we find ourselves in today as one in which we must decide what liberties we are willing to sacrifice for an increased measure of safety, I do not believe that is an accurate or helpful analysis. Before asking what trade-offs are constitutional, we must ask what we gain in security by restricting our civil liberties.

The common thread in the Justice Department's recent actions in detaining individuals, providing for eavesdropping, and the President's order on military commissions is the secrecy and lack of public and congressional participation in adopting those meas-

ures. It is only by forcing the Government to articulate why and how particular restrictions on our liberties will contribute to security that we can have any guarantee that the steps being taken will, in fact, be effective against terrorism.

The hearing today I believe is the crucial first step in that open and public dialogue which to date has been prevented by the administration's unilateral actions.

I want to talk briefly, I think, about the detentions and only for a moment about military commissions. As this Committee is well aware, in the past couple of months more than 1,000 people have been detained according to the Justice Department. Some 600 people are still in detention. At the same time, law enforcement officials have on several occasions been careful to state that only a handful of those individuals, maybe 10 or 20, have in any way been tied to the hijackers from September 19th or other members of Al Qaeda or bin Laden. Hundreds of others are currently in jail. While the Department asserts that their rights are being respected and that it has complied with all applicable constitutional and legal limits, it has until yesterday refused to release that information which the public and this Committee needs to assure ourselves that that is, in fact, the case.

While we welcome the disclosures of the Attorney General yesterday, giving some partial information about the individuals who have been detained, we join in Senator Feingold's request and demand for a full accounting of everyone who has been detained.

There are certainly numerous press accounts which, if accurate, raise serious questions about whether or not individuals' rights have been violated in serious and unconstitutional ways. Most specifically, it appears that perhaps ten, perhaps hundreds of individuals, including United States citizens, have been held for weeks, if not months, in jail when the FBI and the Government has no information connecting them in any way to the September 11th attacks.

There are examples, some of them I am sure the Committee is aware of. Perhaps the most egregious one is the two American citizens who were held in jail, a father and a son, one for several weeks and one for several months, on charges that they possessed suspicious passports. A Federal judge finally had an opportunity to look at it, and it turned out that the plastic on the passport had split, presumably because of age. The key factor, it would appear, in those people spending time in jail while the FBI is conducting an investigation appears to be their Arabic-sounding name, despite their U.S. citizenship.

The Justice Department has defended the detentions by saying that all the individuals now in custody have been charged, either under the criminal law or as immigration violations. I think the question that this Committee needs to ask and the public needs to be assured about is: On what justification are such individuals held in jail before there has been a trial convicting them either on a criminal charge or having violated the immigration laws?

What we are especially concerned about that appears to be happening is that people who have been arrested are being—excuse me. The Justice Department has made an effort that when people are arrested on either immigration or criminal charges, has urged all of the authorities that bail should be denied and as a blanket

matter has urged that they be kept in jail pending trial. That obviously raises serious concerns about imprisonment without there being adequate probable cause of a crime and without meeting the constitutional standards.

I just want to mention one thing, if I might. On the material witness warrants, Mr. Chertoff said that he was prohibited from identifying those individuals who were being held. I don't believe Rule 6(e), governing grand jury secrecy, says anything about not disclosing the number of individuals held on a material witness warrant. I might also mention that there has been information disclosed to the press about not only the identities of the core suspects, but the evidence against them.

Perhaps in the question period I might have an opportunity briefly to discuss military commissions.

[The prepared statement of Ms. Martin follows:]

STATEMENT OF KATE MARTIN, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES

Thank you Mr. Chairman and Vice-Chairman for the opportunity to testify today on behalf of the Center for National Security Studies. The Center is a civil liberties organization, which for 30 years has worked to ensure that civil liberties and human rights are not eroded in the name of national security. The Center is guided by the conviction that our national security must and can be protected without undermining the fundamental rights of individuals guaranteed by the Bill of Rights. In our work on matters ranging from national security surveillance to intelligence oversight, we begin with the premise that both national security interests and civil liberties protections must be taken seriously and that by doing so, solutions to apparent conflicts can often be found without compromising either.

We commend the Committee for holding this series of oversight hearings to examine how the Justice Department can persevere our freedoms while defending against terrorism. After the scheduled examination of the Department's current initiatives and activities in investigatng the September 11 attack, we urge the government to next examine how the Department of Justice intends to implement the new authorities granted in the USA PATRIOT Act.

Certainly, there is no greater government responsibility today than to work to prevent future terrorist attacks like those on September 11. The Attorney General and the FBI Director share the enormous responsibility of carrying out an effective investigation to prevent more attacks. Of equal importance is Congress' responsibility to conduct oversight of that investigation to protect our security and to protect the Constitution.

While some have cast the terrible situation we find ourselves in today as one in which we must decide what liberties we are willing to sacrifice for an increased measure of safety, I do not believe that is an accurate or helpful analysis. Before asking what trade-offs are constitutional, we must ask what gain in security is accomplished by restrictions on civil liberties. It is only by forcing the Justice Department to articulate why and how particular restrictions will contribute to security and that we can have assurance that the steps being taken will be effective against terrorism. This hearing today is the beginning of that essential inquiry.

Immediately following the September 11 attacks, we, along with more than 140 organizations from across the political spectrum called for the apprehension and punishment of the perpetrators of those horrors. At the same time, we all recognized that we can, as we have in the past, in times of war and of peace, reconcile the requirements of security with the demands of liberty.

The government's efforts to identify any perpetrators and to prevent future attacks before they occur could not be more crucial. But we have become increasingly concerned that instead of a focused and effective law enforcement investigation, the government has turned to a number of radical and overly broad measures that threaten basic rights without providing any increased security. We understand that this Committee intends to examine all of them and we welcome your efforts. We will address each briefly in turn.

LACK OF CONGRESSIONAL AUTHORIZATION OR CONSULTATION

A common thread in the recent Justice Department actions is the secrecy and lack of congressional consultation with which they have been carried out. In detaining

more than 1,000 individuals, in adopting a policy of eavesdropping on attorney-client communications, and in setting up a system of secret military trials and detentions, the administration has acted unilaterally without congressional participation or even consultation. By considering these actions in secret before adopting them, the administration prevented any public debate about their effectiveness. The lack of congressional notification is especially troubling in light of the administration's simultaneous request to the Congress to enact what was described as a comprehensive package of new authorities needed to combat terrorism passed as the USA PATRIOT Act. The administration's conduct calls into question its commitment to respecting the constitutional separation of powers and role of the Congress. Indeed, all of these actions would enhance the power of the Executive at the expense of the constitutional roles of both the Congress and the judiciary.

In the case of the new wiretapping policy and the military commission order, the lack of congressional authorization is fatal to the legality of those actions. Only the Congress, not the President, may legislate wiretapping standards or authorize military tribunals. The administration's edicts are invalid on that ground alone.

The lack of public discussion has now left us with restrictions on our liberties without any increase in our security. Only through an open and public dialogue involving the Congress, the Executive, and the American people can we find a solution that advances both national security and civil liberties. The unwillingness of the government to engage in a public or constitutional dialogue, not about the details of the investigations, but about the constitutional rules governing that investigation has prevented that process. This Committee must now remedy that problem.

THE DANGERS OF EXCESSIVE SECRECY

In times of crisis, even more than in times of peace, a commitment to robust public debate is especially important. This is true for two reasons. First, the executive branch is more likely to take actions that violate basic civil liberties and thus an alert and informed public is necessary to counter-act that dangerous tendency. Second, the government is more likely to make effective decisions if there is an informed and influential public.

The government has the right, and indeed the obligation, to keep secret information whose disclosure would genuinely harm national security, interfere in an investigation, or invade the privacy of individuals. However, because public debate requires access to government information, the executive branch also has an obligation to release as much information as possible and to avoid taking actions that would chill essential public debate on national policy issues. Regrettably, the government has been seriously deficient on both accounts.

Almost as worrisome as the detentions of aliens since September 11 is the secrecy and veil of obfuscation that the government has thrown around its actions in blatant disregard of its affirmative obligations to provide information especially about actions in the criminal justice system, its obligation to inform Congress of its actions, and the requirements of the Freedom of Information Act (FOIA).

The Justice Department and the Attorney General have engaged in selective leaks of information about the detentions as part of their effort to calm the public and suggest that it is making progress in the investigation. At the same time, they have refused to provide the Congress and the public with the information to which they are entitled. Its response to FOIA requests about the detentions shows its cavalier disregard of the law. The FBI has responded that no information can be disclosed in response to the request despite the fact that much information has been in the press, clearly coming from the government. The Justice Department, after agreeing that the request deserved an expedited response because it involved a "matter of widespread and exceptional media interest in which there exists possible questions about the government's integrity which affects pubic confidence," has failed to provide a substantive response.

More broadly, the Attorney General has sent the entire bureaucracy a clear signal by reversing the directive regarding discretionary release of information under FOIA as established by his predecessor. Instead of requiring that information be released except when its disclosure would result in some harm, Ashcroft has directed that information be withheld whenever possible under the statute, regardless of whether disclosure would be harmful or violate the public's right to know.

Although the directive cites the September 11 attacks as justification, it covers all government information, much of which has no national security or law enforcement connection whatsoever. It is clearly intended to send the message to the bureaucracy that instead of working with the public to share information that is rightfully theirs, the government should take advantage of the ambiguities in the law

to deny information. The result will surely be a less open and less accountable government.

Congress and the courts are our only recourse. We expect to file suit for the material we requested under FOIA as soon as possible. We will be making other FOIA requests and will file other lawsuits. We are also exploring other statutory as well as constitutional bases for legal action to compel the release of documents. However, we need the Congress. We urge this committee to hold the Justice Department to account by demanding information and holding hearings. We urge you to make public as much of the information that you believe is in the national interest, even if it means acting over the objections of the Justice Department.

SECRET DETENTIONS

In the first few days after the attacks, some 75 individuals were picked up and detained. While the administration sought increased authority from the Congress to detain foreign individuals on the grounds of national security with no judicial oversight, it picked up hundreds more individuals. The Attorney General announced that 480 individuals had been detained as of September 28; 10 days later another 135 had been picked up; and in one single week during October, some 150 individuals were arrested. As of November 5, the Justice Department announced that 1,147 people had been detained.

While trumpeting the numbers of arrests in an apparent effort to reassure the public, the Department has refused to provide the most basic information about who has been arrested and on what basis. We know that the detainees include citizens, legal residents, and, according to INS director James Zigler, 185 individuals were being held on immigration violations. According to the Attorney General and FBI Director, the remaining group includes a small number of individuals held on material witness warrants and others held on violations of local, state, or federal laws. Apparently none have been charged as terrorists, indeed only 10 or 15 are even suspected of being terrorists. At this time, we do not have any idea how many have been released.

As the number of secret detentions increased, press reports began to appear, which if accurate, raise serious questions as to whether the rights of the detainees are being violated. As each successive week has brought hundreds more arrests, demands for release of basic information have intensified. The unprecedented level of secrecy surrounding the extraordinary detention of hundreds of individuals, prompted us, along with nearly 40 other civil liberties, human rights, legal, and public access organizations to demand release of the detainees' names and the charges against them under the FOIA request. The Chair and other members of this Committee and of the Congress have also demanded a public accounting of the arrests.

In response, the Department has only stonewalled. Justice Department officials have refused to release further information on the detentions, and have stopped keeping a record of those detained, presumably in order to avoid having to answer questions about who is being counted in the tallies.

Public disclosure of the names of those arrested and the charges against them is essential to assure that individual rights are respected and to provide public oversight of the conduct and effectiveness of this crucial investigation. Public scrutiny of the criminal justice system is key to ensuring its lawful and effective operation. Democracies governed by the rule of law are distinguished from authoritarian societies because in a democracy the public is aware of those who have been arrested. Individuals may not be swept off the street and their whereabouts kept secret.

The government has made varying claims to justify this secrecy. Ironically, it now claims that it is withholding the names of detained individuals in order to protect their privacy. What is needed to ensure the protection of the rights of these individuals, who have been jailed by the government now worrying about their privacy is what we have always relied upon in protecting against government abuses, namely public sunshine.

Likewise, the Department's claim that releasing the names and charges could harm the investigation is contradicted by its own disclosures. Not only have officials already identified several suspected terrorists, but they have also outlined evidence against them. The Attorney General himself described the evidence against the three individuals whom he believes had prior knowledge of the September 11 attacks. Finally, the Department has made the astonishing claim that because it asked courts to seal some of the proceedings, it is now helpless to disclose even the identities of the courts or the authorities under which those gag orders were sought.

While we are not seeking the details of the investigation or an outline of the evidence being collected by the FBI, we do urge this Committee to secure the release

of information crucial to public accountability: the names and charges against those who have been detained.

There is every reason to fear that the cloak of secrecy is shielding extensive violations of the rights of completely innocent individuals. These violations include imprisonment without probable cause, denial of the constitutional right to bail, interference with the right to counsel, and abusive conditions in detention. We will only outline a few examples, but there are many more.

A. IMPRISONMENT WITHOUT PROBABLE CAUSE.

While the government has admitted that it has evidence of terrorism against only a small fraction of the detainees, it has imprisoned hundreds of individuals against whom there is no evidence of criminal activity. For example, a father and son, both US citizens, were arrested as they returned from a business trip in Mexico because their passports looked suspicious. The father was released after ten days and sent home wearing a leg monitor, but the son spent two more months in jail until a federal judge determined that the plastic covering had split. The key factor in their arrest appears to be their Arabic sounding names. While the Attorney General has announced that terrorists will be arrested for spitting on the sidewalk, he has yet to explain why innocent Americans will be jailed for doing so.

In a handful of cases, the Department is using the authority of the material witness statute to detain people. We urge this Committee to examine carefully the circumstances of those detentions, which are now all shrouded in secrecy, and to consider the dangerous ramifications of using the material witness statute not to secure testimony but to authorize preventive detention.

There is growing evidence that the FBI has abandoned any effort to comply with the constitutional requirement that an individual may only be arrested when there is probable cause to believe he is engaged in criminal activity. The FBI is now seeking to jail suspicious individuals until the agency decides to clear them. The FBI is providing a form affidavit, which relies primarily on a recitation of the terrible facts of September 11, instead of containing any facts about the particular individual evidencing some connection to terrorism, much less constituting probable cause. The affidavit simply recites that the FBI wishes to make further inquiries.[1] In the meantime, the individual is held in jail.

B. DENIAL OF THE CONSTITUTIONAL RIGHT TO BAIL.

The right to be free on bail until trial is a vital part of the constitutional presumption of innocent until proven guilty. While individuals can be denied bail when there is a substantial risk that they would flee or commit acts of violence if released, this constitutional standard currently seems to have been abandoned. Instead of considering whether a particular individual is likely to flee, the Department is attempting to detain all individuals picked up as part of the September 11 investigation. If the past few weeks are an example of what the future holds, it is likely that individuals charged with "spitting on the sidewalk" may serve more time in jail pre-trial than they would if they were found guilty.

All these circumstances raise serious questions about the effectiveness of the current effort. Is the FBI carrying out a focused investigation executing the work necessary to identify and detain actual terrorists, or is this simply a dragnet, which will only be successful by chance. The fact that 1,000, or even 5,000, individuals are arrested is no assurance that the truly dangerous ones are among them.

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[1] While the FBI affidavits are difficult to find, one filed in a bail proceeding in immigration court appears to contain the general formula. It says:

"In the context of this terrorism investigation, the FBI identified individuals whose activities warranted further inquiry. When such individuals were identified as aliens who were believed to have violated their immigration status, the FBI notified in INS. The INS detained such aliens under the authority of the Immigration and Nationality Act. At this point, the FBI must consider the possibility that these aliens are somehow linked to, or may posses knowledge useful to the investigation of the terrorist attacks on the World Trade Center and the Pentagon. The respondent, Osama Mohammed Bassiouny Elfar, is one such individual. . . .

At the present stage of this vast investigation, the FBI is gathering and culling information that may corroborate or diminish our current suspicions of the individuals that have been detained. . .In the meantime, the FBI had been unable to rule out the possibility that respondent is somehow linked to, or possesses the knowledge of the terrorist attacks on the World Trade Center and the Pentagon. To protect the public, the FBI must exhaust all avenues of investigation while ensuring that critical information does not evaporate pending further investigation."

C. VIOLATION OF THE RIGHT TO CONSULAR NOTIFICATION.

Mohammed Rafiq Butt, a Pakistani citizen who was detained for entering the country illegally, died in custody of an apparent heart attack on October 23. Pakistani diplomats only learned of Mr. Butt's arrest when journalists called the Embassy to ask for a comment on his death. Clyde Howard, director of the State Department's Consular Notification and Outreach Unit, said, "We are concerned about these failures of notification when they happen to us overseas, so it becomes more difficult for us to assert our rights under the Vienna Convention if we are not doing a good job in giving the same notification here."[2]

We urge this Committee to examine whether since September 11, law enforcement officials have consistently failed to notify foreign governments when their nationals are arrested. US treaty obligations require foreign consulates to be so notified.

D. VIOLATION OF THE RIGHT TO COUNSEL AND THE FOURTH AMENDMENT.

Even before the Justice Department announced its new policy of eavesdropping on conversations between detainees and their attorneys, there were numerous reports of interference with the right to counsel. Many immigration detainees were prevented from finding counsel. The administration's "one call a week" policy made it difficult for detainees to communicate with their families, find lawyers, or even know if they had successfully secured representation. There is reason to fear that detainees' lawyers have been muzzled by gag orders, or simply intimidated into silence with threats of actions organized against their clients.

Under the Justice Department's recently announced policy, solely on the Attorney General's say-so, the Department can eavesdrop on the privileged attorney-client conversations of persons who have not even been charged. Such individuals can be held incommunicado, with their activities severely restricted. While others have outlined the clear unconstitutionality of this policy, I want to emphasize the equally unlawful way in which it was adopted.

Only weeks before the unilateral announcement of this new policy, the Attorney General had come to the Congress seeking a comprehensive package of new powers the administration believed were necessary to fight terrorism. At no time did the government suggest that any amendment was needed to the wiretap statutes authorizing surveillance of such privileged conversations. Had it done so, there could have been a public debate about whether current law was inadequate in some way. Instead, the Attorney General has simply declared that the government will suspend the Fourth Amendment requirements of probable cause and judicial warrant for wiretapping and substitute his say-so. Such an approach shows a lack of respect for both the Bill of Rights and our system of divided government.

I also want to comment on the administration's claim that the eavesdropping is acceptable under the Constitution because the FBI agents who eavesdrop on privileged conversations will not be involved in criminal prosecution of the individual. It appears highly doubtful that this will be the reality, given the FBI's description of its investigation as a mosaic in which each small piece of information can only be understood when contextualized. Even more significantly, it is clear that such information could be used against the individual in any detention or military commission proceeding authorized by President Bush's most recent order.

INTIMIDATION OF IMMIGRANTS

Many of the recent actions appear to be aimed not so much at gathering information about Al Qaeda and its members, but at simply intimidating those who have come to visit, do business, or work and become Americans. There are myriad reports of individuals who have been jailed for weeks because they have overstayed their visas. Usually they would have been granted some kind of adjustment allowing them to leave the country voluntarily or stay and become law-abiding and productive members of our society, but not since the recent terrorist attacks. The plan to question 5,000 individuals without knowing anything about any specific individual indicating that he or she might have useful information will certainly intimidate many into leaving the country. This plan will take enormous law enforcement resources and will generate many reams of memos; but whether it will produce any useful information is open to question. It is urgent that this Committee immediately examine whether these actions are no more than attempts to intimidate individuals from the Middle East into leaving the country. If so, such a policy needs to publicly

[2] John Dually and Wayne Washington, "Diplomats Fault Lack of US Notice on Many Detainees", *The Boston Globe*, November 1, 2001.

defended and debated. It is not clear what law enforcement or national security purpose is served by such a tactic, which presumably will not work on those who have actually entered the country ready to die in the order to kill Americans. It does, however, erode the trust and confidence of minority and immigrant communities and make law enforcement resources otherwise unavailable.

THE ORDER AUTHORIZING MILITARY COMMISSIONS AND PREVENTIVE DETENTION VIOLATES SEPARATION OF POWERS AND THE BILL OF RIGHTS

The constitutional defects of the recent order authorizing secret military trials and military detentions are outlined elsewhere. Here, I only offer a few observations.

- Individuals currently in detention may be threatened with secret transfers to military custody.

The broad scope of the order would authorize the President to direct that individuals currently held, even if not criminally charged, be immediately transferred to secret military custody, even overseas. It seems clear that the intent of the order is to authorize such transfers in secret and to impose both legal and practical obstacles to individuals obtaining any judicial review of such transfers.

- The authorization of military detention of aliens inside the United States on the say-so of the President is an unconstitutional end-run around the provisions of the USA Patriot Act.

In addition to military commissions for individuals captured overseas, the order authorizes detention of aliens inside the United States believed by the President to be involved in terrorism. This part of the order is a deliberate end-run around the provisions of the USA Patriot Act concerning such detentions, which limits the conditions and time under which individuals may be detained. The President's Order attempts to authorize what the Congress rejected in the first administration draft of the anti-terrorism bill. It is a deliberate end-run around the limits and restrictions agreed to by the administration in negotiating the detention provisions of the Patriot Act.

- The military commission order violates separation of powers.

The administration's unilateral issuance of this order without even discussing it with the Congress is the most blatant example of its disregard for the explicit text of the Constitution. The Constitution gives to the Congress explicit authority over military tribunals.

Article I specifically vests in the Congress: the power to create judicial tribunals "inferior to the Supreme Court;" "To define and punish" Offenses against the Law of Nations; To make Rules concerning Captures on Land and Water; and "To make Rules for the Government and Regulation of the land and naval Forces." Article I, sec. 8. When the Supreme Court approved the use of military commissions in World War II, Congress had specifically authorized their use in the Articles of War adopted to prosecute the war against Germany and Japan.

Accordingly, this order violates separation of powers as the creation of military commissions has not been authorized by the Congress and is outside the President's constitutional powers.

Individuals accused of war crimes are entitled to fundamental due process protections even if tried by military courts.

Since the Supreme Court approved the use of military commissions to try offenses against the laws of war in World War II, the law of war and armed conflict has come to include the requirements that even those characterized as unlawful combatants accused of war crimes must be accorded fundamental due process. Thus, any constitutionally authorized military commissions would be bound by the current legal obligations assumed by the United States. These would include the United Nations charter and the International Covenant of Civil and Political Rights, none of which were in existence at the time the Supreme Court approved the use of military commissions during World War II.

We urge the Congress to make clear that such order is not authorized and thus unconstitutional. If military trials are deemed necessary for individuals captured in Afghanistan or fleeing therefrom, the Congress should authorize their use consistent with the requirements of due process enshrined in the Constitution and the international covenants agreed to by the United States.

In the meantime, we appeal to the Committee to require the Attorney General to immediately notify the Committee of any plans to apply the order to any individuals now detained in the United States and to inform you of the identities of such individuals and the basis for applying the order before doing so.

We urge the Congress to insure that those accused of even the most terrible crimes against humanity be accorded fundamental due process because our commitment to accord everyone the protection of the rule of law is what in the end distinguishes us from the terrorist who simply kill in the name of some greater good.

CONCLUSION

In the darkest days of the Cold War we found ways to reconcile both the requirements for security and those of accountability and due process, by taking seriously both interests. No less is required if in the long run, we expect to be successful in the fight against terrorists, who care nothing for either human liberty or individual rights.

We need to look seriously at how security interests can be served while respecting civil liberties and human rights. It is time to give serious consideration to whether promoting democracy, justice, and human rights will, in the long run, prove to be a powerful weapon against terrorism along with law enforcement and military strength. Current administration policies assign no weight to respecting civil liberties as useful in the fight against terrorism. Only when that is done, will we truly be effective in what has been acknowledged to be a long and difficult struggle.

Chairman LEAHY. Thank you.

I would also note for each of the witnesses, obviously we are, because of the time, being a little bit tighter on the control of the time than normal. But, certainly, you will be getting back transcripts of this and anything you want to add to the transcript, any one of you, of your own testimony, of course, feel free to do that and to make it part of the permanent record. This is going to be a series of hearings that are going to go on for some time and if individual witnesses wish to add to their testimony, they will be able to.

Professor, thank you very much for being here, and please go ahead.

STATEMENT OF NEAL KATYAL, VISITING PROFESSOR, YALE LAW SCHOOL, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY, WASHINGTON, D.C.

Mr. KATYAL. Mr. Chairman, Senator Hatch and members of the Committee, in my judgment the President's order for military tribunals and the Attorney General's attorney-client regulation both contain serious constitutional flaws. Much attention has been focused on whether these decisions violate notions of fair play, but there is a troubling and different issue. These decisions aggressively usurp the role of Congress.

Of course, all Presidents are tempted to go it alone. President Truman seized the steel mills and President Roosevelt tried to pack the courts. Yet, our Constitution's structure, as Senator Specter reminds us in his eloquent editorial in today's New York Times, mandates that fundamental choices such as these be made not by one person but by the branches of Government working together. Ignoring this tradition charts a dangerous course for the future and may jeopardize the criminal convictions of the terrorists today.

Throughout history, there have been times when this country has had to dispense with civil trials and other protections. Yet, those circumstances have been rare, carefully circumscribed, and never unilaterally defined by a single person.

A tremendous danger exists if the power is left in one individual to put aside our constitutional traditions when our nation is at crisis. The safeguard against the potential for this abuse has always

been Congress' involvement in a deep constitutional sense. The default should be faith in our traditions and faith in our procedures.

The attorney-client regulation was announced with no legislative consideration whatsoever. It comes close to infringing both Fourth Amendment rights of privacy and the Sixth Amendment rights to counsel. Those subject to the rule aren't even charged with a crime, for the regulation explicitly contemplates use against "material witnesses."

The Government is currently detaining over 1,100 individuals. On what basis we don't even know. Yet, now it asserts the unilateral power to abrogate the freedom between attorney and client, a freedom described by our Supreme Court as the oldest privilege at common law.

A client might want to talk to his lawyer about the most private matters imaginable—a divorce created, in part, by the Government's attention, for example—and can't do privately. This is a dramatic and unprecedented aggrandizement of power.

The decree's constitutionality is particularly in doubt when a series of less restrictive alternatives exist, and this is particularly true if, as the Justice Department says today, the regulation only applies to 16 individuals, a fact that will actually backfire on the administration's legal case in the future. Such an intrusion into private affairs can only be justified by compelling circumstances, and these circumstances should be announced by this body, by the Congress, in the form of law, not executive decree.

The Fourth Amendment focuses on reasonableness, and one way in which courts assess reasonableness is by looking to Congress. When the courts were in conflict over whether the courts could conduct certain intelligence surveillance, this body and the President compromised in the FISA, the Foreign Intelligence Surveillance Act. This Committee stated at that time the goal of the legislation was to end the President and the Attorney General's practice of disregarding the Bill of Rights "on their own unilateral determination that national security justifies it."

Moving to the issue of military tribunals, the sweep of the order goes far beyond anything that Congress has authorized, for it explicitly extends the tribunal's reach to conduct unrelated to the September 11 attacks.

For example, if a Basque separatist tomorrow kills an American citizen in Madrid, or a member of the Irish Liberation Army threatens the American embassy in London, the military tribunal has jurisdiction over both claims. So, too, the tribunal may have jurisdiction over a permanent green card-holder in Montana who tries to hack into the Commerce Department.

There is no conceivable legislative authorization for these types of trials, trials that may take place under conditions of absolute secrecy. The administration thus sets an extremely dangerous precedent. A future President might unilaterally declare that America is in a war on drugs and decide to place certain narcotics traffickers in secret military trials.

Imagine another President who hates guns. That President might say the threat posed by guns is so significant that monitoring of private conversations between attorneys and gun dealers, and monitoring of conversations between attorneys and gun pur-

chasers, is required, pointing to the precedent set by this administration.

Now, these examples might seem unbelievable to you, but they are much smaller steps than the one the administration is now taking when one compares what previous administrations have done to what the present administration claims it can do today.

It is therefore my hope that this Committee will use its authority to impress upon the administration that its decrees have serious constitutional problems and secure a promise from the President not to use military courts, particularly in America, and not to use attorney-client monitoring until this body so authorizes them. This Committee could then immediately commence hearings to determine whether those policies are appropriate and, if so, how they should be circumscribed, just as it did with the USA PATRIOT bill.

In conclusion, like all Americans, I believe the administration is trying, in good faith, to do the best it can, but that is part of the point. Our constitutional design can't leave these choices to one man, however well-intentioned and wise he may be. We don't live in a monarchy.

[The prepared statement of Mr. Katyal follows:]

STATEMENT OF NEAL KATYAL, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY

INTRODUCTION

Thank you, Chairman Leahy and members of the Committee, for inviting me here today to discuss the topic of preserving our freedoms while defending against terrorism. In particular, I will focus my remarks on the constitutionality of the President's recent Order regarding military tribunals and Attorney General Order No. 2529–2001, which permits the Justice Department to monitor communications between attorneys and their clients under certain circumstances. In my judgment, both of these policies usurp the power of Congress. Our Constitution's framework, from top to bottom, evinces a strong structural preference that decisions of this magnitude not be made by one person. Our Founders understood the temptation that a single person would have when given unbridled power, an understanding substantiated this century when President Franklin Roosevelt tried to pack the courts and President Truman attempted to seize the steel mills. The current course of conduct is an unprecedented aggrandizement of power, one that not only threatens the constitutional prerogatives of this body but also risks jeopardizing the criminal convictions of those responsible for the September 11 attacks.

At the outset, let me be clear about what I am not saying: I cannot say that either of these policies, if crafted correctly and appropriately circumscribed, would be unconstitutional. The policies come close to the constitutional line, but national security in some instances may compel the country to create military tribunals or to monitor conversations between attorneys and clients. The problem today is that the Executive Branch has not made this case, either to this body or to the country. As bystanders, it is impossible to know whether military necessity requires the measures taken by the Administration. Many terrible things have been done in the name of national security—but many terrible disasters have also been averted through concerted efforts by our law enforcement agents and intelligence community. The tough issue is how to strike a balance.

Our Constitution commits this tough issue not to a single person, but to our branches of government working together. Throughout history, there have been times when this country has had to dispense with civil trials, with other protections in the Bill of Rights, and with the rules of evidence. Those circumstances have been rare, carefully circumscribed, and never unilaterally defined by a single person. A tremendous danger exists if the power is left in one individual to put aside our constitutional traditions and protections when he decides the nation is in a time of crisis. The safeguard against the potential for the abuse of military trials has always been Congress' involvement, in a deep constitutional sense.

As I will explain, the sweep of the Military Order goes far beyond anything Congress has authorized, for it explicitly extends the tribunals' reach to conduct unrelated to the September 11 attacks. For example, if a Basque Separatist tomorrow

kills an American citizen in Madrid, or a member of the Irish Liberation Army threatens the American embassy in London, the military tribunal has jurisdiction over both persons. So too, the tribunal has jurisdiction over a permanent green card holder in Montana who tries to hack into the Commerce Department, thus disregarding years of legislative consideration over the computer crimes statutes. There is no conceivable statutory warrant for such trials, trials that may take place under conditions of absolute secrecy. At most, the reach of a military tribunal can reach a theater of war, not Spain, Great Britain, Montana, or the range of other locations not currently in armed conflict.

The Military Order thus sets an extremely dangerous precedent. A future President might unilaterally declare that America is in a "War on Drugs," and decide to place certain narcotics traffickers in military trials. A President might say that some prospective threat is "the moral equivalent of war" and set up military tribunals to counter that threat as well. Some of these decisions might be entirely justified given the particular facts at issue. But they are the sorts of decisions that cannot be made by one man alone. *These hypotheticals are much smaller steps than the one the Administration is now taking*. The Administration's Military Order is such a dramatic extension of the concept of military tribunals, when compared to the predecessors in American history, that these other steps appear not only plausible, but even likely, down the road.

Because the Military Order strays well beyond what is constitutionally permissible, this Committee should inform the White House of the serious constitutional concerns involved in the President's unilateral Military Order. It should ask the President not to use the tribunals until necessary authorizing legislation is passed, and should immediately commence hearings to determine whether military tribunals are appropriate and, if so, how they should be constituted. Without legislation, however, the use of a military tribunals raises serious constitutional concerns, *difficulties that may even lead to reversal of criminal convictions*.

THE MILITARY ORDER

The jurisdiction of the military tribunal reaches any suspected terrorist or person helping such an individual, whether or not the suspect is connected to Al Qaeda and the September 11 attacks. That individual can be a permanent resident alien, thus potentially applying to millions of American residents. The order explicitly permits tribunals to be set up not simply in Afghanistan, but rather they will "sit at any time and any place"—including the continental United States. § 4(c)(1); see also § 3(a), § 7(d). The order authorizes punishment up to "life imprisonment or death." § 4(a). Both conviction and sentencing (including for death) is determined when two-thirds of a military tribunal agree. At the trial, federal rules of evidence will not apply, instead evidence can be admitted if it has "probative value to a reasonable person." § 4(c)(3). Grand jury indictment and presentment will be eliminated, so too will a jury trial. The members of the military tribunal will lack the insulation of Article III judges, being dependent on their superiors for promotions. The Order also strongly suggests that classified information will not be made available to defendants, even though such material may be used to convict them or may be significantly exculpatory. See § 4(c)(4); § 7(a)(1). The Order further claims that defendants "shall not be privileged to seek any remedy or maintain any proceeding. . .in any court of the United States, or any State thereof." § 7(b). And most damaging: the tribunals may operate in secret, without any publicity to check their abuses.

In short, these military tribunals will lack most of the safeguards Americans take for granted, safeguards that the American government routinely insists upon for its citizens, either here or when they are accused of a crime overseas. The Constitution generally requires: 1) a trial by Jury, U.S. Const., Art III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"); 2) that the jury trial be a *public* one, U.S. Const., Am. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . ."); 3) those accused the right to confront witnesses and subpoena defense witnesses, *Id.* ("to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor"); 4) proof beyond a "reasonable doubt" for criminal convictions in general, and detailed procedural protections to insure accuracy before the death penalty is imposed; and 5) indictment by a grand jury, U.S. Const., Am. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger"). These constitutional guarantees may be found inapplicable at times,[1]

[1] E.g., *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950).

but much caution is warranted before making such a finding. Such findings should be made carefully, and not by a single person in a secretive way.

THE STRUCTURE OF THE CONSTITUTION EVINCES A STRONG PREFERENCE AGAINST THIS UNILATERAL MILITARY ORDER

The American colonists, who wrote our Declaration of Independence penned among their charges against the King, first, "He has affected to render the Military independent of and superior to the Civil Power",[2] second, "For depriving us, in many Cases, of the Benefits of Trial by Jury,"[3] and third, that George III had "made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries." It was no accident that the Framers established three branches of government in the wake of George III's reign. A Congress to write the laws, an Executive Branch to enforce them, and a Judicial Branch to interpret them. Consider how markedly the Order establishing the military tribunal departs from this constitutional scheme. This Congress has not been asked to create a military tribunal. The Order attempts to strip the Judicial Branch of much or all of its authority to review the decisions taken by the Executive Branch. And the judges are not "judges" as civilians know them, but rather officials who are part of the Executive Branch. The Executive Branch is acting as lawmaker, law enforcer, and judge. The premise of the Military Order is to bar involvement by any other branch, at every point. This is exactly what James Madison warned against when he wrote "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." Federalist No. 47 (Cooke ed., 1961), at 324.

The issues raised by the Military Order concern not only today, but tomorrow. You can already hear how our treatment of the Nazi saboteurs in 1942 has become the guidepost for our treatment of individuals today. What will the present course of conduct mean for situations down the road? Once the President's power to set up military tribunals is untethered to the locality of war or explicit Congressional authorization, and given to the President by dint of the office he holds, there is nothing to stop future Presidents from using these tribunals in all sorts of ways. In this respect, it is important to underscore that the precedent the Bush administration seeks to revitalize, the Nazi saboteur case of *Ex Parte Quirin*, 317 U.S. 1, 20, 37–38 (1942), explicitly goes so far as to permit military tribunals to be used against American citizens. We must be extraordinarily careful when revitalizing an old and troubling court decision, for doing so will set new precedent for future Presidents that can come back to haunt citizens and aliens alike. Our Constitution limits the power of one person to set this sort of destructive precedent. If the exigencies of the situation demand it, the Congress can of course authorize military tribunals or attorney/client monitoring, just as it expanded law-enforcement powers in the USA PATRIOT Act, Pub. L. No 107–56, 115 Stat. 272 (2001).

In past circumstances, military tribunals have been set up only when Congress had declared war or had authorized such tribunals. It is often asked what purpose the Declaration of War Clause in the Constitution serves. We know it is not about initiation of troops on foreign soil, Presidents have done that for time immemorial without such a declaration by Congress. But one thing, among others, a declaration of war offers is to establish the parameters for Presidential action. By declaring war, the Congress is stating that the President should receive additional powers in times of military necessity. A declaration of war serves to confine the circumstances in which a military tribunal can be used, and it also serves to limit the tribunal's jurisdiction to a finite period of time. As Justice Jackson put it,

> Nothing in our Constitution is plainer than that a declaration of a war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the coun-

[2] E.g., *Laird* v. *Tatum*, 408 U.S. 1, 19(1972) (Douglas, J., dissenting) (finding that this clause restricts the power of the military); *Reid* v. *Covert*, 354 U.S. 1, 29 (1957); *Bissonette* v. *Haig* 776 F.2d 1384, 1387 (8th Cir. 1985).

[3] See, e.g., *Neder* v. *United States*, 527 U.S. 1, 31 (1999) (Scalia, J., concurring in part and dissenting in part) (stating that this clause restricts the ability of the government to limit jury trials); *Parkland Hosiery Co.* v. *Shore*, 439 U.S. 322, 341 n.3 (1979) (Rehnquist, J., dissenting); *Duncan* v. *Louisiana*, 391 U.S. 145, 152 (1968); United States ex rel. *Toth* v. *Quarles*, 350 U.S. 11, 16 n.9 (1955).

> try by his own commitment of the Nation's armed forces to some foreign venture. . . .

Youngstown v. *Sawyer*, 343 U.S. 579, 642 (Jackson, J., concurring).[4] Just as this body feared that the wide-ranging law enforcement powers authorized in the USA PATRIOT Act might be in existence for too long a time and therefore imposed a sunset clause, see § 224, so too a declaration of war restricts the duration and scope of military jurisdiction. No such confinement exists in the Military Order.

A declaration of war, however, is not the only way for this body to provide its assent to military tribunals. Congress can, through ordinary legislation, authorize them, and, if appropriate, limit them. If it were to do so, the constitutional footing of the tribunals would be far stronger. The current unilateral action taken by the Bush Administration threatens to result in the release of those subject to the Military Order. Without sufficient approval by Congress, the Executive Branch has set up an easy constitutional challenge to the existence of the tribunals. There is no good reason why criminal convictions should be jeopardized in this way. The Executive should make his case to Congress, and let Congress decide how it wants to proceed. The failure to do so may be read by courts to imply that reasons other than national security undergird his decision. Should this body authorize such trials, by contrast, it would be read by courts as extremely important indicia about the seriousness of the threat.[5]

THE NAZI SABOTEUR CASE, *Ex Parte Quirin*, IS NOT APPROPRIATE PRECEDENT

The Administration has repeatedly pointed to the fact that President Roosevelt issued an order permitting the military trial of eight Nazi saboteurs. The Supreme Court upheld the constitutionality of the military tribunals in the *Quirin* case, but did so in a way that militates against, not for, the constitutionality of the present Military Order.

In *Quirin*, formal war had been declared by the Congress. The Supreme Court opinion is rife with references to this legislative authorization for the tribunals. E.g., 317 U.S., at 26 ("The Constitution thus invests the President, as Commander in Chief, with the power to *wage war which Congress has declared*") (emphasis added); *Id.*, at 25 ("But the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army *in time of war* and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution *or laws of Congress* constitutionally enacted") (emphasis added); *Id.*, at 35 (stating that "those who during time of war pass surreptiously from enemy territory into are own. . .have the status of unlawful combatants punishable as such by military commission") (emphasis added); *Id.*, at 42 ("it has never been suggested in the very extensive literature of the subject that an alien spy, *in time of war*, could not be tried by a military tribunal without a jury") (emphasis added). What's more, the Court, found that two portions of legislation, the Articles of War, 10 U.S.C. § 1471–1593, and the Espionage Act of 1917, 50 U.S.C. § 38, had recognized the validity of military tribunals in times "of war." *Quirin*, 317 U.S. at 26–27. But applicable legislation here is lack-

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[4] See also Youngstown, 343 U.S. 579, 612 (1952) (Frankfurter, J., concurring) ("In this case, reliance on the powers that flow from declared war has been commendably disclaimed by the Solicitor General").

[5] Naturally, if the subject of the tribunal is a major figure like Osama Bin Laden, courts may be unlikely to void a conviction on any ground. But these tribunals aren't being consider for Bin Laden alone, but also for the more minor players. In those cases, the risk is significant that a court will overturn a conviction because these tribunals are not constitutionally authorized. Should the courts instead uphold such unconstitutionally created tribunals, Americans will then be left with a dangerous precedent that can be used to undermine constitutional guarantees in other situations. Consider Justice Jackson's thoughts in his *Korematsu* dissent:

> [A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. . . .But one a judicial opinion rationalizes such an order to show that it conforms to the Constitution. . .the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon. . . .A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. *Korematsu* v. *United States*, 323 U.S. 214, 245–46 (1944) (Jackson, J., dissenting). Precisely because courts are not equipped to assess the national security implications of various measures, this body has a vital role to play in balancing the national security against our constitutional tradition of individual liberties.

ing.[6] Indeed, the *Quirin* Court explicitly reserved the question of the President's unilateral power: "It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions." *Id.*, at 29.[7]

As I will discuss in detail in a moment, it cannot be maintained that this body has acted comparably with respect to the September 11 attacks. Congress has not declared war. Congress has not stated that the laws of war are applicable to terrorists or that military tribunals are appropriate. It is of course within Congress' prerogative to make these statements, and to have them acted upon by the Executive Branch in its discretion, and later interpreted by the courts. But without a clear statement by Congress, it is a very dangerous precedent to permit the Executive Branch to unilaterally make such a decision. The *Quirin* case does not go nearly as far as supporters of the tribunals wish, indeed, it confirms the simple constitutional fact that Congress, not the President, is responsible for setting up these tribunals.

Furthermore, the *Quirin* case took place at a time when Americans were in a full-scale world war, where the exigencies of the situation demanded a quick result. See *Quirin*, 317 U.S., at 39 (stating that military tribunals "in the natural course of events are usually called upon to function under conditions precluding resort to such procedures [as trial by jury]"). *Quirin*, just as the Revolutionary War, the War of 1812, and the Civil War, were all circumstances in which there was total war in the homeland, with large numbers of enemy troops as occupants. There was a real danger in each that America might lose. The Administration today, by contrast, has not made the case, or even attempted to do so, that the circumstances are comparable. This body might of course so find, and that would go a long way towards removing the constitutional objections. Proportionality is an endemic feature of our government, and deprivations of individual rights that are proportional to the threat presented will often survive constitutional scrutiny. In this case, however, military tribunals cannot be said to be an automatically proportionate response to a threat. If the Administration believes that they are, it should, as other Presidents have done, ask the Congress for greater authority due to the nature of the threat, not decide as much on its own.

President Roosevelt's order also strictly circumscribed the military tribunal's jurisdiction to cases involving "sabotage, espionage, hostile or warlike acts, or violations of the law of war." Roosevelt Proclamation, 56 Stat. 1964, 1964 (July 2, 1942); *Quirin*, 317 U.S. at 30 (finding that prosecution did not violate prohibition on federal common law of crime because Congress explicitly incorporated the law of war into the jurisdiction for military tribunals). The recent Military Order, by contrast, brings millions of green-card holders and others into its jurisdiction. The Military Order extends jurisdiction to "the laws of war and *other applicable laws*." § 1(e) (emphasis added); *see also* § 4(a) (individuals will be "tried by military commission *for any and all offenses triable* by military commissions") (emphasis added).

These distinctions are all made against the backdrop of a case that said that its holding was an extremely limited one. The Court explicitly said that it had "no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals," and that "[w]e hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by

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[6] The Articles of War appeared at 10 U.S.C. §§ 1471–1593 (1940) but was later replaced by the Uniform Code of Military Justice, 10 U.S.C. §§ 801 et seq., which preserves the recognition of the military commissions as having concurrent jurisdiction with the courts-martial when authorized by statute or when trying those who violate the law of war. 10 U.S.C. § 821. Congress's authority here arises out of Article I, § 8, cl. 10 of the United States Constitution which confers power upon the Congress to "define and punish. . .Offenses against the Law of Nations. . ." The common law of war is a subset of the law of nations. *See In re Yamashita*, 327 U.S. 1, 7 (1946).

[7] It is notable that the some of the main proponents of military tribunals for terrorists have noted that affirmative Congressional authorization is necessary. See Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 Ok. City. L. Rev. 349, 398–99 (1996) (stating that the tension between *Quirin* and *Milligan* "can be resolved simply by Congress declaring terrorism to be a form of unlawful belligerency, from which ordinary law no longer secures either public safety or private rights, and further declaring terrorists to be enemy armed forces"); id., at 377 (discussing what "Congressional authorization for the use of military means against terrorism" should provide in order to authorize the President "to establish a military commission").

military commission." *Quirin*, 317 U.S., at 45–46. Indeed, *Quirin* recognized that the use of tribunals may be conditioned by the Sixth Amendment.[8]

The Nazi saboteur case, as Justice Frankfurter later called it, is not "a happy precedent." Danielsky, *The Saboteurs' Case*, 1 J. S. Ct. Hist. 61, 80 (1996) (quoting memorandum from Justice Frankfurter).[9] The real reason President Roosevelt authorized these military tribunals was to keep evidence of the FBI's bungling of the case secret. One of the saboteurs, George Dasch, had informed the FBI of the plot upon his arrival in the United States, and the FBI dismissed his story as a "crank call." Later, the saboteur went to Washington, checked into the Mayflower Hotel, and told his story in person to the FBI. The FBI still did not believe him. It was only after he pulled $80,000 in cash out of his briefcase that the government took him seriously. With Dasch's help, the government arrested the other saboteurs. Yet the government put out press releases suggesting that it was the FBI's diligence that resulted in the arrests.[10] "This was the beginning of government control on information about the Saboteurs' Case and the government's successful use of the case for propaganda purposes." Danielsky, *supra*, at 65.

Finally, even if one is left believing the *Quirin* case provides some judicial precedent in favor of the present military order, this Body is by no means compelled to believe that this judicial decision is the last word on what is constitutional. After all, two years after *Quirin*, the same Supreme Court upheld the internment of Japanese Americans during World War II in the infamous *Korematsu* case, 323 U.S. 214 (1944). *Korematsu* demonstrates that judges will sometimes bend over backwards to defer to a claim of military necessity. Judges are generalists and not particularly suited to evaluating claims of military necessity. For that reason, judicial precedents are not always a helpful guide in determining the meaning of the Constitution, for their determinations are made under traditions that sometimes under enforce certain constitutional rights. See Sager, *Fair Measure: The Legal Status of Under enforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978). This body, by contrast, has the security clearances and the expertise to scrutinize and evaluate claims of military necessity in light of its commitment to the Constitution, see U.S. Const., Art. VI [2]. This is particularly the case here, for the Constitution's meaning has evolved in several ways since 1942, not only with respect to equality, but particularly with respect to the treatment of criminal defendants and conceptions of due process. See Katyal, *Legislative Constitutional Interpretation*, 50 Duke L.J. 1335, 1346–59.

In sum, while the natural tendency is to look to the *Quirin* case, *Quirin* is only a narrow (and inapplicable) exception to the general presumption against military trials in this nation. What's more, *Quirin* was decided before the due process revolution in the federal courts, which took place only in the 1960s. It is not even clear that the limited holding in *Quirin* exists today.

OTHER APPLICABLE PRECEDENT

In circumstances that echo some of today's more far reaching provisions, a military commission tried a group of men for conspiracy against the United States in

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[8] We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in Ex parte Milligan, supra." Id., at 29

[9] The private papers of the Justices reveal that Chief Justice Stone struggled to find a way to claim that Congress had authorized the tribunals, and his answer appears dubious. "Stone answered it uneasily by interpreting a provision in Article of War 15. . . .Thus Congress, he said, in enacting Article 15, had adopted the law of war as a system of common law for military commissions. To arrive at this interpretation, Stone ignored the legislative history of Article 15. . .He also ignored the petitioners' argument that it was settled doctrine that there is no federal common law of crime. Finally, he ignored the constitutional problems raised by his interpretation." Danielsky, *supra*, at 73. See also id., at 76 (quoting Justice Black's memorandum on the case, which stated that I "seriously question whether Congress could constitutionally confer jurisdiction to try *all* such violations before military tribunals. In this case I want to go not further than to declare that these particular defendants are subject to the jurisdiction of a military tribunal because of the circumstances. . .").

[10] Attorney General Biddle stated that as a result of the secrecy, "it was generally concluded that a particularly brilliant FBI agent, probably attending the school in sabotage where the eight had been trained, had been able to get on the inside. . ."Danielsky, supra, at 65. Biddle insisted on absolute secrecy, Secretary of War Stimson later wrote in his diary, because of particular evidence that was likely to come out at a public trial. This evidence included Dasch's cooperation, the FBI's ignoring of Dasch's phone call, and the delay in reporting discovery of the saboteur's landing. Id., at 66.

1864. *Ex Parte Milligan*, 71 U.S. 2, 120 (1866). Milligan sought a writ of habeas corpus, arguing that a military court could not impose sentence on civilians who were not in a theater of war. Several features of the opinion are relevant. The Court disagreed with the government's claim that Constitutional rights did not operate in wartime, explaining the reach of the Fourth, Fifth, and Sixth Amendments, and stating that the founders of the Constitution

> foresaw that troublous times would arise, when rules and people would become restive under restraint. . .and that the principles of constitutional liberty would be in peril. . . .The Constitution of the United States is the law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."

Milligan, 71 U.S., at 120. *see also* William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* 137 (1998) ("The *Milligan* decision is justly celebrated for its rejection of the government's position that the Bill of Rights has no application in wartime. It would have been a sounder decision, and much more widely approved at the time, had it not gone out of its way to declare that Congress had no authority to do that which it never tried to do.")

Milligan went on to hold that when courts are closed due to war, then martial law may be justified in limited circumstances:

> If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails, there is a necessity. . .as no power is left but the military.. . .As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross distortion of power. Martial rule can never exist where courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the *locality of actual war*. Because, during the [Civil War] it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered.

Milligan, 71 U.S., at 127. This part of *Milligan* was distinguished in *Quirin*, but only on the unique facts of the case, for the *Quirin* defendants were charged with violating the Law of War after a declared war and were charged in the locality of the actual war. Under the still-standing *Milligan* rule, martial law might have been appropriate in New York City in the days immediately following the World Trade Center attacks, when Foley Square was closed and the Southern District of New York was not operating as usual. Military tribunals could not exist in other states, however, and would cease in New York after the federal courts became operational. While *Milligan* states the general rule, *Quirin* at most provides an extremely limited exception to it.

The five Justices in *Milligan*'s majority went so far as to prevent military tribunals from being used even when explicitly authorized by Congress. Their decision provoked controversy, leading Chief Justice Chase to author a partial dissent (joined by three other Justices). Chief Justice Chase believed that the laws of Congress did not authorize the use of military tribunals, and therefore joined the majority opinion in part. *Milligan*, 71 U.S., at 136. This opinion is notable because it underscores the power of Congress to authorize these tribunals:

> We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana. . . .
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> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success. . .. Congress cannot direct the conduct of campaigns, nor can the President or any commander under him, *without the sanction of Congress*, institute tribunals for the trial and punishment of offenses, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.
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> We by no means assert that Congress can establish and apply the laws of war where no war had been declared or exists.
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> . . . .it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals.

Id., at 137–40; *see also Id.*, at 122 (majority op.) ("One of the plainest constitutional provisions was, therefore, infringed when *Milligan* was tried by a court not

ordained and established by Congress, and not composed of judges appointed during good behavior").[11] Under either rule in *Milligan*, the majority rule or Chief Justice Chase's dissent, the present Military Order fails. It lacks basic constitutional protections, and has not been authorized by Congress.

In another World War II case, the Court faced the issue of the Executive's authority to order military tribunals to try violators of the law of war. In *In re Yamashita*, 327 U.S. 1 (1946), General Yamashita of the Imperial Japanese Army was tried and convicted by a military commission ordered under the President's authority.[12] The Court held that the trial and punishment of enemies who violate the law of war is "an exercise of the authority sanctioned by Congress, to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists—from its declaration until peace is proclaimed." *Id.*, at 11–12 (emphasis added).[13]

The Supreme Court dealt with the use of military commissions again in *Madsen* v. *Kinsella*, 343 U.S. 341 (1952), where the dependant wife of an American serviceman was convicted by military commission for the murder of her husband. The Court found it within the President's power to establish a military tribunal but under certain constraints. Madsen stated that these commissions "have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war." *Id.* at 346. As such, the Court recognized that these tribunals derive their authority from the Congress' power to "declare war." *Id.* at 346 n.9, and from the occupation of Germany and the recent "cessation of hostilities." *Id.*, at 348.[14]

Of course, there may be times when Congress cannot declare war, for one reason or another.[15] But in many of those cases, the Congress can of course specifically authorize a military tribunal as part of a resolution authorizing force or as stand-alone legislation. If a particular Administration feels that such Congressional activity is not feasible (due to, for example, an invasion), it bears a burden in justifying a unilateral course of action. But in a case like the one today, where Congress is able to meet (indeed, has been meeting to respond to several Administration requests), this justification for unilateralism does not appear tenable.

CONGRESS HAS NOT AUTHORIZED THE MILITARY TRIBUNALS

The present Military Order relies on the Resolution passed by Congress for legal support. The Resolution states: "That the President is authorized to use *all necessary and appropriate force* against those nations, organizations, or persons he determines *planned, authorized, committed, or aided* the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order

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[11] More recent military precedent also suggests that the civil war was similar to a declared war, and that charges could be brought in the locality of war. See Opinion of Patrick T. Henry, Assistant Secretary, Department of the Army, March 6, 2000, available at *http://www.surratt.org/documents/muddarmy.pdf* ("One might content that the facts *Ex Parte Quirin* are distinguishable from those in the Mudd Case [regarding the Lincoln assassination] because the assassination of President Lincoln did not occur during a time of formally declared war. However, the state of hostilities we now call the Civil Was was not legally declared at an end until 1866. At the time of President Lincoln's assassination, Washington D.C. served as the nation's military headquarters and was a fortified city. It remained under martial law for the duration of the Civil War. . .Soldiers, for the most part, conducted civil policing in and around the city. Under these circumstances, conditions tantamount to a state of war existed at the time of President Lincoln's assassination").

[12] In this case, the President had proclaimed that "enemy belligerents who, *during time of war, enter the United States, or any territory or possession thereof, and who violate the law of war, should be subject to the law of war and to the jurisdiction of military tribunals." 327 U.S., at 10. This Presidential order was specifically predicated on a state of war existing between two belligerent powers.*

[13] *Yamashita* also recognized that the very existence of these commissions grew out of Congress's War Power and not any Executive authority. *Id.* at 12–13 (noting "[t]he war power, from which the [military] commission derives its existence" and that the military tribunals had "been authorized by the political branch of the Government").

[14] The Court quotes from Winthrop, Military Law and Precedents, 831 (2d ed. 1920), stating "it is those provisions of the Constitution which empower Congress to 'declare war' and 'raise armies,' and which, in authorizing the initiation of *war*, authorize the employment of all necessary and proper agencies for its due prosecution, from which the tribunal derives it original sanction. Its authority is thus the same as the authority for the making and waging of war and for the exercise of military government and martial law." The court thus subscribes to the view that military commissions derive any authority they have from Congressional sanction under the war powers. They act only pursuant to Congressional delegation of authority.

[15] A declaration of war in today's circumstances may be possible. See Prize Cases, 67 U.S. 635, 666 (1863) ("But it is not necessary to constitute war, that both parties should be acknowledged as independent nations of sovereign States.").

to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Pub. L. No. 107–40, 115 Stat. 224 § 2(a). This Resolution is patently quite far from a declaration of war, and is limited in many respects. Significantly, the Resolution passed by Congress,

1) restricts its reach only to "force,"
2) applies only to persons involved in some way in the September 11 attacks, and
3) permits such activity "in order to" avert prospective damage to the United States.

Now compare the Resolution with the Military Order, which,

1) goes well beyond any conceivable definition of "force,"
2) does not confine its reach to persons involved in the September 11 attacks, but goes so far as to permit any terrorist unconnected to the attacks to be tried before a military tribunal,
3) is entirely retrospective, meting out sentences for past acts, and
4) extends its jurisdiction to places that are not localities of armed conflict.

A tougher question is presented by persons in Afghanistan, for the Use of Force Resolution when read in conjunction with the Uniform Code of Military Justice could suggest military jurisdiction for those that are the direct targets of Congress' Resolution. As I will explain in a moment, this reading is questionable, but the case is a closer one. *But the Military Order goes much, much farther than this*, and illustrates the precise dangers with unilateral determinations by the Executive. The Order does not confine its reach to those involved in the September 11 attacks. It states that individuals subject to the order include anyone whom,

> "there is reason to believe. . .
> (i) is or was a member of the organization known as al Qaida;
> (ii) has engaged in, aided or abetted, or conspired to commit, *acts of international terrorism*, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
> (iii) has knowingly harbored one or more individuals described [in the first two categories above].

Military Order, § 2(a) (emphasis added). There is absolutely no constitutional warrant for such a dramatic expansion of the military tribunal's authority to cover individuals completely unconnected to the September 11 attacks, no matter how broadly the statutes and precedent can be stretched. This is particularly important in light of the fact that the Congress explicitly rejected proposed White House language that would have authorized a broader use of force. See Lancaster, Congress Clears Use of Force, Wash. Post, Sept. 15, 2001, at A4. Subsections ii) and iii) of the Military Order therefore underscore just how important it is for this body to carefully circumscribe the jurisdiction and reach of a military tribunal. Without such guidance, military tribunals can creep far beyond the circumstances of an emergency, sweeping up many unrelated investigations. "Mission creep" can infect not only military operations that employ force, but also those that involve prosecutors and judges.

In the wake of the martial law of the Civil War, Congress passed the Posse Comitatus Act to prevent the military from becoming part of civilian affairs. The Act states, "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both." 18 U.S.C.S. § 1385 (2001). This Act reflects the underlying presumption against blurring military and civilian life, unless Congress authorizes otherwise or the Constitution so demands. It is instructive that this fundamental law has itself been modified recently with respect to the War on Drugs and immigration. See 10 U.S.C. §§ 371–380 (authorizing Secretary of Defense to furnish equipment and personnel to assist civilian agencies in enforcing drug and immigration laws, but preventing the military, with the exception of the Coast Guard, from conducting "a search and seizure, an arrest, or other similar activity"). The Posse Comitatus Act underscores the general presumption against civilian life becoming subject to military law, unless Congress or the Constitution explicitly say otherwise. The recent Military Order undercuts this post Civil War tradition, and does so unilaterally.

As previously stated, the Uniform Code of Military Justice (UCMJ) is still on the books. It might be thought that the language in the Uniform Code, which recognizes

the concurrent jurisdiction of military tribunals, 10 U.S.C. § 821,[16] constitutes sufficient congressional authorization of them under the rule laid down in *Quirin*. I have already explained why *Quirin*, and its interpretation of the predecessor statute to the UCMJ, does not come close to justifying the present Military Order. Not only the facts and opinion in *Quirin*, but cases decided under the UCMJ itself suggest that this body has not authorized the military tribunals envisioned in the recent Military Order.

In *United States* v. *Averette*, 19 U.S.C.M.A. 363 (1970), a civilian employee of the Army was charged with criminal violations in Vietnam and tried by court-martial under the UCMJ. The United States Court of Military Appeals there decided that, in determining the applicability of the UCMJ, "the words '*in time of war*' mean. . .*a war formally declared by Congress*." *Id.*, at 365 (emphasis added). Further, the court believed that "a strict and literal construction of the phrase '*in time of war*' should be applied," *Id.*, in the case of the jurisdiction of military courts. The conclusion in this case was that the hostilities in Vietnam, although a major military action, was not a formal declaration of war for purposes of the military's jurisdiction.[17] The Court of Military Appeals followed this line of reasoning is *Zamora* v. *Woodson*, 19 U.S.C.M.A. 403 (1970), where it held again that the term '*in time of war*' means "a war formally declared by Congress," *Id.* at 404, and that the military effort in Vietnam could not qualify as such. The question of whether a terrorist can even qualify as a belligerent or engage the machinery of the "laws of war" is itself not clear. See Scharf, Defining Terrorism as the Peace Time Equivalent of War Crimes, 7 ILSA J. Int'l & Comp. L. 391, 392 (2001) ("The key is the 'armed conflict' threshold. By their terms, these conventions do not apply to 'situations of internal disturbances and tensions such as riots and isolated and sporadic acts of violence.' In those situations, terrorism is not covered by the laws of war, but rather by a dozen anti–terrorism conventions").[18]

Finally, the United States Court of Claims faced this issue in *Robb* v. *United States*, 456 F.2d. 768 (Ct. Cl. 1972). The Court of Claims held that the decedent's prior court-martial had not held jurisdiction over him as a civilian employee of the Armed Forces because "short of a declared war," *Id.*, at 771, the court-martial did not possess jurisdiction under the UCMJ.

Thus both civil and military courts have held that the UCMJ's use of the term "in a time of war" requires an actual, congressionally declared war to provide jurisdiction over civilians for the military courts-martial or tribunals. This strict reading should also apply to the Court's previous rulings holding the President's power to convene military tribunals to vest only "*in time of war*." This strict reading is justified not only because of the precedent established by the Court of Military appeals, but also in light of the tremendous damage to individual rights the Executive and the military could create if military courts could be convened without explicit Congressional authorization.

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[16] The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." 10 U.S.C. § 821.

[17] In a rather different setting, the military courts have found that a substantive offense, sleeping at one's post during time of war, was possible during the Korean War. *United States* v. *Bancroft*, 3 U.S.C.M.A. 3 (1953). The Court pointed to many indicia of a wartime situation, including special "national emergency legislation." Id., at 5. See also *United States* v. *Ayres*, 4 U.S.C.M.A. 220 (1954) (following *Bancroft*). *Averette* is not modified by *Bancroft* or *Ayres*, as *Averette* is the more recent case and was explicitly decided in light of these other case. While members of our military might be subject to additional punishment based on statutes that aggravate penalties during wartime, to apply the jurisdiction of the UCMJ to those not ordinarily subject to it requires an affirmative act of Congress. *Averette*, at 365 ("We emphasize our awareness that the fighting in Vietnam qualifies as a war that word is generally used and understood. By almost any standard of comparison—the number of persons involved, the level of casualties, the ferocity of the combat, the extent of the suffering, and the impact on our nation—the Vietnamese armed conflict is a major military action. But such a recognition should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction.")

The *Averette* ruleing means that when the constitutional rights hang in the balance, courts should read statutes as narrowly to avoid violating these rights unless congressional intent is clear. The term "time of war" is ambiguous, and as such, should be read narrowly as requiring a congressional declaration of war before constitutional rights are abrogated in the name of national security. Congress must speak clearly if it wishes to constrain, or allow the Executive to constrain, civil rights through its war powers.

[18] Making the laws of war applicable to terrorists may also raise problems, including possibly providing them with the "combatant's privilege,"under which combatants are immune from prosecution for common crimes, and prisoner of war status upon detention. Scharf, supra, at 396–98.

After all, many would be surprised to learn that the Administration is arguing that this Body has already ratified military tribunals for terrorists. The dusting off of an old statute passed for an entirely different purpose and in another era raises significant constitutional concerns when that statute is used to justify the deprivation of individual rights. The Supreme Court often speaks in terms of "clear statement" rules: if the legislature wants to deprive someone of a constitutional right, it should say so clearly, otherwise the legislation will be construed to avoid the constitutional difficulty. E.g., *Kent* v. *Dulles*, 357 U.S. 116, 129–30 (1958) (holding that the Secretary of State could not deny passports on the basis of Communist Party membership without a clear delegation from Congress, and that this permission could not be "*silently granted*") (emphasis added).[19] Without a clear statement by this Congress about the need for military tribunals, it will be difficult for a civilian court to assess the exigencies of the situation and to determine whether the circumstances justify dispensing with jury trials, grand juries, and the rules of evidence on habeas review.

Even if there is some ambiguity in the UCMJ about the meaning of "time of war," standard principles of legislative interpretation would counsel reading the statute to avoid constitutional difficulties, and mean that the President lacks authority.[20] As Justice Jackson put it in his concurrence in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 673 (1952), in the zone of twilight between the powers of Congress and the President, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables. . . ." One of these imperatives is the preservation of individual rights. In *Valentine* v. *United States ex rel Neidecker*, 299 U.S. 5 (1936), the Court considered the Executive's power to extradite under a treaty where the treaty did not provide for such extradition. Although this case took place before Youngstown, it is clear that this Executive action would fall into Jackson's zone of twilight. The Court did not allow the extradition because of the trampling of individual rights: "the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceeding against [an individual] must be authorized by law. . . .It necessarily follows that as the legal authority does not exist save as it is given by an act of Congress. . .[i]t must be found that [a] statute. . .confers the power." *Id.* at 9; *see generally* Silverstein, Imbalance of Powers 115–16 (1997) (stating the proposition that when it comes to individual liberties, the

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[19] *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981) loosened the definition of "implied Congressional authorization" somewhat but did not find that lack of Congressional voice would constitute implicit authorization. The decision expressly disclaimed any attempt to use its precedent in other cases: "we attempt to lay down no general 'guidelines' covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case." Id., at 661. In *Dames*, a case in which a constitutional right was probably not at stake, the Court approved an Executive Order which terminated all litigation between United States nationals and Iran in return for the establishment of a claims tribunal to arbitrate the disputes. The Court did not find explicit authorization by Congress but grounded a finding of implied authorization in the fact the Congress had passed the International Claims Settlement Act of 1949 which approved another executive claims settlement action and provided a procedure to implement future settlement agreements. Also, the legislative history of the International Emergency Economic Powers Act (IEEPA) showed that Congress accepted the authority of the President to enter into such settlement agreements. *Id.* In the current case, Congress has passed no such legislation which recognizes or ratifies the President's authority to convene military tribunals without a declaration of war, and the constitutional rights at stake are significant. As such, implicit approval of Congress cannot be found here as it was in *Dames & Moore*.

[20] A comparison between the Military Order and President Truman's seizure of the steel mills via Executive Order is instructive. The Supreme Court declared Truman's Executive Order un constitutional because it "was a job for the Nation's lawmakers, not for its military authorities. . . .In the frame work of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown, supra*, at 587 (majority cop. per Black, J.). Even though legislative action might "often be cumbersome, time-consuming, and apparently inefficient," Justice Douglas stated, that was the process our Constitution set up. See id., at 629; see also id. ("The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. . .to save the people from autocracy") (quoting *Brandeis, J., Dissenting in Myers* v. *United States*). *See also Youngston, id.*, at 650 (Jackson, J., concurring) ('Aside from suspension of the privilege of the writ of habeas corpus. . .[the founders made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so. . . .[T]he President of the [German] Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more the 250 occasions. Finally, Hitler persuaded President Von Hindenberg to suspend all such rights, and they were never restored.").

Court is hesitant to defer to the Executive in the absence of specific Congressional mandate).[21]

In the current case, the Executive Order is made applicable even to resident aliens who are constitutionally vested with due process rights. As such, the Court should be wary of allowing the Executive to unilaterally abrogate these individual protections.[22]

Finally, if the UCMJ were stretched to give the President power to create a tribunal in this instance, it would leave the statute so broad as to risk being an unconstitutional delegation of power. Such a statute would leave the President free to define a "time of war," grant him the discretion to set up military tribunals at will, bestow upon the Executive the power to prosecute whomever he so selects in a military tribunal, and give him the power to try those cases before military judges that serve as part of the Executive Branch and perhaps even the ability to dispense with habeas corpus and review by an Article III court. It would be a great and unbounded transfer of legislative power to the Executive Branch, a claim that every defendant before the tribunal would raise repeatedly. *See Clinton* v. *City of New York*, 118 S. Ct. 2091, 2108–10 (Kennedy, J., concurring); *Industrial Union Dep't, AFL–CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J. Concurring); *American Textile Mfrs. Inst., Inc.* v. *Donovan*, 452 U.S. 490, 545 (1981) (Rehnquist, J., dissenting); *California Bankers Ass'n* v. *Schultz*, 416 U.S. 21, 91–93 (1974) (Brennan, J., dissenting).

There is one other aspect of the Military Order that is constitutionally troubling: its secrecy.[23] Government secrecy is a tremendously dangerous, though important, power. The Constitution was designed to avoid secrecy when the criminal process has been engaged. Our Founders feared secret trials, knowing that the impulse would be too great for the prosecutor to abuse his powers. See U.S. Const., Am. VI; cf., *Morrison* v. *Olson*, 487 U.S. 654, 728–29 (1988) (Scalia, J., dissenting).

When criminal trials take place in open court in front of a jury of one's peers, a tremendous checking function exists. Yet the Military Order scraps all of this, and permits trials to be conducted in secret, without the attention of press or peers. Nothing will check the power of the prosecutor in these trials. Our enemies will call them "show trials" to cover up for our government's failures, our friends will wonder

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[21] The *Pentagon Papers Case, N.U. Times Co.* v. *United States*, 403 U.S. 713 (1971), also underscores the constitutional problems with unilateral executive action. In that case, the Court, in a per curiam opinion, denied the President an injunction to block the New York Times and the Washington Post from publishing certain documents which the Administration claimed would be damaging to the military effort in Vietnam. Justice Brennan observed that the Executive acted without authorization from Congress. Previously, Congress had considered legislation which would have made such disclosure criminal. Brennan stated that "[i]f the proposal. . .had been enacted, the publication of the documents involved here would certainly have been a crime. Congress refused, however, to make it a crime." *Id.* at 746. Justice Douglas indicated that the case might have been different with specific Congressional authorization, stating "[t]here is. . .no statute barring the publication by the press of the material which the Times and the Post seek to use." *Id*. at 720. Douglas also conceded that a state of declared war might authorize such action on the part of the Executive when he state "[t]he war power stems from a declaration war. . . .Nowhere (in the Constitution] are presidential wars authorized. We need not decide therefore what leveling effect the war power of Congress might have." *Id*. 722. Similarly here, a declared state of war vests the President with the power to abrogate some Fifth Amendment rights but in the absence of such declaration of war or specific Congressional authorization, the Executive's attempt to remove Fifth Amendment protections through the use of military tribunals is constitutionally problematic.

[22] Additionally, if one subscribes to Justice Murphy's view that the Fifth Amendment protects all people accused by the Federal Government and "[n]o exception is made as to those who are accused of war crimes or as to those who possess the status of any enemy belligerent," then it would be logical that the Executive not be allowed to unilaterally abrogate individual rights of even non-resident aliens. *In re Yamashita*, 327 U.S. at 26 (Murphy, J., dissenting) (stating that "[t]he immutable rights of the individuals, 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 the status of belligerency or outlawry. They survive any popular passion of frenzy of the moment. . . .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.").

[23] There is also a second strain of unilateralism in the Military Order, that of unilateralism in our foreign policy. Spain has already refused to extradite suspects in the September 11 investigation until America promises not to subject them to a military trial. The upshot of the military order may be to weaken not strengthen, our ability to conduct thorough investigations, to interview material witnesses, and prosecute those responsible. Again, these costs of the tribunals may be worth it, but these are the types of determinations that are appropriate for Congressional oversight.

why American justice cannot handle those who are obviously culpable. And a dubious precedent will be set that gives the President the power to establish these tribunals in circumstances untethered to formal declarations of war. If the circumstances demand secret trials, this body can so authorize them. Our Constitution and laws necessarily require many procedures before the cloak of government secrecy can be worn.

ATTORNEY GENERAL ORDER NO. 2529–2001 RAISES SERIOUS CONSTITUTIONAL CONCERNS AND JEOPARDIZES THE CRIMINAL CONVICTIONS OF THOSE RESPONSIBLE FOR TERRORISM

A similar analysis of executive unilateralism applies to Attorney General Order No. 2529–2001. This regulation was announced with no legislative consideration whatsoever. It comes close to infringing both Fourth Amendment right to privacy and the Sixth Amendment right to counsel. Those who are the subject of the rule have not been charged with a crime, for the order permits monitoring of "inmates," defined under this rule to include not merely criminal convicts, but anyone "held as witnesses, detainees or otherwise." The government is currently detaining well over 1000 individuals, some on immigration violations, some as possible suspects, and still others who are material witnesses, all of whom are subject to such monitoring. The monitoring may occur, not on a probable cause standard, but whenever the Justice Department determines that "reasonable suspicion exists to believe that an inmate may use the communications with attorneys. . .to facilitate acts of terrorism." *Id.* Moreover, the determination that someone is too threatening to speak privately with counsel is made not by a judge, but by the executive branch acting unilaterally, in contradistinction to other legislative procedures such as the Foreign Intelligence Surveillance Act (FISA).

Again, this dramatic order, if carefully circumscribed, might be justified on national security grounds, but it is the type of action that requires legislation, not a unilateral decision by the Executive Branch. After all, "the attorney-client privilege under federal law [is] the oldest of the privileges for confidential communications known to the common law." *United States* v. *Zolin*, 491 U.S. 554, 562 (1989).

My analysis here will not dwell on judicial cases, for a good reason, there are none. The Government has not issued such a sweeping ruling in its entire history. All previous precedents pale in comparison to the major change of law issued by the Attorney General. To be sure, there are indications that both the Fourth Amendment and Sixth Amendment are violated when the government monitors conversations between attorneys and their clients. But my argument is really one based on common sense: such an intrusion into private affairs can only be justified by compelling circumstances. Standard separation of powers principles suggest that such a justification be announced by Congress, in the form of law, and enforced at the discretion of the President.

While defenders of the regulation have pointed out that separate teams for "prevention" and "prosecution" will be set up, the result of this form of monitoring is to chill the relationship between attorney and client. Confidentiality is the essence of representation in this privileged relationship. As a result of the new regulation, people will not be able to consult their lawyers without the risk of a government agent listening to their conversation. The conversation might be about the most private matters imaginable—a divorce created in part by the government's detention, for example. A long tradition has prevented the government from intruding into conversations between lawyer and client, for such matters may be deeply private ones, subject to traditional fourth amendment protection. Amar & Amar, *The New Regulation Allowing Federal Agents to Monitor Attorney-client Conversations: Why it Threatens Fourth Amendment Values*, Find law, Nov. 16, 2001, at *http://writ.news.findlaw.com/amar/20011116.html.*

Without the order, clients might talk to their lawyers about arranging plea bargains and other deals in exchange for information about future plots of terrorism. In the wake of the Regulation, these conversations may conceivably to dry up, resulting in the government receiving less, not more, information. Again, the Justice Department might have special reason to discount this risk, and special reason to believe that clients are passing messages through their attorneys. But if so, it is up to them to make that case to this Body.

As anyone who has worked with intelligence data knows, there are often mistakes. This is natural given the shadowy world of informants and purchased information, and circumstances in the wake of September 11 may justify holding people in detention on the basis of such data, despite these mistakes. But to go farther than this, and to abrogate the historic relationship between attorney and client in the name of national security, threatens constitutional freedoms, and, indeed, may

threaten the criminal convictions of these individuals. This is particularly the case when a series of less restrictive alternatives exist to the regulation. See Amar & Amar, *supra* (discussing "cleared counsel" approach in Classified Information Procedures Act and videotaping of attorney/client conversations that could become reviewable ex parte by a judge).

Congressional legislation authorizing such searches will undoubtedly put such a regulation on stronger constitutional footing. The Fourth Amendment focuses on reasonableness, and one way in which courts assess reasonableness is by looking to Congress. Because there is a "strong presumption of constitutionality due to an Act of Congress, especially when it turns on what is 'reasonable,'" *United States* v. *Di Re*, 332 U.S. 581, 585 (1948), the Court has in certain circumstances chosen to "defer to [the] legislative determination" about the safeguards necessary for searches and seizures under a particular regulatory scheme. *Donovan* v. *Dewey*, 452 U.S. 594, 603 (1981). *see also* Amar, *Fourth Amendment, First Principles*, 107 Harv. L. Rev. 757, 816 (1994) ("Legislatures are, and should be, obliged to fashion rules delineating the search and seizure authority of government officials. . . .In cases of borderline reasonableness, the less specifically the legislature has considered and authorized the practice in question, the less willing judges and juries should be to uphold the practice."). Without legislative approval, by contrast, courts may well frown on such an unprecedented intrusion into privacy. *See Coplon* v. *United States*, 191 F.2d 749 (D.C. Cir. 1951) (Sixth Amendment violated by government interception of private telephone consultations between the accused and lawyer); *Hoffa* v. *United States*, 385 U.S. 293, 306 (1966) (assuming without deciding that Coplon is correct).

While some have claimed that *United States* v. *Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991) justifies the immense monitoring order involved here, a close reading of *Noriega* reveals otherwise. It is telling that the main precedent cited by defenders of the regulation is a district court opinion from a single district in Florida. In the case, former Panamanian dictator Manuel Noriega claimed that the interception of his phone calls while in prison (but not those with his attorneys) violated his Fourth Amendment right, and that his Sixth Amendment right was violated when conversations with his attorneys were intercepted. The district court decision dismissed the latter claim because the government did not intentionally intercept the attorney/client phone calls, see 764 F. Supp., at 1489, a claim that the government can in no way make today. The AG Regulation contemplates intentional monitoring of these conversations. The Fourth Amendment claim Noriega put forth was not at all about monitoring of attorney/client conversations, *Id.*, at 1490, and therefore did not decide the difficult issue raised by the Attorney General's Regulation. Moreover, the Noriega monitoring was done under very limited circumstances where probable cause was almost certainly met and the search was as reasonable as the facts were unusual. Noriega did not concern a sweeping order such as the one involved today, which, again, targets even those held as material witnesses.

In this respect, a comparison with FISA is helpful. When the Circuit Courts were in conflict on the question of whether the President has inherent authority to conduct surveillance without a prior judicial screen, compare *Zweibon* v. *Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (disclaiming executive power) with *United States* v. *Butenko*, 494 F.2d 593 (3d Cir. 1974) (upholding it), Congress and the President compromised in the Foreign Intelligence Surveillance Act of 1978. The Act rejected the notion that the executive may conduct surveillance within the U.S. unbridled by legislation.[24] FISA was re-affirmed and amended just last month with the passage of the USA PATRIOT Act.

The approach taken with the passage of FISA disclaimed any pretense of unilateralism. At that time, the Senate Judiciary Committee declared that the FISA was a "recognition by both the executive branch and the congress that the *statutory* rule of law must prevail in the area of foreign intelligence surveillance."." S. Rep. No. 95–604, at 7 (1977) (emphasis added). The Senate Intelligence Committee announced that the FISA represented a "*legislative* judgment that court orders and other procedural safeguards are necessary to insure that electronic surveillance by the U.S. government within this country conforms to the fundamental principles of the Fourth Amendment." S. Rep. No. 95–701, at 13 (1978).

Speaking for the executive branch before this Committee, Attorney General Bell himself agreed to this judgment, praising the Act because "'for the first time in our society the clandestine intelligence activities of our government shall be subject to the regulation and receive the positive authority of a public law for all to inspect.'"

[24] See Pub. L. No. 95–511, 92 Stat. 1783 (codified as 50 U.S.C. §§ 1801–11 (2001)); Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Act of 1978*, 137 U.Pa. L. Rev. 793 (1989).

Id. at 7 (citation omitted). He praised it because, as he said, "'it strikes the balance, sacrifices neither our security nor our civil liberties, and assures that the abuses of the past will remain in the past and that the dedicated and patriotic men and women who serve this country in intelligence positions, often under substantial hardships and even danger will have *the affirmation of Congress* that their activities are proper and necessary.'" *Id.* (emphasis added). Again today, we find ourselves in a world where we need recognition both by the President and by Congress that the *statutory* rule of law must prevail in the area of foreign intelligence surveillance. The world is not so different today that we do not need the "positive authority of a public law for all to inspect," or that we do not need procedural safeguards to protect against the abuses of the executive branch.

Twenty-four years ago this Committee spoke that it wanted to "curb the practice" by which the President and the Attorney General may disregard the Bill of Rights on their "own *unilateral determination* that national security justifies it." S. Rep. 95–604, at 8–9 (emphasis added). The executive branch at that time agreed, and since that time the judiciary has protected that deference to legislative judgment. A similar course of action is appropriate today.

THE POSSIBILITY OF LEGISLATIVE REVERSAL OF EITHER EXECUTIVE DECISION DOES NOT MAKE THEM CONSTITUTIONAL

The Congress today retains some formal power over both the Military Order and the Attorney General Regulation and can use legislation to reverse them. But this possibility does not transform either Executive decision into a constitutional one. The Executive Branch has acted ultra vires in issuing both of these decisions, and both lack the appropriate constitutional stature to survive separation of powers scrutiny. The speculative possibility of a Congressional reversal cannot make an act of the Executive constitutional. (If President Clinton during a budget deadlock got frustrated and decided to proclaim his budget proposal the law of the land, and directed his Secretary of Treasury to begin disbursements, Congress would of course have the power to trump his "budget" with one of their own, but the existence of its trumping power wouldn't make the President's initial action constitutional.) Indeed, President Truman's Order to seize the steel mills could have been reversed by Congress (a possibility explicitly invited by President Truman—in contradistinction to the recent Administration actions—who sent messages to Congress stating that he would abide by a legislative determination to overrule his Executive Order). The dissent in *Youngstown* made much of Truman's overture to Congress, but that did not stop the Supreme Court from declaring President Truman's action unconstitutional for overstepping his authority.

Furthermore, there may be all sorts of barriers to Congressional reversal: trials might be underway, in which case a Congressional reversal might create double jeopardy problems, or the Congress might not want to set up a dangerous confrontation between the branches in a time of national crisis. A Congressional reversal would require not a simple majority, but a two-thirds one (because a President would have the power to veto the legislation proposing the reversal), therefore such a reading of the Constitution would work a subtle but dangerous transformation in power away from the Congress and toward the President. A future President could then set up military tribunals in a national crisis, declaring, for example, the "War on Drugs" to require military tribunals for narcotics traffickers, and the Congress would have to attain a two-thirds majority affirmatively reverse such a determination. The Separation of Powers is designed precisely to guard against such transfers of constitutional authority. Particularly because our constitutional traditions are evolving ones, it is dangerous for one person to be given the authority to freeze the Constitution at a single moment in time. This body is uniquely equipped to assess the meaning of constitutional guarantees, such as the Fourth, Fifth and Sixth Amendments, in light of contemporary circumstances.

CONCLUSION

Given the national importance and fundamental commitment to Constitutional values, the better course of action is for the President to only act in this area when his powers are at their highest ebb, namely, when he acts with the approval of the co-equal legislative branch. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) (when the President acts with explicit authorization of Congress, "his authority is at its maximum, for in includes all that he possesses in his own right plus all that Congress can delegate."). Even though I am a supporter of the unitary executive theory, which generally endorses a broad view of constitutional powers of the President, the Military Order and AG Regulation go too far.

The Executive Branch should therefore, at a minimum, decline to enforce either the Military Order or the Attorney General regulation until this body has expressly authorized these methods. The Congress should then immediately take up the question of whether these methods are necessary and proper, and give due weight to the views of the Administration on this point. A united Executive-Legislative determination, just as with FISA, the USA PATRIOT Act, and other major national-security decisions, will best safeguard individual liberty for the future and prevent convictions from being overturned in the ongoing terrorism investigations. *At the very minimum*, Congress should consider enacting legislation similar to the War Powers Act and laws governing covert activity, so that the President is required 1) to notify some or all members of Congress quickly when military tribunals are initiated, and 2) to provide details of the cases to this body so that it may perform its oversight function.

In conclusion, like most all Americans, I believe the Administration is trying to make the best calls that it can. But that's part of the point: Our Constitutional design can't leave these choices to one man, however well intentioned and wise he may be. We do not live in a monarchy. The structure of government commits wide-ranging decisions such as this to the legislative process. To say this is not to be "soft on terrorism," but actually to be harder on it. We cannot afford to jeopardize our beliefs, or to risk accusations of subverting our constitutional tradition, simply because one branch thinks it expedient.

Chairman LEAHY. Thank you very much, Professor.

Let me ask you, General Barr—I know you have long supported the idea of military tribunals—when did you first consult with the administration on the option of military tribunals, this administration?

Mr. BARR. Well, I didn't consult with anybody. I reminded people of work that had been done previously in the Department on this topic.

Chairman LEAHY. Reminded people just on the street or people in the administration?

Mr. BARR. Staff people in the administration.

Chairman LEAHY. And when did you do that?

Mr. BARR. After September 11.

Chairman LEAHY. Shortly thereafter?

Mr. BARR. Yes.

Chairman LEAHY. General, I am thinking back to the time when you were Attorney General under former President Bush. We went through Desert Storm and Desert Shield, facing thousands of people that we were in open conflict with.

Let me ask you, did former President Bush ever issue a similar order for military tribunals during Desert Storm or Desert Shield?

Mr. BARR. No.

Chairman LEAHY. What about after the bombing of Pan Am Flight 103 over Lockerbie, Scotland?

Mr. BARR. No. It was in that context which we explored the possibility because we looked at the Nuremberg model and considered setting up a joint military tribunal.

Chairman LEAHY. And did you recommend that to the President?

Mr. BARR. No, because my informal contacts with the Scots indicated they were not interested in doing that, primarily because of the death penalty.

But the Iraqi war is a good example. That was not a declared war, but I think it would be ridiculous to say that if the Republican Guards had started executing American prisoners or pilots that had been shot down that we would have been powerless to convene military courts to try them for those violations of the laws of war. Our only option would not have been, as some seem to suggest,

bringing back Republican Guard members and trying them in our civilian courts.

There has never been a circumstance I am aware of of an armed foreign combatant waging war against the United States having been tried for war crimes in a civilian court.

Chairman LEAHY. But I think you have heard the testimony that, the way it is drafted, this could go well beyond an armed combatant directing actions against the armed forces of the U.S.

Mr. BARR. Not at all. I think Mike Chertoff was referring to one of FDR's orders. FDR issued two orders. One of them was extremely broad. The second one was the one that was directed at these specific Nazis. His first one was sweeping and applied to anybody who was a resident of a country at war against the United States who attempted to enter the United States for the purpose of carrying out hostile or warlike actions.

So I think that the President's order applies to people who commit war crimes; that is, they have to be in a state of unlawful belligerency against the United States and commit war crimes that are triable in military tribunals. The order says that in Section 4.

Chairman LEAHY. Do you agree with that, Mr. Heymann?

Mr. HEYMANN. Well, no, I don't think they have to be war crimes. I think the order plainly applies to any terrorist act, but the big problem is that you don't know whether the guy is a terrorist or not.

Israel killed a Norwegian waiter on the mistaken ground that he was one of the people responsible for the Munich Olympics massacre of the Israeli athletic team.

This order applies to any of 20 million people, unreviewable, whom the President believes are terrorists or have helped terrorists or were terrorists or used to harbor terrorists. And it is the power; it is not how it is being exercised.

I think your first question is whether you are going to address the claim of power of the President or whether you are going to address its likely use, limited to a relatively few people. And I agree with former Attorney General Barr that I don't think there is an obligation to bring them back from Afghanistan. But the claim of power reaches 20 million people living in the United States and anyone in Spain, France, or Germany, and it applies to indefinite detention without trial, without the immigration grounds we are now using, as well as to military trials. It is an extraordinary claim of power.

Chairman LEAHY. Well, since I am going to follow the lights very strictly for everybody, I will stop at that point and not do a follow-up.

Senator Hatch?

Senator HATCH. Mr. Silliman, if I understand your testimony correctly, you are willing to accept that the President can, consistent with our laws and our Constitution, establish military tribunals to try those accused of violating the "law of war."

Mr. SILLIMAN. That is correct, Senator.

Senator HATCH. But, apparently, your objection to the President's order is that we were not technically at war with Al Qaeda until after they orchestrated the September 11 attacks. Your analysis appears to me, at least, to lead to the perplexing result that the

President could lawfully order trial by military tribunal for terrorists who commit war crimes after the September 11 attacks, but cannot try them by military tribunal for the September 11 attacks themselves.

Here is where I find it difficult to believe that our laws would command such a perverse result: Even if I were inclined to accept your analysis, I wonder how you deal with the following fact. The President did not premise his order exclusively on the September 11 attacks. Rather, his order explicitly states, "International terrorists, including members of Al Qaeda, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens within the United States."

Now, the question is, is it your position that it is the province of this Congress to second-guess the President's factual determination as to when a state of war came into being?

Mr. SILLIMAN. No, Senator. Let me try to explain. My analysis is based on a distinction between what we would call and have called terrorist acts, such as the initial bombing of 1993. The bombing of our embassies in Tanzania and Kenya in 1998 and the bombing on the USS Cole are but examples of this.

Senator HATCH. Right.

Mr. SILLIMAN. Now, I suggest that the problem is that every time we have looked at violations of the law of war, it has been within the context of dealing with state actors. We are dealing with nonstate actors here, and what I am suggesting is that on the 11th of September we dealt with 19 terrorists who committed a horrendous act against the World Trade Center and the Pentagon. I concede that, but we were not yet at a state of armed conflict.

I agree with the comments that we need not be in a declared war. I think all would agree with that, but we were not at that moment in a state of armed conflict with any kind of recognized entity. And it interests me that in the joint resolution of the Congress and in the President's signing order in the declaration of emergency issued, there is not one mention of violations of the law of war. Continually, the reference is to terrorist acts, terrorist acts, terrorist acts.

The rhetoric of war against terrorism has now been extended to create a legal predicate for violations of the law of war, and I am unwilling to go that far. I believe, as I suggest in my statement, Senator, that the Congress could, in fact, define violations of the Law of Nations which go far beyond the law of war to include terrorist acts, and could do so either in Article 21 of the Code for Military Commissions or in Article 18 to provide for courts-martial, if the Committee feels that a higher level of due process should be in order.

That is the province of Congress, but I do admit that the President of the United States, as Commander-in-Chief, has the power under the law of war to bring into being military commissions, but only to prosecute violations of the law of war.

Senator HATCH. But you don't think the law of war applies in this instance?

Mr. SILLIMAN. I do not believe that the law of war applies at 8:47 on Tuesday morning, September 11. It did at some time. My concern, Senator, is as to a prosecution by military commission of of-

fenses directly related to that specific attack. That is my concern, and I fear that if we were to lose a case in a military commission that it would damage the entire credibility of the President's authority.

Senator HATCH. I don't think we would have much chance of losing the case if we could find the right people. I mean, let's be honest about it.

In your written testimony, you acknowledge that the Secretary of Defense has not yet established the procedures by which the military tribunals will operate. You go on to say that the guidelines and the modes of proof that will be employed by such tribunals will be different than and inferior to those employed by the military in connection with the court martial process. I don't know how you are able to reach that conclusion without knowing the Secretary of Defense's forthcoming procedures.

Mr. SILLIMAN. Senator, I concede, as has been mentioned several times this morning, that the Secretary of Defense is seeking guidance and counsel right now to promulgate those regulations. No one knows to what level of due process he will raise that bar.

Senator HATCH. But you can't presume that he will not have—

Mr. SILLIMAN. No, Senator. My script is the President's order itself. As has been suggested earlier in this hearing, it could possibly have been prudent for the administration to consult with the Department of Defense in a further and more extensive mode to bring those due process requirements into the initial iteration of the order rather than leaving us as we are now to guess.

Senator HATCH. But you could become more supportive if those due process requirements are met?

Mr. SILLIMAN. I could be more supportive, Senator, certainly of trials outside this country, and I could be more supportive of trials within this country with a high degree of due process. However, the President always has the option of using courts-martial, with the assistance of legislation from this Committee and other Committees.

Senator HATCH. Ms. Martin, just one question for you. Many, including you, have asserted that the names of each individual being held on immigration charges should be released. In support of that argument, you cite the Freedom of Information Act as support for that argument.

In 1991, the Supreme Court found that the disclosure of unredacted reports of interviews of Haitian nationals who were interdicted and returned to Haiti, as to whether they were harassed or prosecuted after their return, would have constituted a clearly unwarranted invasion of privacy. That is in *U.S. Department of State* v. *Ray*.

In so doing, the Court held, among other things, that disclosure of the names would publicly identify the returnees, possibly subjecting them or their families to embarrassment in their social and community relationships, or even to retaliatory action.

Now, my question for you is, is it not reasonable to assume that the release of the names of those being held on immigration violations could subject those persons to embarrassment or harm, if and when they are released?

Ms. MARTIN. Senator, I think that the problem here is that the administration and the Justice Department have made repeated public statements saying that the hundreds of people who have been arrested have been arrested in connection with a terrorism investigation and the harm to their reputation will follow from the fact that they have been identified as being arrested in an investigation of terrorism, when there isn't, in fact, any evidence linking them to the investigation of terrorism.

Mr. Chertoff, I believe, correctly stated that there is no legal prohibition against disclosing the names of those who have been detained on immigration violations. The INS, in fact, in implementing the Supreme Court decision in *Ray* which you refer to has adopted a regulation which provides that, although in many situations the names of immigration detainees will be withheld, that will not be the case when questions are raised about agency practice. I believe that that is exactly the situation before us, and that therefore the names are required to be released under the Freedom of Information Act.

Chairman LEAHY. Thank you.

Senator Feingold?

Senator FEINGOLD. Thank you very much, Mr. Chairman. I would like to ask a question of Professor Katyal and Professor Heymann.

I am concerned about statements I have read or heard in the press recently indicating that one reason that the administration has moved unilaterally, without authorization or consultation with Congress, on a number of issues that we have been discussing today, from issuing an executive order on military tribunals to regulations on the monitoring of attorney-client communications, apparently is that the administration believes Congress moves too slowly in considering and making decisions.

Professor Katyal, in your testimony you specifically discuss the constitutional necessity of the involvement of Congress and the dangers of unilateral actions by the executive branch in authorizing military tribunals and monitoring of privileged attorney-client communications.

I am wondering if both Professor Katyal and Professor Heymann could comment on the role of Congress in times of crisis or national emergency and the importance of congressional authorization or consultation with the executive branch. Obviously, I am interested in hearing you comment on whether there isn't a valuable deliberative process that Congress brings to our Nation that is always needed, but is especially vital as the Nation responds to a crisis.

Let's start with Professor Katyal.

Mr. KATYAL. Senator, of course, this body has, after September 11, recalibrated and acted efficiently in things like the USA PATRIOT Act, working with the administration on a very quick basis. But even if this body were to be a slow one in the future, efficiency can't be a reason to disregard the Constitution.

President Truman, for example, said that he needed to seize the steel mills right away because Congress wasn't going to act, and the Supreme Court struck down that executive order and said that efficiency can't be a reason for unilateral action. So I think that this course of conduct is a tremendously dangerous one not just be-

cause it disregards separation of powers, but also because one day courts are going to review what this military tribunal does and it may be the case that in some circumstances a court might find that this military order is unconstitutional as applied to some of these people.

Senator FEINGOLD. Thank you.

Professor Heymann?

Mr. HEYMANN. Senator Feingold, there are obviously some cases where the executive has to move more quickly than any deliberative body of 100, let alone of 535, can act. But the matter of military tribunals, particularly as applicable to, as I keep repeating, 20 million non-citizens in the United States is not one of those matters.

Other countries have emergency powers—they were not written into our Constitution—that allow the president to bypass the congress and to bypass anything like a bill of rights when the president determines there is an emergency. We do not have that in our Constitution. It was not part of our tradition and I am very proud that it is not part of our tradition.

Senator FEINGOLD. Thank you, Professor.

Let me now ask a question of General Barr and General Bell. As I understand the President's military order, anyone that the President designates as a terrorist, for the purposes of the order, would be subject to the exclusive jurisdiction of a military commission. This has already been discussed some here on this panel.

As such, this order could conceivably be applied to designated terrorists or their supporters who have no connection to Al Qaeda or to the tragic events of September 11.

Now, I would like each of you to address whether you think that interpretation is correct and, if so, do you think that the President could or should consider establishing military commissions to deal with other terrorist-related acts against United States interests perhaps in the Middle East or in Central America.

General Barr?

Mr. BARR. Senator, I think the President has to find either that they are members of Al Qaeda or that they are members of other terrorist organizations that have either already committed or are in the process of committing significant acts of terrorism which, under Section 4 of the order, would have to be of a magnitude and in a context which would make them violations of the laws of war against the United States. So I don't think it is as sweeping as people suggest, that the potential group of people is as sweeping. But you are right that it is not limited to Al Qaeda.

Senator FEINGOLD. General Bell?

Mr. BELL. I think modified by the word "international" terrorism, and I think it has to be some act of war. I think again—and I am not sure you were in the room when I said this—we need to wait until the Secretary of Defense promulgates his orders and regulations to see what a lot of these things mean. That would be the time for the Congress to really get into whether this can stand or whether there ought to be some congressional legislation.

Mr. BARR. Senator, may I just—

Senator FEINGOLD. General Barr?

Mr. BARR. You may have been out when I mentioned that we should also bear in mind that if this is used against people in the United States—and, of course, it could only be used against noncitizens, but if they are in the United States, then I think the order allows for the writ of habeas corpus for judicial review.

So when you say exclusive jurisdiction, that is right, but the determination up front that this is properly within the jurisdiction of the court and there was a reasonable basis for exercising it—Article III courts would be open to hear those claims for people in the United States.

Mr. BELL. I agree with that.

Mr. HEYMANN. Though the order itself was intended to bar all judicial review.

Mr. BARR. No, that is not right, Phil, because the language in the order was taken from FDR's order, and the Supreme Court in the *Quirin* case did not interpret that language as affecting their ability under a writ of habeas corpus to review whether jurisdiction was proper in the military tribunal. What that language does is say that the person is not entitled to a de novo Article III trial on the merits.

Senator FEINGOLD. Do you agree with that characterization, Professor Heymann?

Mr. HEYMANN. Well, I agree with General Barr that, yes, indeed there would be habeas corpus review of, number one, whether these tribunals were constitutionally established, and, number two, whether the person before them came within the terms of a constitutional tribunal.

Perhaps the order was first written for President Roosevelt. I certainly believe General Barr on that, but it was written with an obvious intent to eliminate all judicial review. In other words, anyone who reads this will think that the United States has gone to unreviewable military courts.

Mr. BELL. I come at it a little different way. I think there is an assumption that the President would obey the law, and there is no law that the President can suspend the writ of habeas corpus. So that is the way I come at it.

Senator FEINGOLD. Mr. Silliman?

Mr. SILLIMAN. I would agree with Professor Heymann that it is clear that there could be review by the Supreme Court as to the jurisdiction of the tribunal, just as in the *Quirin* case, but that the order appears to deny that.

There is one point, Senator, I think that has not been raised that needs to be. The administration has walked a very fine line in doing two things. It has tried to capitalize on the concept of a war and acts of war, while at the same time declaring that those in Al Qaeda are unlawful belligerants, unlawful combatants.

The result of that is that they are denied prisoner of war status under the Geneva Convention which would require trial by courts-martial. So what the administration has done is forced these people into some forum that has minimal due process, and I think that needs to be clearly understood.

Senator FEINGOLD. Thank you for the extra time, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Specter?

Senator SPECTER. Thank you all for coming. I believe this has been enormously helpful to have this kind of an analysis. I think that had the analysis been held before the promulgation of the executive order, it would have been framed somewhat differently.

The executive order does purport, I believe, on its face to bar any judicial review. This is the specific language: "The individual shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf in any court of the United States."

Now, that is very, very sweeping, but I think it is correct, as noted by both General Bell and General Barr, that it runs afoul of the Constitution which has a specific provision to the contrary: "The privilege of the writ of habeas corpus shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it."

Mr. BELL. And then Congress does it.

Senator SPECTER. Well, that is not what that phrase says, so that I believe there is a lot to be learned from what we have been talking about today.

General Bell, I think your comment about no secret trials is very, very helpful. When the Assistant Attorney General testified, he talked about the need for secrecy on military secrets, and you have been very blunt about it: "Will the trials be secret? No, and it is nonsense to contend otherwise." I believe that this kind of a commentary will be very helpful.

I want to turn for just a minute to the regulations promulgated by the Attorney General on detention of aliens. There is no distinction as to legal aliens or illegal aliens, and in a Nation of immigrants there are a lot of people who are aliens before they become citizens. Both of my parents, for example, were aliens when they got to these shores.

The regulations provide that if an immigration judge authorizes the release, it is stayed until there is an appeal by the Board of Immigration Appeals. And if the Board of Immigration Appeals says the person can be released, then he or she is still not released when the commissioner certifies the Board's custody to the Attorney General, and then the stay continues until a decision by the Attorney General. But I do not see any standard for making a determination as to what the Attorney General has in mind.

We questioned earlier today whether the rules were complied with about publication in the Federal Register, which did not appear until after the order was put into effect, and a comment period. The language of "reason to believe" may be necessary as a minimal standard. I am not sure.

What do you think about it, Mr. Heymann? Is "reason to believe" sufficient without probable cause? We do face a tremendous threat.

Mr. HEYMANN. In the military order, Senator Specter?

Senator SPECTER. Well, military tribunals. That is the standard, where there is reason to believe that someone is a member of Al Qaeda or another terrorist organization.

Mr. HEYMANN. The question is whether to take the writing at this point seriously. It is written as if it is a subjective determination of the President. That Presidential determination is plainly

not meant to be reviewable by any court. It says, "when I determine that I have reasonable suspicion."

Senator SPECTER. Would you require probable cause?

Mr. HEYMANN. If anybody living in the United States were to be denied civil trails or detainned indefinitely, I would require at least that.

Senator SPECTER. Well, there is no language of suspicion. It is just "reason to believe." If somebody said "suspicion," it would be challengeable immediately. But we do face an enormous threat. We perhaps ought to give some thought as to some specification perhaps a little bit beyond "reason to believe."

General Bell, what do you think?

Mr. BELL. Well, some definitions in the regulations would help because "reasonable suspicion" is an art form and a well-known term in law because of use on the borders. We can search an automobile at the border on reasonable suspicion, for example, but this says "reason to believe." But you are talking about some immigration regulations, as I understand it.

Senator SPECTER. The Attorney General's detention of aliens.

Mr. BELL. I view the whole immigration legal system as a quagmire.

Senator SPECTER. That is the nicest thing that has ever been said about it.

[Laughter.]

Senator SPECTER. General Barr, a final question. What do you think about having a little activity, and perhaps others, too, of the Department of Justice playing some sort of a role here?

The responsibility for drafting the rules has been sent to counsel in the Department of Defense. We are into some pretty tricky areas here, for those of us who have been in the criminal courts or with military tribunals or with constitutional rights, with all of the contours and complexities.

If you were Attorney General, would you pick up the phone and say to the Secretary of Defense, I would like to offer you some help?

Mr. BARR. Absolutely, and I am confident that is going to happen. I don't know what the process was, but I know from my own experience that I can't think of an executive order that would be issued without having some legal review in the Department of Justice. I would assume there was some review as to form and legality of the order.

Now, I think you are really getting at what are the rules of the game going to be going forward, and it is inconceivable to me that the Department of Justice will not be heavily involved in consulting with the Secretary of Defense and giving them their experience in trying terrorist cases.

Senator SPECTER. Well, the Assistant Attorney General this morning was not so sanguine about that. He didn't put that in the mix.

Mr. Heymann, did you have your hand up?

Mr. HEYMANN. Yes. I just wanted to add a word there. Whatever the Secretary of Defense does, the claim of presidential power is either going to be accepted by the Congress and the courts or it isn't, and it is an extraordinary claim of presidential power.

The Secretary of Defense may cut it back to reasonable exercises, and I think these hearings are a very important step in that process. But the claim of power here over people all over the world and 20 million people in the United States made on the basis that the President is asserting seems to me to be something that should not go unchallenged.

Senator SPECTER. Well, I thank you. I believe it is enormously helpful to have—I am sorry I didn't get a chance to ask Professor Silliman or Ms. Martin or Professor Katyal a question, but it is very helpful to have this kind of mature thinking and questioning, and to come to a conclusion which accommodates security and constitutional rights.

Thank you.

Chairman LEAHY. Thank you, Senator Specter.

I think as a practical matter, the question of who advises whom is going to be asked next week. The Attorney General is going to be before this Committee, and I believe the Secretary of Defense is going to be before the Armed Services Committee, and I am sure that they will have the same story. Otherwise, it gets interesting. But I am sure they will.

General Barr, Professor Heymann, General Bell, Professor Silliman, Professor Martin and Professor Katyal, thank you very much. I agree with what has been said here on both sides of the aisle. Your presence here, all of you, has been extremely helpful. I know you have been here a long, long time, and I do want to add please feel free to add to your transcript. You may get additional questions. This has been very helpful, on what is probably the most contentious issue presently before the Congress. So thank you all very much.

We stand adjourned.

[Whereupon, at 1:32 p.m., the Committee was adjourned.]

DEPARTMENT OF JUSTICE OVERSIGHT: PRESERVING OUR FREEDOMS WHILE DEFENDING AGAINST TERRORISM

TUESDAY, DECEMBER 4, 2001 (MORNING SESSION)

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:08 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. Charles Schumer, presiding.

Present: Senators Schumer, Feinstein, Feingold, Durbin, Hatch, Specter, Kyl, and Sessions.

OPENING STATEMENT OF HON. CHARLES SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. The hearing will come to order. I will make and then Senator Sessions will make brief opening statements. There won't be any others since Senator Leahy and Senator Hatch are not coming, and we will then get right to the witnesses.

Before I begin, I want to thank Senator Leahy for helping us schedule this hearing. Tomorrow, as you know—or Thursday, rather, Attorney General Ashcroft will be here. There are so many questions to ask him, and there have been so many questions asked on this issue of military tribunals that Senator Leahy and I both thought it was a good idea to have a sort of warm-up panel, almost, to flesh out some of those questions before we hear from Attorney General Ashcroft. And so I want to thank Senator Leahy for helping us schedule this hearing this morning.

On September 11th, our world changed dramatically, and our focus and our priorities changed along with it. We went from a country of peace whose most pressing concern was a slipping economy to a Nation at war with a new kind of enemy. In this war, we are battling terrorists instead of nations. In this war, some of our enemies are already here plotting against us in our towns and cities and on our own American soil. The FBI has already captured some suspects who the Justice Department believes were involved in the terrorist plot of September 11th.

There are also those prisoners of war who we have captured and will capture in Afghanistan and other countries who will receive a trial of some sort. It is clear we need to try those suspects in a forum that achieves two primary goals—two goals, I might add, that may not conflict. First, the Government must have the power to use even the most sensitive classified evidence against these sus-

pects without compromising national security in any way, shape, or form. In addition, those who commit acts of war against the United States, particularly those who have no color of citizenship, don't deserve the same panoply of due process rights that American citizens receive. Should Osama bin Laden be captured alive—and I imagine most Americans hope he won't be captured alive. But if he is, it is ludicrous to suggest he should be tried in a Federal court on Center Street in Lower Manhattan.

Nevertheless, the second priority is to ensure that our proceedings, wherever they are held, respect our Nation's great tradition of due process. No one wants trials that are ad hoc or regarded as unfair, so we need established and fair procedures.

We all want and we all must have trials that both protect our national security interests and at the same time respect our Nation's great tradition of due process. I believe we can, and the question is how we get those two goals to co-exist.

The administration has proposed the use of secret military tribunals as part of the solution. Secret military tribunals constitute a significant departure from our normal legal system. I believe strongly—and many of my colleagues on both sides of the aisle agree—that any departure this significant should be vetted by Congress. That is what we are doing here today.

Congressional involvement is essential for a number of reasons. First, it respects our tradition of checks and balances. Second, it offers an opportunity to discuss how to meet the two goals of safeguarding national security and ensuring basic rights. That discussion will not only produce a better final product, but it will give the final product more legitimacy in the eyes of the American people and of our friends abroad.

I think that is the lesson we learned from the anti-terrorism bill. The Justice Department sent up a list of anti-terrorism proposals that some criticized as going too far. Chairman Leahy offered a set of proposals that some thought didn't go far enough, and there were some points, for instance, many of us, myself included, agreed with the Justice Department and others where we agreed with Senator Leahy. We ended up with a bill, in my judgment, that was more balanced, more fair, and more effective than either of the first proposals by either side, and that is because this committee was involved, not in a dilatory way, not in a partisan way, but simply in a way to come to the best product. And the final product was better public policy. That is what I hope we can work towards with this issue as well.

The President is clearly right in saying that some of the terrorism trials will require a forum outside our regular Federal courts. And the administration is also correct in saying that some of the terrorist suspects we capture, especially an American citizen who commits an act of terrorism in this war, could be tried in our regular Federal courts with certain processes to guard secrecy.

So we agree that trying at least some terrorists will require a new type of forum, and for others, particularly for American citizens, we may be able to use our preexisting courts, although we might need new procedures to protect national security. There is that much of a consensus.

But when we use a new type of forum or when we use new procedures in a traditional forum, we need to figure out how such a process should work. That means answering the following types of questions:

Should traditional Article III judges preside, or should we bring in special magistrates? What standards of evidence are most appropriate? What burdens of proof should be used? Should a conviction require the decisions of a unanimous jury? How do we ensure that defendants receive effective assistance of counsel? Is there a right to appeal? If so, how should the appeals process work?

These are just some of the questions we hope to begin to answer today.

It is also interesting to note that the proposed answers to these questions don't fall along the typical liberal and conservative lines. There are some on the right, such as William Safire and the Cato Institute, who oppose military commissions. There are some on the left, including some of the witnesses here today, who support military commissions. It just shows how complicated these issues really are.

To answer these questions, we have brought a distinguished panel of professors, experts, and practitioners who I will introduce after Senators Hatch and Sessions make their opening statements.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. I appreciate it. I want to thank you for convening this hearing to discuss military commissions. This issue has generated a great deal of attention, and I hope this hearing will enlighten the Congress and the public again about the difference between the real issues and the alarmist rhetoric that has been swirling around Capitol Hill in the past few weeks.

Now, I hope the participants in this hearing will keep in mind three basic facts about the President's Order. First, the Order is very narrow. The only people it allows to be tried by military commissions are non-citizens specifically determined by the President to be members of Al Qaeda, supporters of Al Qaeda, or people engaged in other international terrorist networks. Secondly, the Order is a military command. It instructs the Secretary of Defense, not the Attorney General, to develop rules and procedures for conducting fair trials for those whom the President designates. And, third, the Order has not been utilized; as of today, the President has not determined that anyone will be tried by military commission, and the Secretary of Defense is still working on the rules and procedures. And the only secrecy that I can see that is involved here with regard to military tribunals is the protection of national security matters. And I believe that is probably the way this is going to wind up.

These four points are essential to a useful discussion here today because they explain the two different avenues of questioning that have emerged. Our primary interest here is examining the legal and constitutional question as to whether the Order, by itself, is proper and allowed. I think the answer to that is yes, and I will explain more about that in just a minute.

President Bush has made it abundantly clear that he regards the option of military commissions as a tool to be used only with the utmost discretion. After all, the President not only retained exclusive authority to determine who will be subject to trial by military commission—as opposed to delegating this authority—but also constrained himself by limiting the people he can designate essentially to non-citizen international terrorists. This is unlike the use of military commissions after World War II. The 1945 Order establishing military commissions for the trial of war crimes in the Pacific theater came from the pen of General Douglas MacArthur—not the President—and it stated that military commissions had jurisdiction over "all of Japan and other areas occupied by the armed forces commanded by the Commander-in–Chief, United States Army, Pacific." It delegated the decision of whom to try to "the convening authority" rather than the President. In contrast, President Bush's Order has a very narrow scope, and it ensures that decisions will be made at the very highest level of our Government. I am very much reassured by these features of the Order. And so are the American public, seven out of ten of whom believe that the Government is doing enough to protect the civil rights of suspected terrorists.

I do not mean to suggest that congressional oversight is inappropriate when the public has thought about, and accepted, an administration plan. I am strongly in favor of congressional oversight. But we should remember that the purpose of oversight is to make sure the administration is doing its job. At some point, too many partisan hearings and too much hysteria only make it more difficult for the administration to do its real job. In the Judiciary Committee alone, we are holding four hearings in 8 days. And these are multiple hearings on the same subjects. We talked about military commissions last week, we are talking about them today, and we will talk about them again with the Attorney General on Thursday.

Frankly, I think this committee would better serve the public by looking for ways to help, instead of distracting the administration, which has an enormous task on its hands and is doing a superb job under very difficult circumstances and conditions.

One obvious way we could help is to confirm the nominees languishing in this committee for important jobs, including judgeships, positions at the Department of Justice, and the Office of National Drug Control Policy. As the Washington Post—again, I might mention, not known for its membership in the vast right-wing conspiracy—editorialized last week, "[f]ailing to hold [judicial nomination hearings] in a timely fashion damages the judiciary, disrespects the President's power to name judges and is grossly unfair to often well-qualified nominees."

Now, in light of the nominations backlog that we have, one is hard-pressed to understand the wisdom of holding hearings every other work day on whether Osama bin Laden should be able to avail himself of the intricacies of the hearsay exception in the event that he survives the bombs headed in his direction. Am I the only one who finds it ironic that, while no one questions the President's authority to instruct the military to drop bombs on his hideouts, there is a little group of outspoken critics who want to quibble over

which set of evidentiary rules the Secretary of Defense should apply in bin Laden's trial? And this is in a country where we have always been decent in protecting the rights of the accused, whether by military tribunal or not.

To those who reflexively oppose the military tribunals, I ask, do we really want to litigate in a criminal trial whether the soldiers who apprehend bin Laden should have obtained a search warrant before entering his cave? Now, that is meant to be humorous. Or whether he understood—

Senator SCHUMER. We are all laughing.

[Laughter.]

Senator HATCH. You should have laughed a little quicker than you did.

Or whether he understood his *Miranda* rights? Or whether he is not guilty by reason of insanity? He certainly is not living his religion, we will put it that way.

I know that some are less worried about bin Laden and more concerned about the reaction that our use of military commissions would engender in Europe and elsewhere around the world. Some have speculated that Spain and other countries would refuse to extradite suspects to the United States. To my knowledge, no country has made such a refusal yet. And any such refusal, if made without reviewing the actual rules and regulations that will govern our military commissions, would be based on speculation and distrust rather than facts. When the United States has criticized other countries for unfair military courts, it was because they were unfair, not because they were military courts.

Now, I want to turn to the constitutionality question that I mentioned a minute ago. Despite the articulate explanation this committee received last week from Assistant Attorney General Chertoff, some of my colleagues still question whether military tribunals are, in fact, permitted by the Constitution. The fact is that the Supreme Court has repeatedly upheld the constitutionality of using military commissions to prosecute individuals charged with crimes under the law of war. As the Supreme Court has explained, "[s]ince our Nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war."

Furthermore, contrary to recent suggestion, military tribunals can be—and have been—established without further congressional authorization. Because the President's power to establish military commissions arises out of his constitutional authority as Commander-in–Chief, an act of Congress is unnecessary. Presidents have used this authority to establish military commissions throughout our Nation's history, from George Washington during the Revolutionary War to President Roosevelt during World War II. Congress, for its part, has repeatedly and explicitly affirmed and ratified this use of military commissions. Article 21 of our Code of Military Justice, codified at section 821 of Title 10 of the United States Code, expressly acknowledges that military commissions have jurisdiction over offenses under the law of war.

Now, I would like to also add—and I think it may be important to do so—that I think underlying part of the reason why the President wants to have military commissions in the case of Al Qaeda

terrorists in particular—and who knows whether he will decide to establish them or not, but he has the right to, in my opinion. But one reason that he wants to do that is to protect national security interests. Who wants to serve on a jury trying Osama bin Laden or Al Qaeda terrorists? Or who wants to be in the hotel that is housing those jurors if they are sequestered? Or who is going to protect those jurors' families? Or who is going to protect the community in which those trials are being held?

We shouldn't pussyfoot around here. There are some things that literally are to be considered. Others have said, well, the World Trade Center trials were held, and they went off just perfectly. Yes. Well, an awful lot of the architecture of the World Trade Center buildings was disclosed in those trials, as I understand, giving the Al Qaeda people even more ability to destroy those towers and to devastate our whole country, and the world, as a matter of fact.

And who knows what else could be done by people who don't abide by even the rules of war, who don't abide by morality and decency, who distort their own religious principles to oppress their own people, and who have no qualms about using weapons of mass destruction if they can get their hands on them?

So I can understand why the President feels the way he does. I can understand why so many people in this country feel the way they do under these circumstances.

In closing, Mr. Chairman, I want to thank you again for convening this hearing. I have criticized having so many of them, but I also know that you have, if anybody in this body has the right, to call a hearing like this, you certainly do. Coming from New York City and representing your State, you have done a magnificent job in doing it. So I just want you to know that this hearing is an important hearing. I think you have a right to call it. I just don't think we need all of them, and I don't think we need to take all the time that we do. But this is an important hearing for the truth about these issues to be made public, and I look forward to hearing from our witnesses. And I know there will be some who will disagree with some of the things that I have said, and I respect that and will respect them. But this is a very trying time for our country, very, very difficult time for the President and those who are working with him. And we need to get behind him, and we need to quit worrying so much about whether or not this is going to be fair since I can't imagine any military tribunal, the same similar tribunals in a sense that try our own young men and women when they commit crimes, I can't imagine them being unfair. And I have to say that since our young men and women are subjected to these rules, I find it a little bit difficult to see why we should argue why Osama bin Laden deserves more constitutional protection than they do.

Thank you, Mr. Chairman.

Senator SCHUMER. Thank you, Mr. Hatch.

Just one thing. Let the record show this is the first hearing that is being held on this subject. There was one last week on all of the subjects. The one Thursday is on all. There has been none on this subject, and I think if you are right, then you would welcome such a hearing because all the questions will come out. The witnesses are chosen down the middle. You chose as many as we did. And

sunlight is great in producing good product. And no one is trying to delay it. No one is trying to impede the President's role. I am of an open mind on this issue, as you know. And you comparing these to *courts-martial*s, finding out exactly what the administration has in mind, fleshing out the differences, that is our job. It is not our job to impede. It is our job to make our country work best.

Senator HATCH. I agree.

Senator SCHUMER. And that is what we are doing here. And I think anybody who thinks we shouldn't have one hearing devoted to this subject, an important subject, doesn't understand the process. I don't think you are saying that. You welcome this hearing.

Senator HATCH. No, no. I welcome the hearing.

Senator SCHUMER. But that is our job.

I would like to call on my ranking member, a gentleman I have worked very closely with, and it has always been a pleasure to work with Senator Sessions.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Chairman Schumer. As Senator Hatch noted, I know that you feel deeply about civil liberties, and I know you feel deeply about the terrorists who attacked your city, and no one feels more personally the pain of the families than you, and you have done an outstanding job—

Senator SCHUMER. Thank you. I appreciate it.

Senator SESSIONS. —in defending the interests of New York in so many ways, some of which are made public, some of which are not. So I think it is fine and good to have hearing like this to discuss these issues, particularly in light of some of the extreme, I have to say, charges that have been made about the procedures as being unprecedented and secret and unfair and unjust and unconstitutional and contrary to law. So I think that is what we ought to do today. Let's put it out on the table. To the extent to which someone can improve what goes forward, I would be pleased to hear it.

I was also pleased that Secretary Rumsfeld on "Meet the Press" Sunday said he has not completed his view of how the procedures ought to be handled, and he welcomed debate and input into how to make them better. I am certain he has no interest in convicting someone of a war crime that is not guilty of a war crime, and I would say, as a former prosecutor and also as a former JAG officer for a few years in the Army Reserve, that our military justice system is a good system, and the officers and enlisted people who participate in *courts-martial*s and other tribunals and commissions in the military are men and women of integrity. They are men and women of personal discipline. They follow rules and law as given to them. And F. Lee Bailey, I believe, as I recall, has repeatedly praised military justice as being fair justice. And somehow to suggest because a trial is going to be tried by military officers or military people that this is inherently unfair is not so.

I think the proof is in the pudding. The proof is whether or not justice is occurring and does occur. And it is important for this great Nation, the beacon of liberty and the symbol of law in the

world, the rule of law, that we conduct these hearings fairly, and I am confident that that will occur.

I will offer my full statement into the record. It deals with many of the details of the issues.

Senator SCHUMER. Without objection.

Senator SESSIONS. And I know Senator Hatch has made a number of the points that I would have made had he not been here, most eloquently also. But let me just mention what Justice Jackson, who was the leader at the Nuremberg trials, said. And I think he comes right down to this point. And let me also note, I am not aware throughout history that people who have been involved in violations of the rules of war or combatants have been tried in civil courts normally. I am just not aware that that has ever occurred. I am not sure that there has ever been an incident where an illegal combatant in a wartime situation has been tried in civilian courts. Perhaps it is true, but normally not. But this is what Justice Jackson said at the Nuremberg trials, which was not a normal civil trial, for the Nazi war criminals. He said, "We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice."

And just as history judged the Allied powers by how they conducted the Nuremberg trial, so history will judge America by how we conduct the trials of these terrorists. We do not want history to conclude that America, through these military commissions, rendered victor's justice, but real justice. And, you know, I think that MacArthur, he just did these trials with very little supervision. But because he did them right, we have a new relationship and better relationship with Japan today. Some of those things simply had to be done. Eisenhower did commissions in Europe, and it has strengthened our relationship, the way they were conducted. And I believe when this is concluded, likewise our relationships with the people in the Middle East, their respect for American justice will be enhanced. But I must say that we do not need to bring them all back to the United States to make our courtrooms a target for all those hatreds and venom that may be still out there. I think that would be unwise. And I would also note that you can't try these cases consistently even with certain rules that allow the protection of certain secrets without the terrorists' being able to learn a great deal more about how our systems of intelligence and surveillance and electronics work. And I think that would be dangerous, too.

Thank you, Mr. Chairman. I look forward to this excellent panel of witnesses.

[The prepared statement of Senator Sessions follows:]

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

I commend Senator Schumer for holding this hearing to examine the use of military commissions to try terrorists who commit war crimes against American citizens.

It is a good and healthy thing to debate and discuss every aspect of these procedures. I welcome that. So has Secretary of Defense Rumsfeld. I would be surprised

if we do not find some suggestions to improve the system. But, I must say there has been a host of changes, some very extreme, that are justified by the Constitution, statute, history or reason.

The last example of this tactic was the USA Patriot Act—the Anti-Terrorism Bill—that was vilified by political interest groups as "shredding the Constitution," "stripping our privacy," etc. When the bill was reviewed by more serious minds, however, we found that the bill's provisions did not violate the Constitution, and, after adjustment by Congress, the bill passed with an overwhelming vote.

Similarly, today, with respect to the President's order providing for the use of military commissions, we are hearing the ACLU state that the commissions "could easily be used against any one of some 20 million non-citizens within America." *ACLU Urges Congress to Leash New Military Tribunals*, Reestablish Oversight (visited Dec. 3, 2001) *<http:www.aclu.org/safeandfree/>*. In fact, the President's November 13th Military Order has a requirement in addition to non-citizenship: that the non-citizen be a member of al Quaida or engaged in or aiding someone engaged in international terrorism. Military Order of November 13,20001, § 2(a)(1)(i) and (ii). We can be sure that only a very small fraction of the 20 million non-citizens in America is engaged in international terrorism.

The People for the American Way charges that "the attorney general and his allies are acting in ways that threaten to circumvent [] checks and balances, effectively amending our Constitution by executive fiat." *Statement of Ralph G. Neas, President of People for the American Way, concerning the Senate Judiciary Committee's hearings on civil liberties*, (visited Dec. 3, 2001) *<http://www.pfaw.org/news/press//2001–11–28.347.phtml.>*. In fact, the President's Military Order is directly consisted with the orders of prior presidents, Congress's statutes providing for military commissions, and the Supreme Court's cases approving the use of military commissions by the President and his military subordinates.

We have heard claims that the President's Order will result in "secret trials." Written Testimony of Kate Martin, Hearing Before the Committee on the Judiciary: DOJ Oversight: Protecting Our Freedoms While Defending Against Terrorism p.11. (Nov. 28, 2001). In fact, White House Counsel Gonzales has explained that the trials will only be as secret as the "urgent needs of national security" require. Alberto Gonzales, *Martial Justice, Full and Fair*, New York Times, Nov. 30, 2001, at A27. We do not want judges and jurors to be under death threats from terrorist groups like the judge in the 1998 embassy bombing trial.

We have also heard people compare the President's Military Order to the World War II internment of over 70,000 Japanese based on their race—the *Korematsu* case. Written Testimony of Prof. Neal Katyul, Hearings Before the Committee on the Judiciary, DOJ: Oversight Protecting Our Freedoms While Defending Against Terrorism, p. 8. In fact, unlike the World War II internment, the President's Military Order expressly provides that persons detained thereunder will be "treated humanely, without any adverse distinction based on *race*." Military Order of November 13, 2001 § 3(b) (emphasis added). Further, the military commissions will provide for what the internment order did not—an individualized determination of whether an accused committed a crime, in this case, an international war crime.

Finally, I have a press article railing that the President's Military Order amounts to a seizure of "dictatorial power," that it provides for the use of "military kangaroo courts," and that it is a "Soviet-style abomination." William Safire, *Seizing Dictatorial Power*, The New York Times, November 15, 2001, at A31. Military trials are full and fair. Our service men and women are subject to them every day. Indeed, F. Lee Bailey, famed criminal defense lawyer, has consistently praised their fairness. It is a slap in the face to America's military and its history of dispensing justice to call this system a 'kangaroo court.'

When seriously examining an issue of national, or in this case international, importance, it is incumbent upon the Senate to separate partisan rhetoric from legitimate substance. I commend Senator Schumer for taking this approach.

With respect to military commissions, my personal experience as a federal prosecutor and as an Army Reserve JAG officer taught me that violation of federal criminal statutes are tried in Article III courts, violation of the Uniform Code of Military Justice are tried before courts martial, and violations of the laws of war are tried before military tribunals, including military commissions. My experience has also taught me that any court, civilian or military, must be fair and adhere to the rule of law.

Our country has been attacked by ruthless terrorists who slipped into this country, hijacked civilian airliners, and killed approximately 4,000 of our civilian citizens without warning, without trial, and without justice. They have declared a war against America and everything that we stand for—liberty, justice, and the rule of

law. They have committed war crimes and thus voluntarily gave up the protections that the law provides to civilian or to military servicemen who follow the law of war.

On September 18, 2001, the Congress exercised its authority under the War Powers Act to authorize President Bush to use all necessary military force to defend the United States and our people. Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for Recent Attack Launched Against the Untied States, Pub L. No. 107–40, 115 Stat. 224 (Sept. 18, 2001). On November 13, 2001, President Bush issued an order authorizing the trial of captured terrorists for war crimes in military commissions. (1942).

It is against this background that we address the questions that have been raised as to the legitimacy of the President's Military Order. We should begin with Constitution and our history.

Constitution, Statute, and Supreme Court Precedent Authorize the Use of Military Commissions—First, the President's Military Order is based on sound legal authority that has been recognized by all three branches of government. Article 2, section 2, Clause 1 of the Constitution provides that the "President shall be Commander and Chief of the Army and Navy of the United States. . . ." In *In re Yamashita*, 327 U.S. 1, 10 (1946), the Supreme Court held that the President's commander in chief power includes the power to try war criminals by military commission.

Article I, §8, cl. 10 of the Constitution confers upon Congress the power "To define and punish. . .Offences against the Law of Nations," and the law of nations includes the law of war.

In exercising its constitutional power, Congress passed section 821 of Title 10 of the United States Code that states, in pertinent part:

"The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive *military commissions*. . .of concurrent jurisdiction with respect to offenders or offenses that by statute or by the *law of war* may be tried by *military commissions*. . . ." (Emphases added)

President Roosevelt ordered the trial of eight Nazi saboteurs by military commission 1942. Military Order of July 2, 1942. In *Ex parte Quirin*, 317 U.S. U.S. 1 (1942), the Supreme Court approved President Roosevelt's order. In *In re Yamashita*, 327 U.S. 1 (1946), the Supreme Court approved the use of a military commission, ordered by General MacArthur, to try a Japanese war criminal.

Thus, President Bush's order to try terrorists involved with killing 4,000 innocent Americans is based on precedent from all three branches of government: Legislative, Executive, and Judicial.

History—Second, American history is replete with examples of the President, or our military commanders, using military commissions to try those charged with offenses against the law of war. General George Washington appointed a military tribunal to try Major Andre, a British spy who was cooperating with Benedict Arnold. *Ex parte Quirin*, 327 U.S. 1, 31 n.9.

During the Mexican War of the 1840s, General Winfield Scott ordered military commissions to try offenses against the law of war. *Ex parte Quirin*, 327 U.S. 1, 31 n.9 (1942).

During the Civil War, Union Army General Order No. 100, provided for the use of "military commissions" to try offenses outside the rules of war. *Ex parte Quirin*, 317 U.S. 1, 31 n.9 (1942).

During World War II, President Roosevelt used a military commission to try the eight Nazi saboteurs who surreptitiously slipped into this country without military uniform and conspired to blow up government and private property. *Ex parte Quirin*, 317 U.S. 1 (1942).

After World War II, President Truman agreed to use an International Military Tribunal to try major Nazi war criminals at Nuremberg. TELFORD TAYLOR, AN ANATOMY OF THE NUREMBERG TRIALS 73 (1992). Further, Generals Eisenhower and MacArthur used military commissions to try hundreds of war criminals in Europe and Asia. *See* Maximillian Koessler, *American War Crimes Trials in Europe*, 39 Geo. L.J. 18 (1951).

President Bush's order to try the terrorists involved with killing the 4,000 innocent Americans is consistent with these historic precedents.

Constitution Does Not Require that Procedures be Set by Congress—Third, the President may legally provide for the Department of Defense to draft procedures for the Military Commissions. Congress has expressly provided in section 836 of Title 10 of the United States Code that "[p]retrial, trial, and post-trial *procedures*, including modes of proof, for cases arising under this chapter triable in. . .*military commissions*. . .may be prescribed by the *President*. . ." (Emphasis added.)

Acting under similar authority, President Roosevelt ordered that the Military Commission that would try the eight Nazi saboteurs would set its own procedures. MILITARY ORDER OF JULY 2, 1942 ("The Commission shall have power to and

shall, as occasion requires, make such rules for the conduct of the proceeding, consistent with the powers of military commissions under the Articles or War, as it shall deem necessary for a full and fair trial of the matters before it.”).

President Truman, through his representative Justice Jackson, provided that the Allied prosecutors would submit, and the military tribunal would approve, procedures for conducting the Nurembery trial. *See* CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL ART. 14(E).

President Bush's order to try the terrorists who helped kill 4,000 innocent Americans provides for the issuance of further procedures by the Department of Defense and is thus consistent with the traditional deference that Congress has shown to past Presidents who ordered military commissions.

Different Procedures for Military Commissions—Fourth, military commissions and tribunals dealing with war crimes have traditionally had different means of adopting procedures, different standards of evidence, different voting requirements, and different appeal rights than Article III courts by our servicemen.

The charter for the Nuremberg International Military Tribunal provides that the prosectors would draft the procedures prior to trial for the military tribunal's approval, that evidence would be admitted if it had probative value, that a majority vote was sufficient in all cases, and that there would be no appeals. CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL ART 14(e) (procedures), 19 (evidence), 4(c) (vote), and 26 (appeal).

Similarly, President Roosevelt's proclamation for the trial of the eight Nazi saboteurs by military commission provided for the commission to set its own procedures, for evidence to be admitted when it had probative value to a reasonable man, for conviction by a two-third's vote, and for no direct appeal to a higher court. Military Order of July 2, 1942.

Consistent with these precedents for the admission of evidence with probative value to a reasonable person, for conviction by a two-third's vote, and for no direct appeal. Military Order of November 13, 2001 § 4. Of course, terrorists tried in the United States will have habeas corpus review in the federal courts. *Ex parte Quirin*. 317 U.S. 1 (1942). Before we criticize the Department of Defense's procedures, we should wait until all the procedures are drafted and we have had an opportunity to review them.

Constitution Does Not Require Consultation—Finally, while Article II, Section 2, Clause 2 of the Constitution indicates that the President should obtain the Advice and Consent of the Senate in appointing federal judges, there is no similar consultation requirement for the issuance of military orders. Article II, Section 2, Clause 1 provides that the President is the Commander in Chief. As Commander in Chief, several Presidents have issued orders and authorized agreements to try war criminals by military tribunal or commission without adhering to a consultation with Congress requirement.

In *Ex parte Quirin*, 317 U.S. 1 (1942), the Supreme Court upheld the constitutionality of the military commission without any reference to a consultation with Congress requirement. The Court held that existing statutes—the pre-Uniform Code of Military Justice statutes—recognized military commissions as the proper forum to try persons accused of war crimes. *Id*. at 29.

Similarly, there was no formal question raised that President Truman should have consulted with Congress before agreeing with the other Allied Powers to use an International Military Tribunal to try the major Nazi war criminals. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 73 (1992). And the President's subordinates, Generals Eisenhower and MacArthur, issued orders allowing literally hundreds of military commissions to try lesser war criminals without adhering to any consultation with Congress requirement. Maximillian Koessler, *American War Crimes Trials in Europe, 39 Goe. L.J. 18 (1951). In In re Yamashita*, 327 U.S. 1 (1946), the Supreme Court upheld the use of Military Commissions to try war criminals, again with no mention of a consultation requirement for the President or the Generals with Congress.

The same constitutional and statutory authorizations for the President's use of military commissions. remain in the law today. Article II, Section 2, Clause 2; 10 U.S.C. § 821. No additional enactments or resolutions of Congress are required. Accordingly, while a formal consultation by President Bush with Congress would have been politically expedient, it was not constitutionally required. Nonetheless, I am pleased to see this hearing, and I hope to see increased consultation and cooperation with the Congress in the future.

CONCLUSION

In sum, the President had constitutional, congressional, and historical authority to issue the November 13th Military Order calling for trial of the terrorists who helped to kill 4,000 innocent Americans by military commissions. Instead of listening to the knee-jerk reaction of political interest groups attacking the Administration, we should await the issuance of the procedures by the Department of Defense. We should then review the procedures and provide constructive criticism.

I was very pleased Sunday to hear Secretary of Defense Rumsfeld welcome comment and debate on this subject as the DOD drafts its procedures. I am sure the Department of Defense will keep in mind that the procedures by which the accused terrorists are to be judged must be fair in fact and in appearance. As Justice Jackson said in his opening statement at the Nuremberg trial: "We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice." TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 168 (1992).

Just as history judged the Allied powers by how they conducted the Nuremberg trial, so history will judge America by how we conduct the trials of the terrorists. We do not want history to conclude that America, through these military commissions, rendered "Victor's Justice," but real justice. We have done it before, and we can do it again.

While I will defer to the President until the procedures for the commissions are published by the Department of Defense, I thank the Chairman for holding this hearing, and I look forward to hearing from our excellent witnesses.

Senator SCHUMER. Thank you, Jeff. And, again, as I stated, I agree with you. I don't think anybody—some may, but I don't think any—most everybody disagrees that there is a need for secrecy and having a regular civil trial, criminal trial doesn't make sense here. We are just trying to figure out where the appropriate balance ought to be. What the President has proposed, first, hasn't been fleshed out. Second, unlike what Senator Hatch said, it is not a courts-martial. There are more procedures in a courts-martial. We may come to the conclusion on this committee that it ought to be the same as a courts-martial.

Senator SESSIONS. But a courts-martial doesn't give all the protections that a civil trial that we think protect defendants. But we don't think it is unjust.

Senator SCHUMER. That is correct.

Senator SESSIONS. And I would note Mr. Gonzalez, the White House counsel, had written an op ed in the New York Times in which he did make a strong statement that these commissions are not—these commission trials are not secret. The President's Order authorizes the Secretary to close the proceedings to protect classified information. It does not require any trial, or even portions, to be conducted in secret. And we should be as open as possible, he said.

Senator SCHUMER. And we have dealt with that under the CIPA law in the past as well, so we have good precedents here. We have got to figure out what to do. I think a lot of the problems here have occurred because the initial statements were so vague and so broad, and we are hoping to flesh those out.

We were just going to have the ranking members make opening statements, but I have been told that Mr. Feingold wants to make a brief statement. I know he feels very strongly about this, and so with the permission of the committee, I would call on Senator Feingold for a brief opening statement.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Mr. Chairman, I certainly don't want to delay things, and I will only speak for a minute. But I would like to welcome all the witnesses here today, and I certainly want to thank the chairman. This is an extremely important hearing to be held, in particular because I am concerned that the President has not adequately consulted with Congress on the issue of military commissions. I am concerned that he has not, in my reading, demonstrated that the civilian courts are inadequate to conduct these trials, particularly when terrorists have previously been tried in civilian courts, and I, like the chairman—and I want this clear—do not oppose the concept of tribunals categorically. In fact, I believe the use of an international court at Nuremberg was effective in bringing Nazi war criminals to justice in a fair manner, but also while conferring legitimacy to the process. But I believe that military tribunals are proceedings our Nation should pursue only after careful thought and consideration.

For example, if people want to talk about the issue of the first World Trade Center trials, that is a fair example to discuss. When the ranking member, Senator Hatch, suggests that there was secret information about the structure of the building and information about the building, the question isn't simply do you take a leap then and assume that you have to use a military tribunal. The first question should be: Could that information have been adequately protected in a regular court through our laws, for example, under the Classified Information Procedures Act and other bills? That should be the first question.

I want to say that I am certainly not happy about the fact that that information came out in that trial. That was obviously a mistake. But that does not allow a leap to assuming that you have to go wholesale to a military tribunal approach. It means you have to use the protections that are provided under current law.

If it turns out that the evidence suggests that that is not adequate, so be it. Then I would join with the chairman and talk about the need to do something else. But I think it is far too easy to suggest that simply because a mistake was made there it can't be addressed under our current system.

In that context, I just want to briefly express my alarm at the failure of the Department of Defense to appear before the committee today. The Department of Defense was invited to appear before us today, but I understand that the Department of Defense declined to appear. I would note that this committee has already heard from the Department of Justice on the issue of military commissions, and today we will hear from the Department of State. But we have yet to hear from the Department of Defense. And that is the Department which has the primary authority under the President's Order for the creation and administration of the commissions.

I am very concerned by this lack of meaningful consultation, and I do hope that representatives of the Department of Defense will appear before us in the future to discuss these important issues.

I thank you, Mr. Chairman.

Senator SCHUMER. Thank you, Senator Feingold.

Senator FEINSTEIN. Could I make a brief statement?

Senator SCHUMER. Certainly. Senator Feinstein, who has been an active and diligent member of this committee.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman, and I, too, thank you for these hearings. I think they are extraordinarily important that if we do go into the military tribunal, we go in with an understanding of exactly what is going to take place.

I for one think the goal of the tribunal is a good one: swift, fair, full justice, without revealing national secrets or making a courthouse into a target for terror.

To read some of the critics, it would appear that these tribunals will not be limited to the most visible or heinous terrorists. Instead, even a long-time resident alien in the United States could suddenly be thrust before a secret tribunal of military officers, and with no opportunity to appeal, the individual could be sentenced to death by a mere preponderance of the evidence and by just two-thirds of the tribunal members present at the time. This would indeed be of deep concern and deeply troubling. I don't know whether this is accurate or not. I hope the witness will clarify it. But this is important to flesh out, I think, at this hearing.

Just to be very brief, Mr. Chairman, I hope that the Bush administration will work with the committee and the full Congress as it moves forward in this analysis. I, too, have read Judge Gonzales' article. I, too, have read Professor Tribe's article. I think both present some very interesting views which we need to press a little further on to be sure that we know the confines and the context in which these tribunals will be held.

Senator SCHUMER. Well, thank you, Senator Feinstein. I thank all the members here. You can see the broad range of views but, more importantly, the many questions. And just, again, when I heard Senator Hatch's statement, I thought he was saying to even ask any questions about this is wrong. I was glad at the end he backed off that because I think that would be totally inappropriate. And that is what we are here to do. There are so many questions, such as the Senator from California has answered, who these apply to, what the rules are, et cetera. And I think most of us believe that there is a need for some kind of tribunal. We are beginning the questioning process and the fleshing-out process right now, and I appreciate that.

I want to introduce our first witness. The Honorable Pierre–Richard Prosper serves as the Ambassador-at–Large for War Crimes Issues at the Department of State. He received his B.A. from Boston College, his J.D. from Pepperdine University School of Law. Prior to his appointment, Ambassador Prosper served between 1999 and 2001 as special counsel and policy adviser in the Office of War Crimes Issues. He was detailed to the State Department from the Justice Department, where he served as special assistant to the Assistant Attorney General for the Criminal Division. From 1996 to 1998, Ambassador Prosper served as war crimes prosecutor for the United Nations International Criminal Tribunal for Rwan-

da. Before that he prosecuted cases as an Assistant U.S. Attorney in California.

Before you begin, Ambassador Prosper, I want to let you know, and everyone else here, that we did invite, as Senator Feingold mentioned, the Department of Defense to send representatives to this hearing. We thought it was important to have them here since they have been charged with drafting the regulations for the commissions. Many of the details and questions we have can be answered by them, and, unfortunately, the Defense Department refused to send a witness. I think that doesn't serve the purposes they seek, which is in gaining—in coming to the right conclusion because they are debating it right now, and I hope that they will in the future be more willing to address this committee and this subcommittee.

With that, Ambassador Prosper, that does not say we are not grateful and honored that you are here, in addition, and thank you for being here. Your entire statement will be read into the record, and you may proceed as you wish.

STATEMENT OF HON. PIERRE–RICHARD PROSPER, AMBASSADOR–AT–LARGE FOR WAR CRIMES ISSUES, DEPARTMENT OF STATE, WASHINGTON, D.C.

Ambassador PROSPER. Thank you. Mr. Chairman, members of the committee, I thank you for this opportunity to speak with you regarding the Military Order issued by the President on November 13th in response to the tragic events of September 11th. The events remind us that we must vigorously pursue justice to ensure that the acts not go unpunished.

Mr. Chairman, members of the committee, I come before you as Ambassador-at–Large for War Crimes Issues and also as a former prosecutor. Prior to my appointment to this post, I spent 10 years in the trenches as a line prosecutor. As a deputy district attorney in Los Angeles, I prosecuted hundreds of cases and tried dozens of murder cases and multiple murder cases as a member of the Hard Core Gang Division. As an Assistant United States Attorney, I prosecuted and investigated sophisticated international drug cartels trafficking tons of cocaine into the streets of Los Angeles. And as a lead prosecutor for the United Nations International Criminal Tribunal for Rwanda, I successfully prosecuted, in a 14-month trial, the first-ever case of genocide before an international tribunal under the 1948 Genocide Convention.

With this experience, I recognize, understand, and truly believe that there are different approaches that can be used to achieve justice. I recognize that different procedures are allowed and that different procedures are appropriate. No one approach is exclusive, and the approaches need not be identical for justice to be administered fairly. But in all approaches, what is important is that the procedures ensure fundamental fairness. And that is what the President's Order calls for.

After the tragic events of September 11th, we as a Nation were forced to reexamine our traditional notions of security, our conceptions of our attackers, and our approaches to bringing to justice the perpetrators. The conventional view of terrorism as isolated acts of egregious violence did not fit. The atrocities committed by the Al

Qaeda organization at the World Trade Center in New York, at the headquarters of our Department of Defense, and in Pennsylvania were of the kind that defied the imagination and shocked the conscience.

These atrocities are just as premeditated, just as systematic, just as evil as the violations of international humanitarian law that I have seen around the world. As the President's Order recognizes, we must call these attacks by their rightful name: war crimes.

President Bush recognized that the threat we currently face is as grave as any we have confronted. While combating these war crimes committed against U.S. citizens, it is important that the President be able to act in the interest of this country to protect the security of our citizens and ensure that justice is achieved. He has repeatedly promised to use all the military, diplomatic, economic, and legal options available to ensure the safety of the American people and our democratic way of life. The President should have a full range of options available for addressing these wrongs. The Military Order adds additional arrows to the President's quiver.

Should we be in a position to prosecute bin Laden, his top henchmen, and other members of Al Qaeda, this option should be available to protect our civilian justice system against this organization of terror. We should all ask ourselves whether we want to bring into the domestic system dozens of persons who have proved they are willing to murder thousands of Americans at a time and die in the process. We all must think about the safety of the jurors, who may have to be sequestered from their families for up to a year or more while a complex trial unfolds. We all ought to remember the employees in the civilian courts, such as the bailiff, the court clerk, and the court reporter, and ask ourselves whether this was the type of service they signed up for—to be potential victims of terror while justice is pursued. And we all must think about the injured city of New York and the security implications that would be associated with a trial of the Al Qaeda organization.

With this security threat in mind, we should consider the option of military commissions from two perspectives. First, the President's Military Order is consistent with the precepts of international law. Second, the military commissions are the customary legal option for bringing to justice perpetrators of war crimes during a time of conflict.

The Military Order's conclusion that we are in a state of armed conflict deserves some comment. Because military commissions are empowered to try violations of the law of war, their jurisdiction is dependent upon the existence of an armed conflict, which we have.

It is clear that this series of attacks against the United States is more than isolated and sporadic acts of violence or other acts of a similar nature. Rather, a foreign, private terrorist network, with the essential harboring and other support of the Taliban-led Afghanistan, has issued a declaration of war against the United States. It has organized, campaigned, trained, and over the course of years repeatedly carried out cowardly and indiscriminate attacks.

Tracing the criminal history of this organization further confirms that we are in a state of armed conflict. A decade's worth of hostile

statements by bin Laden over and over and over again state that he is at war with the United States. He has instructed his followers to kill each and every American. We should also consider the intensity of the hostilities and the systematic nature of the assaults. Consider the fact that Al Qaeda is accused of bombing the World Trade Center in 1993 and attacking U.S. military service personnel serving in Somalia in that same year. Consider that bin Laden and Al Qaeda are accused of attacking and bombing the embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. Remember that Al Qaeda is accused of perpetrating last year's bombing of the U.S.S. Cole. And, of course, added to this history are the horrifying and unprovoked air assaults on the Twin Towers in New York, the Pentagon, and the airplane tragedy in Pennsylvania.

It is clear that the conduct of Al Qaeda cannot be considered ordinary domestic crimes, and the perpetrators are not common criminals. One needs to look no further than the international reaction to September 11th to see that it was perceived as an armed attack against the United States. NATO's North Atlantic Council declared that the attack was directed from abroad and invoked Article V of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all. The Organization of American States, Australia, and New Zealand activated similar mutual defense treaties. The UN Security Council in a series of resolutions recognized our inherent right to self-defense and labeled terrorism as "one of the most serious treats to international peace and security." And this Congress, in a joint resolution, authorized the use of all necessary and appropriate force in order to prevent any future acts of international terrorism.

Mr. Chairman, members of the committee, we are at war, an unconventional war conducted by unconventional means by an unprecedented aggressor. Under long-established legal principles, the right to conduct armed conflict, lawful belligerency, is reserves only to states and recognized armed forces or groups under responsible command. Private persons lacking the basic indicia of organization and the ability or willingness to conduct operations in accordance with the laws of armed conflict have no right to wage warfare against a state. In waging war, the participants become unlawful combatants.

Because the members of Al Qaeda do not meet the criteria to be lawful combatants under the law of war, they have no right to engage in armed conflict and are unlawful combatants. Because their intentional targeting and killing of civilians in time of international armed conflict amount to war crimes, military commissions are available for adjudicating their specific violations of the laws of war. As the U.S. Supreme Court unanimously stated in *Ex Parte Quirin*, "by universal agreement and practice, the law of war draws a distinction between. . .those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but, in addition, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."

In this campaign against terrorism, it is important that the President have the full range of available forums for seeking criminal accountability against persons for their individual and command responsibility for violations of the law of war. The military commission provides a traditionally available mechanism to address these unconventional crimes.

Military commissions have been utilized and legally accepted throughout our history to prosecute persons who violate the laws of war. We have heard of some of the domestic examples that have been stated here today, but they are also used in the international arena with deep historical roots. The international community has utilized military commissions and tribunals to achieve justice, most notably at Nuremberg and in the Far East. The tribunals which tried most of the leading perpetrators of Nazi and Japanese war crimes were military tribunals. These tribunals were followed by thousands of Allied prosecutions of lower-level perpetrators under the Control CounciL Law No. 10.

By the end of 1958, the Western Allies had used military tribunals to sentence 5,025 Germans for war crimes. In the Far East, 4,200 Japanese were convicted before military tribunals convened by the United States, Australian, British, Chinese, Dutch, and French forces for their atrocities committed during the war.

Today, the commissions as envisioned by the President in the Military Order, while different from those found in our Article III courts, are in conformity with these historical precedents and the world's current efforts to prosecute war crimes through the ad hoc United Nations International Criminal Tribunals for the Former Yugoslavia and Rwanda. To help understand this, it may be helpful for me to articulate some commonalities. Like its predecessors, in the Nuremberg and the Far East International Military Tribunals, the Allied Control Council Law cases, and the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the judges sit as both triers of fact and law. In addition, decisions such as judicial orders, judgments, and sentences are reached by a majority vote and not unanimity. In all of the above proceedings, including the Military Order, evidence of probative value is admitted. And in the United Nations International Criminal Tribunals for the Former Yugoslavia and Rwanda, proceedings have been and are authorized to be closed, just as is contemplated in the President's Order.

Mr. Chairman, members of the committee, since September 11th I have been asked about our criticisms of foreign military tribunals. And I want to say in these cases what the United States Government has done is to criticize the processes and not the forums themselves. Also, since September 11th I have been asked why not create an international tribunal. In our view, the international practice should be to support sovereign states seeking justice domestically when it is feasible and would be credible, as we are trying to do in Sierra Leone and in Cambodia. International tribunals are not and should not be the courts of first redress, but of last resort. When domestic justice is not possible for egregious war crimes due to a failed state or a dysfunctional judicial system, the international community may, through the Security Council or by con-

sent, step in on an ad hoc basis as it did in Rwanda and the former Yugoslavia. But this is not the case in the United States.

Our goal should be and this administration's policy is to encourage states to pursue credible justice rather than abdicating their responsibility. Because justice and the administration of justice are a cornerstone of any democracy, pursuing accountability for war crimes while respecting the rule of law by a sovereign state must be encouraged at all times. The President understands our sovereign responsibility and has taken action to fulfill his duty to the American people. In creating an additional option, the Nation is now prepared and will have an additional forum to address these wrongs when needed.

Mr. Chairman, members of the committee, I thank you for your consideration, and I am prepared to answer any questions you may have.

[The prepared statement of Amassador Prosper follos.

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willing to murder thousands of Americans at a time and die in the process. We all must think about the safety of the jurors, who may have to be sequestered from their families for up to a year or more while a complex trial unfolds. We all ought to remember the employees in the civilian courts, such as the bailiff, court clerk, and court reporter and ask ourselves whether this was the type of service they signed up for—to be potential victims of terror while justice was pursued. And we all must think also about the injured city of New York and the security implications that would be associated with a trial of the al Qaida organization.

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The Military Order's conclusion that we are in a state of armed conflict deserves comment. Because military commissions are empowered to try violations of the law of war, their jurisdiction is dependent upon the existence of an armed conflict, which we have.

It is clear that this series of attacks against the United States is more than isolated and sporadic acts of violence, or other acts of a similar nature. Rather, a foreign, private terrorist network, with the essential harboring and other support of the Taliban-led Afghanistan, has issued a declaration of war against the United States. It has organized, campaigned, trained, and over the course of years repeatedly carried out cowardly, indiscriminate attacks, including the largest attack in history against the territory of the United States in terms of number of persons killed and property damage.

Tracing the criminal history of the organization further confirms the state of armed conflict. A decade's worth of hostile statements by Bin Laden over and over and over again state that he is at war against the United States. He has instructed his followers to kill each and every American civilian. We should also consider the intensity of the hostilities and the systematic nature of the assaults. Consider the fact that al Qaida is accused of bombing the World Trade Center in 1993 and attacking U.S. military service personnel serving in Somalia in the same year. Consider that Bin Laden and al Qaida are accused of attacking and bombing our embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. Remember that al Qaida is accused of perpetrating last year's bombing of the U.S.S. Cole. And of course, added to this history are the horrifying and unprovoked air assaults on the twin towers in New York, the Pentagon, and the airplane tragedy in Pennsylvania.

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We can also look at our domestic response, including the joint resolution passed by this Congress authorizing "the use of all necessary and appropriate force" in order to prevent any future acts of international terrorism.

Mr. Chairman, members of the committee, we are at war, an unconventional war conducted by unconventional means by an unprecedented aggressor. Under long established legal principles, the right to conduct armed conflict, lawful belligerency, is reserved only to states and recognized armed forces or groups under responsible command. Private persons lacking the basic indicia of organization and the ability or willingness to conduct operations in accordance with the laws of armed conflict have no legal right to wage warfare against a state. In waging war the participants become unlawful combatants.

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peaceful populations of belligerent nations, and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but, in addition, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."

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Military commissions have been utilized and legally accepted throughout our history to prosecute persons who violate the laws of war. They were used by General Winfield Scott during his operations in Mexico, in the Civil War by President Lincoln, and in 1942 by President Roosevelt. They are an internationally accepted practice with deep historical roots. The international community has utilized military commissions and tribunals to achieve justice, most notably at Nuremberg and in the Far East. The tribunals which tried most of the leading perpetrators of Nazi and Japanese war crimes were military tribunals. These tribunals were followed by thousands of Allied prosecutions of the lower-level perpetrators under the Control Council Law No. 10.

By the end of 1958, the Western Allies had used military tribunals to sentence 5,025 Germans for war crimes. In the Far East, 4,200 Japanese were convicted before military tribunals convened by U.S., Australian, British, Chinese, Dutch, and French forces for their atrocities committed during the war.

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Mr. Chairman, members of the committee, since September 11th I have been asked about our criticisms of foreign military tribunals. In these cases, we criticized the process and not the forum.

Since September 11thI have also been asked why we do not create an international tribunal? In our view, the international practice should be to support sovereign states seeking justice domestically when it is feasible and would be credible, as we are trying to do in Sierra Leone and Cambodia. International tribunals are not and should not be the courts of first redress, but of last resort. When domestic justice is not possible for egregious war crimes due to a failed state or a dysfunctional judicial system, the international community may through the Security Council or by consent, step in on an ad hoc basis as in Rwanda and Yugoslavia. That is not the case in the United States.

Our goal should be and this administration's policy is to encourage states to pursue credible justice rather than abdicating the responsibility. Because justice and the administration of justice are a cornerstone of any democracy, pursuing accountability for war crimes while respecting the rule of law by a sovereign state must be encouraged at all times. The President understands our sovereign responsibility and has taken action to fulfill his duty to the American people. In creating an additional option, the nation is now prepared and will have an additional forum to address these wrongs when needed.

I thank you for your consideration in this matter and I am prepared to answer any questions you may have.

Senator SCHUMER. Thank you very much, Mr. Ambassador. We appreciate your remarks, and you noted as you closed your testimony that the criticism that the United States has had of others of these is not that it is a military tribunal but, rather, the process. That is one of the things we want to learn, is what process is envi-

sioned for these. And there are lots of questions that have not been answered by the administration.

Let me start out by asking you this: You mentioned the military tribunals that tried Nazis and Japanese, and I think by most people's view, they were successful, and there are direct analogies. How would these tribunals that the President is proposing differ in their rules from those that were used after World War II for Nazis and for Japanese war criminals?

Ambassador PROSPER. Well, Mr. Chairman, at this time I would be speculating to answer that question because we are in the process or the Department of Defense is in the process of drafting the rules. We will have to wait and see what the rules look like at the end to do a line-by-line comparison with the Nuremberg/Far East proceedings or even a comparison with the existing ad hoc tribunals.

But I think if you look at the general framework that has been put forth by the President, it is consistent with all these approaches in that, firstly, the President calls for full and fair trials; the judges will be both the trier of fact and the trier of law, as I stated. The decisions and verdicts will be reached by two-thirds or a majority vote, and probative evidence will be admitted, just to name a few examples.

Senator SCHUMER. Let me ask you this: How would these, at least in terms of the President's statements thus far—and I know that they haven't formulated the rules. How would they differ from, say—I think Senator Hatch mentioned courts-martials. How would they differ from courts-martials? Why is the forum of a military tribunal as outlined by the President superior to using the general process and procedures of courts-martials for some of these enemies—I guess is the right word—that we pick up?

Ambassador PROSPER. I believe one of the subsequent witnesses will testify on this issue, but what I can say here is there are a few differences. With a courts-martial process, it will be a case that would be tried before jurors. There is the issue of trying the case before a jury or judges. And also with the courts-martial process, generally that is reserved to prosecute prisoners of war. And here in this instance, we are prosecuting unlawful combatants, and we need to remember that the Al Qaeda organization are unlawful combatants and do not carry prisoner of war status.

Senator SCHUMER. But why wouldn't the courts-martial process—and I am not advocating it at this point. I am just trying to ask some questions. Why wouldn't the courts-martial process work for unlawful combatants as well as prisoners of war? Many of the same problems that you have mentioned we would face in an ordinary trial—and no one is advocating that—would be solved by the courts-martial process. It is one that is accepted, as I think Mr. Sessions mentioned. It has generally been regarded as a process that has consensus. And it has worked for prisoners of war.

So I understand that these people are unlawful combatants. The rules of war do not apply in a war on terrorism. It is one of the reasons we are having this hearing because we have to break new ground. Nonetheless, that doesn't mean that old models don't work.

Ambassador PROSPER. Well, I think what we need to do is take a look at the nature of offenses themselves and recognize that

there is the need for a specialized process to address and adjudicate these offenses.

What I have seen from my personal experience working in the tribunals is that it is wise at times to have a specialized tribunal to focus on these abuses. And just by way of example, I think, again, we need to refer back and look back at the fact that these are not just ordinary crimes where you may have an eyewitness, for example, that will be able to prove the entire case or it is a crime that occurred in a room of this size. Generally, when you are prosecuting or investigating war crimes, the realization becomes that these are the type of offenses in which the entire country, for example, is the crime scene. If you look at the events of the conduct of Al Qaeda, the entire world is a crime scene. And when you take it from that perspective, you need to create a court that has the ability or the special expertise to inquire, to allow the truth to unfold, and that will also have flexible rules to permit the introduction of evidence that may be probative.

I think when we look at the issue of the flexible rule on probative evidence, we shouldn't look at it in the light that it is the denial of rights to an accused, because the rules apply both ways. You see, the purpose of the process and the purpose of having a forum that is flexible is to allow the truth to come out so that the trier of fact can adequately judge and assess the violations that have occurred.

Senator SCHUMER. A final question because my time is expiring. Would you recommend that these tribunals ever be used for somebody who is picked up within the United States, assuming they are not a citizen?

Ambassador PROSPER. I think what we need to do, we need to look at the Executive Order itself and look at the category of people that are subject to the Order, and then look at the offenses that have been committed. I have heard people talk about the fact that these courts may be used against resident aliens and so on. But I think what we need to look at as another jurisdictional element is that they must commit war crimes. They can't be picked up and prosecuted for a Department of Motor Vehicle violation.

Senator SCHUMER. Obviously. But assuming they are engaged in an act of terrorism, what would be your recommendation, given your extensive experience?

Ambassador PROSPER. These issues will need to be judged on a case-by-case basis, and the President will make the final decision once these cases have been presented to him with all the facts, and only at that time can—

Senator SCHUMER. But there are going to have to be some general rules. You can't just say—I mean, it wouldn't make any sense to say that some people who are picked up for crimes of terrorism in the United States would get one type of justice and others would get another. Or are you saying that that could possibly happen?

Ambassador PROSPER. What I am saying is that there are a lot of factors that will go into the decision made by the President, including procedural rules that are developed and the factual circumstances of the case.

Senator SCHUMER. Okay. Thank you, Mr. Ambassador.

Mr. Sessions? Senator Sessions? We are going to try to stick to the 5-minute rule because we have a whole other panel coming.

Senator SESSIONS. It does remain with the President? If he thought a trial could be tried in civil district court, he could allow it to go there? Or he could sent it to a military tribunal? Is that your understanding of the Order?

Ambassador PROSPER. That is absolutely correct, and I think, again, one thing that I would like to highlight here is what the President has done is created an option. He has not ruled out the Federal courts or the Article III courts. He is creating an option. So at the time that a particular case comes to his desk, he will balance the interests of the country and make the appropriate decision at that time.

Senator SESSIONS. Now, with regard to the MacArthur military commissions and tribunals in the East, he initiated that without any Presidential authority, didn't he, and actually tried people on his own authority as the commander in the region?

Ambassador PROSPER. That is correct, and that is permissible. What we have here is the President has decided that this issue is serious enough that it warrants his personal attention.

Senator SESSIONS. And MacArthur wasn't given the kind of protections and an order from the President that personally guaranteed Presidential protection for the right to counsel, the right to a full and fair trial, and that sort of thing. Isn't that true? So this is much stronger protection than what took place after World War II.

Ambassador PROSPER. And I think a factor that we can add to this is that there is an order from the Commander-in–Chief calling for full and fair trials, and that should also be remembered when we examine and comment on this process.

Senator SESSIONS. Well, I think it is important we have that full and fair trial, but ultimately what I think is a good safeguard for us here and those who are nervous about these procedures is the President has kept this as his personal responsibility. He has personally put his credibility on the line to give a full and fair trial in those circumstances in military tribunals that he decides is appropriate to American security. That is different from some of the historical examples we have discussed, is it not?

Ambassador PROSPER. It is.

Senator SESSIONS. You know, I was thinking about how you would try somebody—let's say you catch a person—I was a prosecutor, and I am glad to see you have been in the courtroom and tried a lot of cases. There are some basic things that you run up against. You catch an Al Qaeda member in Kabul with an anthrax factory, and you don't have direct proof that he intended to send it to New York. Maybe you have proof he intended to send it to France. Would there be any way under traditional rules of law that you would have venue in New York or any other place in the United States to try that? Or would that be a difficult legal question to overcome?

Ambassador PROSPER. Well, those are difficult legal questions that I know my colleagues in the Department of Justice will be able to answer. But the advantage of the military commission is that it can prosecute people who have committed war crimes against the United States, essentially regardless of venue. Obviously, we look at the events in New York; the President will make

a decision at that time as to who should be prosecuted. But this approach is a flexible approach, and the court will be able to sit in any location, whether within or outside the country.

Senator SESSIONS. And it strikes me that no city in its right mind would want to have a nest of Al Qaeda terrorists to be tried in a normal Federal trial that would take years to conclude, that would subject the city to all kinds of threats that it might not otherwise be facing, and that would be a reason that we might want to try some of these people in foreign countries, wouldn't it be, for the basic security of the United States?

Ambassador PROSPER. Security is a factor that will have to be considered, and the President will be in the unique position, not only as Commander-in–Chief but also the President of this country, to assess what is in the best interest of the country, whether or not the trial should be held in some more remote location or in Manhattan, for example.

Senator SESSIONS. And you touched on something very fundamental that former Attorney General Bill Barr testified to here recently, just last week. This was what he said about the difference between a war-type trial and a normal civil trial. He said, "When the United States is engaged in armed conflict and exercising its power of national defense against a foreign enemy, it is acting in an entirely different realm than that of domestic law enforcement."

Would you agree with that?

Ambassador PROSPER. Yes, I would.

Senator SESSIONS. We don't give people who are attacking us *Miranda* rights before we fire on them. Is that correct?

Ambassador PROSPER. I think what we can say is the first priority for our service members overseas is not investigation and collection of evidence. It is security. It is neutralizing the threat. After the fact, when a particular location has been stabilized, the particular armed forces or members of the armed forces will be able to go in and conduct investigations. And oftentimes at that point in time you will have serious questions as to chain of custody, if you will, because the scene may not have been secured. Obviously there is a conflict going on. And this is why in the ad hoc tribunals that exist today there are flexible standards for the introduction of evidence, and the trier of fact, experienced judges will be the ones that will judge and give the appropriate weight to the evidence.

Senator SESSIONS. Thank you. I would just say that, as Mr. Barr stated also, "When we wage war, the Constitution does not give foreign enemies rights to invoke against us; rather, the Constitution provides us with the means to defeat and destroy our enemies." Otherwise, our liberties would be subject to potential victory by a terrorist group who doesn't value any of the values that we cherish in this country.

So I think we need to understand this distinction, Mr. Chairman, when we are in a war situation as opposed to a domestic law enforcement situation, and historically all nations, to my knowledge, have always understood the great difference.

Senator SCHUMER. And I think that is generally accepted by just about everybody here.

Senator Feinstein?

Senator FEINSTEIN. Thanks very much, Mr. Chairman.

In order to clarify the context and confines of this, I want to ask my questions working off of the chief counsel's op ed in the New York Times, if I might. In that op ed, he states, "The Order covers only foreign enemy war criminals. It does not cover United States citizens or even enemy soldiers abiding by the laws of war. Under the Order, the President will refer to military commissions only non-citizens who are members or active supporters of Al Qaeda or other international terrorist organizations."

So I would assume that that would mean that this would be reserved for only the principals and that legal residents who may have had some peripheral involvement would not—would be subject to civil law, not a military tribunal. Is that correct?

Ambassador PROSPER. The idea behind this Order is to go after exactly just that, people who bear the responsibility for these egregious abuses. Another jurisdictional element is the fact that they need to have committed war crimes. These are grave violations that require organization, leadership, and obviously promotion of the purpose.

Senator FEINSTEIN. Well, that is not a specific answer. I will ask these same questions of the Attorney General on Thursday, but let me go to the second one. "The military commission trials are not secret. The President's Order authorizes the Secretary of Defense to close proceedings to protect classified information. It does not require that any trial or even portions of a trial be conducted in secret. Trials before military commissions will be as open as possible, consistent with the urgent needs of national security."

I trust that what that means is that those parts of a trial that require the use of classified information will be in camera, and those that do not, which is the bulk of the trial, would be in the open. Is that correct?

Ambassador PROSPER. That is correct. But what I would like to add to this is some of my personal experiences with the ad hoc tribunal.

In prosecuting the first genocide case, there were portions of my proceedings that were closed, and there were portions in the Hague tribunal proceedings that were closed. In those instances, it wasn't necessarily because of classified information. There were other issues such as witness protection. In my case, we had several witnesses who testified to sexual violence, being raped by—

Senator FEINSTEIN. Respectfully, that is not my question. My question is: What will it be in this case?

Ambassador PROSPER. And my point is that while the proceedings may be closed for issues of national security, we cannot rule out the possibility that there may be other legitimate reasons to close the proceedings in relation to the witnesses.

Senator FEINSTEIN. I understand. Let me ask my next question, and I quote again. "Everyone tried before a military commission will know the charges against him and be represented by qualified counsel and be allowed to present a defense."

Would that be a counsel of the defendant's choice, or would that be a counsel provided by the Government?

Ambassador PROSPER. We will have to see exactly what the rules promulgated by the Secretary of Defense call for. The Order has instructed the Secretary of Defense to promulgate rules that will go

to the conduct of defense attorneys, hiring defense attorneys, appointing defense attorneys and so on. So we will have to see what the specific rules—

Senator FEINSTEIN. All right. I will ask that question Thursday.

The last one: "The Order preserves judicial review in civilian courts. Under the Order, anyone arrested, detained, or tried in the United States by a military commission will be able to challenge the lawfulness of the Commission's jurisdiction through a habeas corpus in a Federal court."

Could you expand on that, please?

Ambassador PROSPER. I think that particular issue I would suggest that you direct that question to the Department of Justice because those are the type of issues that the Department of Justice raises, the habeas corpus-type proceedings, and they would be the ones defending it. But—I will leave it at that. Thank you.

Senator FEINSTEIN. Thank you. That completes my questions.

Senator SCHUMER. Thank you, Senator Feinstein.

Senator Hatch?

Senator HATCH. I am going to pass, but we welcome you here. We are grateful for your testimony, and thank you for coming.

Ambassador PROSPER. Thank you.

Senator SCHUMER. Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman.

Sir, I admire your work on the prosecutions in Rwanda. We have talked about that in the past. And I am pleased to see you here. Let me just say, though, that in the present case many have said that the President's proposed military commission could be counterproductive to our efforts to ease anti–American hatred and tension in the Arab and Muslim world. Clearly, a civilian court would be more likely than a military tribunal to confer a legitimacy on any ultimate verdict, and this would be true not only in the minds of the people here in the United States but also around the world.

Unlike the military tribunal, our Federal courts are independent of the executive branch. Jurors bring their own skepticism of the Government to court, which would further demonstrate the fairness of the process. Indeed, as I have watched the arguments unfold in editorial pages and on television talk shows, I see that many legal commentators on both sides of the political spectrum argue that the United States should turn to existing safeguards, perhaps, as I said earlier, even enhancing those existing safeguards to protect highly sensitive evidence while still making an open case against Al Qaeda in a civilian court.

In so doing, the United States could set the historical record by exposing the true nature of the crimes that were committed. And really, in a related way, some have also raised the concern that the President's proposed military tribunal could actually undermine our ability to protect Americans abroad who are subject to special or military courts in other countries. As William Safire said in his column on Monday of this week, "On what leg does the United States now stand when China sentences an American to death after a military trial devoid of counsel chosen by the defendant?"

Aren't you somewhat concerned that Americans will be subject to an increased risk of trials by military or special courts in foreign

nations with little or no due process protections as a consequence of the use of President Bush's proposed military tribunal?

Ambassador PROSPER. Thank you, Senator. I think one point that needs to be added to the debate, if you will, is that in a military system there is adoption of what I will call command influence, and that is that the jurists are required to remain impartial and not be influenced by the President, by the Commander-in–Chief, in making their decisions.

In the end, I think that when the finished product is put forth, the international community will see what is promulgated, what is envisioned by the President, and what is actually articulated by the Secretary of Defense in the rules, is that it is or will be a process that will not only meet the President's Order and provide for a full and fair trial, but it will meet requirements of fundamental fairness, international standards, so that when we go out there and we talk to our allies and people see the finished product, it will be viewed as a fair process. And I think that is important, and that will be the principle that we will put forth and that we will ask others to stand by in whatever proceedings they may invoke.

Senator FEINGOLD. So you are not at all concerned that the use of military tribunals would be used, whether they are actually fair or not, as an excuse for other countries to more extensively use military tribunals against Americans?

Ambassador PROSPER. I would be concerned if proceedings were used against Americans that are not fair and do not offer fundamental fairness. If a judicial body, be it civil, military, or ad hoc, is properly convened, then it is properly convened. But the key is the process, and we must look and examine the process.

Senator FEINGOLD. Let me ask you another question. You have indicated that what the President has done here is created another option. But by prosecuting terrorists for war crimes only, as specified under the Presidential Order, aren't we, in fact, in a way limiting our prosecutorial options? In civilian courts, we could rely on extensive anti-terrorism legislation to try those responsible for the September 11th atrocities. In military commissions, as you have discussed rather well, we are limited to trials for violations of the laws of war. Does it make sense to limit our prosecutorial options in this way? And if the administration proceeds with a trial of terrorists before military commissions, doesn't it at least make sense to ask for congressional action to expand the range of crimes that could be tried to include terrorism-related crimes?

Ambassador PROSPER. I think you do raise a good point that we want to have options and we want to be able to have a broad reach to cover the offenses that occurred. And I believe that this is why the President, when he will make his final decision, will be able to examine these issues. In appropriate cases, he may determine that it is appropriate to have the accused person go before the civilian system, our Article III courts. In other cases—you know, of course, we need to look at the facts—a decision may be made it is more appropriate to try it before a military commission. So I think we do have the options and we are not limited. The President will make the decision at the appropriate time.

Senator FEINGOLD. Let me try one other question. As you may know, at least one of our coalition allies, Spain, has already ex-

pressed its concern with the President's proposed military commission and said that it will not extradite eight suspected terrorists to the United States. It appears that one significant downside to pursuing the President's proposed military commission approach could be that our coalition allies will not be willing to cooperate fully with bringing suspected terrorists to the United States to stand trial, which to me is an extremely serious concern.

Aren't you concerned by the very real prospect that going forward with the President's proposed military commission could actually diminish our Nation's ability to try suspected terrorists and bring them to justice?

Ambassador PROSPER. Regarding the case of Spain, an extradition request has not been put forth, to the best of my knowledge, and the Spanish Government has not denied such a request. In fact, I believe when the President of Spain was here, he said that he would entertain a request when received and consider all the surrounding circumstances.

I think we will have the responsibility, once the commission is actually created and the rules are put forth, to talk to our allies, to show them that this is a fair process. It does provide fundamental fairness. The military judges or lawyers that are attached to the proceedings are competent and credible people, and we must recognize that a lot of the lawyers and judges in our military system are some of the finest we have in the countries. They went to the finest law schools. Many have been out in the civilian system.

So we will have to make the case, and I do not believe that it will be a hard case to make.

Senator FEINGOLD. Well, I admire your optimism, but the matter of making sure we have absolute maximum access to trying these terrorists should be a very serious consideration. I question whether it is going to be so simple to persuade all of our allies to overlook their concerns about fairness in this process, and I think it is something that should be taken extremely seriously in the name of bringing terrorists to justice.

Thank you, Mr. Chairman.

Senator SCHUMER. Thank you, Senator Feingold.

Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman. I regret that I have not been able to be present for a good bit of the proceedings, but we are in another hearing room simultaneously on cloning, and I had to be present for that session.

With respect to the jurisdiction of the Federal courts, there is a provision in the Executive Order which essentially says that no one can have any redress to the Federal courts or any other court. And that runs directly in conflict with the constitutional provision which says that the writ of habeas corpus may not be suspended except in time of invasion or rebellion.

Is it possible to implement military tribunals which runs afoul of that constitutional provision?

Ambassador PROSPER. Well, I will leave the constitutional questions to the Department of Justice, but the President has acted within his authority. And in order for the military commission to be convened, we must have an armed conflict. We must be in a state of armed conflict, and that is part of the determination. The

Order, the President's Order, begins by saying we are in a state of armed conflict, and, again, if we look at the conduct and the events that have unfolded over the years in relation to Al Qaeda, we can see that they have waged a war against the United States. So military commissions are allowable in that context and are allowed to stand independent.

Senator SPECTER. Well, when you talk about leaving that to the Department of Justice, I would certainly agree with you that the Department of Justice ought to be involved. The testimony we heard last week was that the Department of Justice had, in fact, not been consulted. That is what the Assistant Attorney General in charge of the Criminal Division testified to. And the President on the face of the Executive Order has left this to the Department of Defense, so that a very important threshold question is how the Executive Order meshes with the constitutional requirement that the writ of habeas corpus be available except in case of rebellion or invasion.

Now, there are very serious issues involved beyond any question, and we know that again this morning from the comments made yesterday by Homeland Administrator Ridge that we now have another threat warning.

When you comment that the President is acting within his authority, the Constitution gives the authority to the Congress to establish military tribunals, and the implementing legislation, which is cited in the President's Executive Order, refers to a statute which says that, unless impracticable, the President shall utilize or implement regulations of military tribunals which conform to the rules of law and evidence in the United States district courts.

Now, the Congress has been very cooperative with the President, obviously, giving the authorization for the use of force on the 14th of September, 3 days after the terrorist attack, providing the appropriation of $40 billion, and providing terrorist legislation on a relatively fast track, and congressional inputs are obviously very important, as are the inputs of the courts and the constitutional system which we have for separation of power.

Now, perhaps there does not have to be an amplification of impracticability in light of the terrorist attack and the continuing threats, but I would be interested in your observations as to what predicates the President has to establish to show impracticability to carry out the congressional requirement for use of the regular rules of evidence or rules of law which prevail in District Courts.

Ambassador PROSPER. What I can say on this issue is—and I will draw from my experiences as a war crimes prosecutor—the rules at times need to be different to prosecute cases of this magnitude. At this point in time I do not think we can say that the UCMJ will be completely thrown out. What is going to happen here, it is my understanding that the Department of Defense will create a body of rules that will be used in this process. Perhaps it will draw from the UCMJ, perhaps it will draw from our Federal statute. I do now know. But what is happening here, this will be a commission that is actually created and will have the necessary tools to adequately address this problem and provide for a full and fair trial.

Senator SPECTER. Let me ask you one further question, which is tangential, but one I would like to have your views on. As we set

forth rules for military tribunals, this may have an impact on war crimes tribunals generally as to where we may be heading for an international criminal court, although the United States has not signed on. We have not had ratification by the Senate on the War Crimes Tribunal for Yugoslavia. The War Crimes Tribunal, with the key prosecutor, Carla Del Ponte, investigated General Wesley Clark on the complaint of Russia and Yugoslavia for possible war crimes, and the issues under investigation involved whether NATO had targeted civilians or whether NATO and its commanding officer, General Clark, had been at fault in carelessly targeting, which endangered civilians. If that kind of a standard is to be employed, making it a fact question for the prosecutor, it seems to me that U.S. military personnel all the way up to four-star General Clark, would be at risk on a war crimes tribunal, giving very very broad discretion and making it highly unlikely that the United States would or perhaps should ever join in an international criminal court. Do you have an opinion or a judgment on that range of discretion for a prosecutor in an international tribunal?

Ambassador PROSPER. Senator, that is one of the issues of concern for the administration regarding the ICC, the International Criminal Court, and that is the fact that you have or may have a prosecutor that is answerable to no one, and will launch off in investigations that could be political investigations and not based in fact or based in law. There is no check to the process.

Another objection that we have to the ICC is the fact that it will exercise jurisdiction over nonparty states. As you mentioned, we have not ratified the treaty, the President has not sent it up for ratification, but the proponents of the ICC believe that regardless, it can exercise jurisdiction over us just because, just because a document exists and just because other states, 60 states when it come into force, have decided that is the way to go. That is our objection. The safeguards are not in place. The prosecutor is not answerable.

Senator SPECTER. Thank you.

Senator SCHUMER. Thank you, Senator Specter.

Senator Durbin.

Senator DURBIN. Thank you very much, Ambassador Prosper, for being with us today. I will make a prefatory comment and then I will try to ask two questions.

The prefatory comment is this: some of the members of this panel have suggested that it is important to them that the President is willing to accept personal responsibility for this decision. I think that is important, but under our Constitution, it is not enough. Under the Constitution Congress must also accept responsibility, and under Article I, Section 8 of the Constitution, it is my belief that Congress has the sole authority to declare war. I have noticed that Presidents since Franklin Roosevelt have avoided bringing that question to Congress with the exception of former President Bush, who with the urging of many of us on Capitol Hill, brought this question for a vote, which I thought was important constitutionally and nationally, that the American people expressed their feelings through their elected representatives.

And I would also note that this President Bush currently serving, on September 14th asked for an authorization for us of military force, which I considered consistent with Article I, Section 8, and

with no dissenting votes in the Senate and only one in the House, received that authority. I thought that was the right thing to do, and as painful as it was for many of us to consider the prospect of war, we accepted our congressional responsibility and did it.

Now, in your very cogent remarks, Mr. Ambassador, you have really laid the case for military tribunals based on the concept of an armed conflict, and I quote from your statement, "Because military commissions are in part to try violations of law of war, their jurisdiction is dependent on the existence of an armed conflict, which we have." And then you go on to say, when you were justifying the fact that we are in armed conflict, "We can also look at our domestic response, including the joint resolution passed by this Congress, authorizing the use of all necessary and appropriate force" in order to prevent any future acts of international terrorism.

Ambassador Prosper, I think that that reasoning is sound, but I think it limits the President beyond any limitation that he has accepted with his Military Order. Specifically let me point this out. In the resolution passed by Congress, and I will read from it, "The President is authorized to use all necessary and appropriate force against nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11th, 2001, or harbored such organizations or persons in order to prevent any future acts of international terrorism against the United States."

That authorization for armed conflict from Congress referred to in your testimony as the basis for a military commission and the President's Military Order, limits it to the occurrence of September 11th, 2001. And if you read the President's Order, in terms of his engaging military tribunals, the terms "individual subject to this order" included a person who has engaged in, aided or abetted or conspired to commit acts of international terrorism or acts in preparation therefore that have caused, threatened to cause, or have as their aim to cause injury to or adverse effect on the United States, its citizens, national security, foreign policy or economy.

If you follow what I am leading to, if you are going to use congressional action and the definition of armed conflict in this joint resolution, that definition is specific to the events of September 11th. The President's request or Military Order for military commissions goes far beyond that. How would you reconcile it?

Ambassador PROSPER. Thank you, Senator. The reference to the joint resolution essentially is a—it was a factor to be considered when making a case against al Qaeda. We not only look to the joint resolution itself to see how the Congress viewed the events of September 11th and the actions of this international terrorist organization, but we also need to look at the international response and the actions and conduct of al Qaeda itself to show that there is an armed conflict. So it does go beyond or even backward, if you will, from September 11th.

Senator DURBIN. Let us be more specific. So if we should happen to find a terrorist associated with Hamas, could the President bring that terrorist before a military tribunal under this Military Order?

Ambassador PROSPER. The Military Order—what will be needed in order for someone to be brought to or before the military com-

mission is that there is a state of armed conflict and that that particular person is part of that armed conflict and has committed war crimes.

Senator DURBIN. So, are you agreeing with me then that unless we can create a nexus between the person brought before the tribunal and the events of September 11th, then this Miliary Order does not apply?

Ambassador PROSPER. Unless we can prove a nexus between the particular individual and armed conflict and violations of laws of war, then the person is not subject to the—

Senator DURBIN. Well, I think you have given a good legal answer, but I think you have avoided my question, and I will not press it, other than to say I think that is a serious issue that has to be raised and responded to, and I think that there is need for military tribunals in this case, but I think we should take care that we create them so that we not only reflect the personal responsibility of the President but the congressional responsibility we have under the Constitution.

The last point I will make to you was made by Senator Feingold. In the Country Report for the year 2000 from your State Department, they listed about a dozen countries out of 195 that the Secretary concluded violated the right to a fair public trial, and specifically referred to military tribunals in Peru and Nigeria. I know the case in Peru because I had one of my constituents who has languished in prison for years waiting for a trial before a tribunal in Peru. I will go back to the point that Senator Feingold raised. Was the State Department consulted in the promulgation of this Military Order so that we would have a consistent foreign policy in what we expect of other nations and what we are prepared to expect of ourselves in the establishing of the standards of justice and military tribunals?

Ambassador PROSPER. Thank you, Senator. To begin with I would like to comment on the Peru and Nigerian cases in general. And what we did there was we did not criticize military tribunals, per se. We criticized the process, as you know, because the processes were not fair, the judges wore masks, they were not known, the accused were not informed of the charges against them, and there is a whole list that we can go down if we start comparing the different criticisms. But in looking at this Order and when this, actually the idea of military commissions came up, the State Department was part of the development process, if you will, and the President was advised by his appropriate advisers on all aspects.

Senator DURBIN. One last brief question. If John Walker Lindh is charged with a crime, the man who was apprehended in the fortress in Mazar-e–Sharif, an American who was associated in some way with the Taliban, if he is charged with a crime, he could not be tried under a military tribunal by the President's definition; is that true?

Ambassador PROSPER. The definition is limited to non–Americans, yes.

Senator DURBIN. Thank you.

Senator SCHUMER. Thank you, Senator Durbin, and thank you, Mr. Ambassador, for your testimony before us.

Ambassador PROSPER. Thank you very much.

Senator SCHUMER. We will now call the second panel to come forward. While we do, I would ask unanimous consent the record be held open for a week for questions, written questions from the members and other matters, without objection.

[The prepared statements of Senator Leahy and Senator Thurmond follow:]

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Today this Committee holds two more hearings in an important and timely series begun last week on the Department of Justice's response to the September 11 attacks. Today's sessions focus on the Administration's plan to form military commissions that bypass our established court system and on the hundreds of people detained and arrested in the aftermath of September 11. I commend Senator Schumer, the chair of the Administrative Oversight and the Courts Subcommittee, and Senator Feingold, the chair of our Constitution Subcommittee, for holding today's hearings. They are acting in the finest tradition of the Senate and this country.

Last week, Senator Specter wrote an article expressing his concern that the Administration had not demonstrated the need for the President's extraordinarily broad order on military commissions. Others, Democrats and Republicans, have expressed concern with the broad powers asserted by the Administration and with the manner in which it has asserted them—bypassing both Congress and the courts. Last Wednesday's hearing allowed this Committee to hear firsthand from legal experts across the spectrum on these questions and to assist in clarifying the Administration's intentions and actions.

It is never easy to raise questions regarding the conduct of the executive branch when we have military forces in combat, even when those questions do not focus on the military operations. The matters we are examining concern homeland security, constitutional rights, and preservation of the checks and balances on governmental authority that lay at the foundation of our constitutional democracy. This Committee hopes to cast the light of reasoned public inquiry on the Administration's actions, especially sweeping unilateral actions as might affect fundamental rights. Ultimately, taking a close look at assertions of government power is among the best ways we have to preserve our freedoms and keep our country safe.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Mr. Chairman:

I am pleased that you are holding this hearing on President Bush's proposed use of military commissions. I believe that a full discussion of this issue will display to the American people that military commissions are appropriate forums for the trials of war criminals associated with the al Qaida terrorist network. Military commission have been convened throughout the history of our Nation, and the courts have repeatedly recognized their legitimacy. Additionally, these commissions will protect our national security interests and ensure the safety of trial participants. I believe that these commissions can be utilized in a way that will provide fair trials to all accused terrorists.

President Bush's military order providing for the trial of foreign terrorists by military commissions has been criticized as an affront to our Nation's tradition of impartial justice. I disagree with this criticism. Not only is the President's order historically based, but it is in accordance with current law. Military commissions are rooted in American history, from the trial of deserters in the Mexican-American War to the trial of President Lincoln's assassins. The Supreme Court has repeatedly upheld the us of military commissions. In *Ex Parte Quirin*, 317 U.S. 1 (1942), the Supreme Court unanimously upheld President Roosevelt's use of a military commission to try Nazi saboteurs during World War II. The Court also approved the use of a military commission to try the Japanese commander in the Philippines for violations of the laws of war. *In re Yamashita*, 327 U.S. 1 (1946).

In addition to historical and legal precedent, Congress has approved, as part of the Code of Military Justice, the use of military commissions under the law of war (10 U.S.C. § 821,836). Some critics have suggested that the President does not have authority under the Code of Military Justice because we are not officially in a state

of war. However, the murderers who flew commercial airliners into the World Trade Center towers and the Pentagon perpetrated nothing less than acts of war. The unimaginable destruction in New York and the damage done to the symbol of American military power are sobering reminders of the acts of war that were committed on our soil.

At this moment, American forces are engaged in a real war against terrorism. It is a unique war because al Qaida is a loosely organized group spread throughout many different countries. because the enemy is a shadowy network of international terrorists, it is unreasonable to insist that an official declaration of war be made.

Congress also recently acknowledged, in authorizing the President's use of force against those responsible for the terrorist attacks, that the "President has authorizing the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Pub. L. No. 107–40 115 Stat. 224, (2001). Because the President has clearly determined that the use of military commissions would serve to prevent future terrorist attacks, he is acting according to Congressionally recognized powers under the Constitution.

It is important to stress that the President's military order invokes his powers as Commander in Chief, which is derived from the Constitution and is not dependent upon statutory authority. The President's powers and responsibilities in defending our Country are separate and distinct from his authority to enforce domestic laws. The ability to try enemy war criminals in an efficient manner is an important component of our war on terrorism. It is just one part of the President's war arsenal. To fight the war effectively, we must demonstrate that the barbaric actions of al Qaida will not go unpunished, and we must disrupt their ability to operate by bringing their members to trial.

Military commissions are preferable to trial in civilian courts because of the unique conditions of war. For example, these commissions would allow for the more flexible use of classified information. If such information were disclosed in a civilian court, intelligence operations could be seriously endangered. Critics have pointed to the fact that Federal courts are currently able to handle classified information under the Classified Information Procedures Act. 18 U.S.C. app. 3. However, the Act provides for the disclosure of classified information under certain circumstances, and defense lawyers can use this as a bargaining chip to frustrate the prosecution. While this system may be acceptable in domestic law enforcement, it presents serious roadblocks to the effective use of trials as a national security tool.

Military tribunals would also better protect witnesses and other trial participants. Additionally, more flexible rules would allow for the use of evidence collected during war. Rules governing the gathering of evidence for use in trial courts in the United States do not necessarily apply to evidence gathered on the battlefield.

Lastly, Mr. Chairman, I would like to point out that defendants brought to trial before a military commission would still have access to review by way of habeas corpus. President Bush, in issuing this order, does not intend to convene commissions that render unfair judgments. On the contrary, the order specified that a "full and fair" trial must be given. If used fairly, military commissions will be constitutional, lawful, and effective tools in the war against terror. It is in fact a testament to our sense of fairness that we are providing trials for an enemy that has a sworn duty to destroy the American way of life.

I want to thank our second panel. I saw that all of you were here earlier and appreciate your patients. We are going to call the witnesses. I will introduce each one, but just to inform you folks, it is going to be Terwilliger, Tribe, Nardotti, Sunstein and Lynch, in that order.

So first let me call on George Terwilliger, III. He is a partner

with the Washington law firm of White and Case, did his undergraduate work at Seton Hall University and graduated from the Antioch School of Law. Prior to his tenure at White and Case, he was the Deputy Attorney General at the Justice Department from 1991 to 1992. In the first Bush Administration he also served as a Federal prosecutor for over 10 years. As a private practitioner, he has represented the interests of major clients in civil and criminal proceedings.

Gentlemen, we are going to try to keep your testimony to the 5 minutes because many of us, there are going to be a lot of ques-

tions and we have to break by 1 o'clock. So if you could indulge us with that, we would appreciate it.

Mr. TERWILLIGER.

STATEMENT OF GEORGE J. TERWILLIGER III, PARTNER, WHITE AND CASE, WASHINGTON, D.C., AND FORMER DEPUTY ATTORNEY GENERAL

Mr. TERWILLIGER. Thank you, Mr. Chairman, Senator Hatch, members of the Committee. I thank you for asking me to join your discussion of the issues of law and policy concerning the extraordinary crisis that is before the nation today.

I too am a strong believer in the value of responsible congressional oversight, and that necessarily involves being properly informed, and I am honored that you have asked me to try to assist the Committee today.

I appreciate the introduction, Mr. Chairman. I will skip my background, except to say that during my government service I was involved in investigating or prosecuting several terrorism cases and I supervised the conduct of others, working very closely with the FBI and other law enforcement and intelligence agencies both here and in foreign countries. During the Persian Gulf crisis I had the lead responsibility for the Justice Department's counter-terrorism program and represented the Department at the National Security Council.

Since leaving government service in 1993 I have participated in a number of symposia and national security exercises related to terrorism. Most recently I participated in the mock role of the Attorney General in the Dark Winter Bioterrorism exercise at Andrews Air Force Base. In that exercise, our mock National Security Council, under the leadership of former Senator Sam Nunn, had a sobering experience dealing with what is now a not-so-futuristic outbreak of smallpox due to a bioterrorism incident.

As a result of my work in both criminal justice and intelligence matters over the years, I offer one simple conclusion for your consideration. The most sound viable defense against terrorism is the collection and analysis of intelligence sufficient to ensure the preemption of terrorist activities. We simply cannot lock down the country so as to secure it from terrorism without inflicting unacceptable levels of harm to individual liberties and to the stream of commerce. To be sure, there are many other aspects of a comprehensive counter-terrorism program, including immigration enforcement as well as criminal investigations and prosecution. Prosecutors and investigators in Washington, New York and elsewhere have done an outstanding job of investigating and prosecuting terrorism cases. However, we are now in a state of war. This is not just another criminal case to be investigated. In this war, a rigorous intelligence program will permit us to triumph by identifying whom and what groups represent danger. All of the intelligence needed to assess their vulnerabilities and undertake preemptive acts cannot, and very well should not, be obtained solely through the criminal justice system,. In fact it would be a mistake in my judgment to provide law enforcement generally with the broad powers that may be necessary to the more specific and limited counter-terrorism intelligence mission. Requiring that all terrorists be tried

in the criminal justice system with its expansive rights providing defendants information from the government's investigative files, is counterintuitive because it may compromise the long-term intelligence goals necessary to preempt terrorist violence.

Because of the importance and value of intelligence to victory, we must utilize all lawful means to promote its collection, preservation, analysis and appropriate sharing. For example, the use of military tribunals to adjudicate the responsibility of unlawful belligerants for so-called war crimes is an exercise of constitutional authority clearly supported by Supreme Court precedent, and deeply rooted in the law of civilized nations. How and when such tribunals are best used is a decision for the Executive as Commander-in–Chief and as part of directing the military campaign of national defense.

Using military tribunals to adjudicate individual responsibility for acts of war against our civilian population is an important option. These lawful procedures may be critical to the government in both providing a fair adjudication and protecting the sensitive sources and methods by which relevant evidence to be presented in the tribunal proceedings is obtained. That, in turn, can preserve our ability to collect and use the intelligence necessary to win the war. For this reason, as well as several others, the President's carefully drawn Order providing the option to use such tribunals, is a wise choice.

The use of tribunals characterized by fair and reasonable procedures is consistent with our national commitment to the rule of law. Concerns that military tribunals somehow take away civil liberties or bypass the civil justice system are unfounded. One can understand that some, perhaps not having fully considered the lawful authority for the use of these tribunals, might initially harbor such concerns. This is understandable, given that a state of war is itself an unusual circumstance, and that we have not before faced a foreign threat of the magnitude and nature on our home soil that we do now. On reflection, I hope that responsible analysis will lead to an understanding that responsibility for war crimes is not a matter of civil justice, that military tribunals have been lawfully and successfully used throughout history, that tribunals can indeed be fair, and that preservation of sources and methods by which information, including evidence of responsibility for war crimes is obtained, is vital to victory.

The key consideration here is the use of existing lawful authority to good effect. Lawful procedures are meant to be used, and used aggressively in times of peril. Today we face the presence of infiltrators in our midst who are prepared to kill and destroy indiscriminately, even at the cost of their own lives. That is a harsh and ugly reality. Dealing with that reality is not an option. It is the responsibility of government to provide for the national defense by determining who embodies this threat and capability and rooting them out. The survival of the freedoms we cherish, for which many prior generations have paid dearly in blood, depends on our success. Truly, the greatest threat to our civil liberties is failure in the mission to secure America from terrorist violence.

Mr. Chairman, I would ask to submit the balance of my statement that I have given to the Committee in writing for the record. Thank you.

Senator SCHUMER. Without objection it will be so submitted.

[The prepared statement of Mr. Terwilliger follows:]

STATEMENT OF GEORGE J. TERWILLIGER III, PARTNER, WHITE AND CASE, WASHINGTON, D.C., AND FORMER DEPUTY ATTORNEY GENERAL

Mr. Chairman, Senator Hatch and members of the Committee. Thank you for asking me to join your discussion of issues of law and policy concerning the extraordinary crisis before the Nation today. I am a strong believer in the value of responsible congressional oversight of the Executive Branch. Oversight necessarily involves being properly informed, and I am honored to try to assist the Committee today.

I am currently a partner in the Washington, D.C. office of White & Case, an international law firm. Because I represent corporations and other institutions that face government inquiries, I see the exercise of significant government powers daily. Previously, I was privileged to serve in the Justice Department for fifteen years, including as the Deputy Attorney General of the United States in the Administration of President George Herbert Walker Bush and as United States Attorney in Vermont appointed by President Reagan. For eight years prior to that I was an Assistant United States Attorney both here in Washington and in Vermont. During my government service I investigated or prosecuted several terrorism cases and supervised the conduct of others. I worked very closely with the FBI and other law enforcement and intelligence agencies, both here and in foreign countries. During the Persian Gulf crisis, I had

lead responsibility for the Justice Department's counter-terrorism program and represented the Department at the National Security Council counter-terrorism inter-agency working group.

Since leaving government service in 1993, I have participated in a number of symposia and national security exercises related to terrorism. Most recently, I participated in the mock role of the Attorney General in "The Dark Winter" bio-terrorism exercise at Andrews Air Force base. In that exercise, our mock National Security Council, under the leadership of former Senator Sam Nunn, had a sobering experience dealing with a now not so futuristic outbreak of smallpox.

As a result of work in both criminal justice and intelligence matters over the years, I offer one, simple conclusion for your consideration:

The most sound, viable defense against terrorism is the collection and analysis of intelligence sufficient to ensure the preemption of terrorist activities.

We cannot "lock down" the country so as to secure it from terrorism without inflicting unacceptable harm to individual liberties and the stream of commerce. To be sure, there are many other aspects of a comprehensive counter-terrorism program. These include immigration enforcement, as well as criminal investigations and prosecution. Prosecutors and investigators in Washington, New York and elsewhere have done an outstanding job investigating and prosecuting terrorism cases. However, we are now in a state of war. This is not just another criminal case to be investigated. In this war, a rigorous intelligence program will permit us to triumph by identifying whom and what groups represent danger. All the intelligence needed to assess their vulnerabilities and undertake preemptive acts cannot, and very well should not, be obtained solely through the criminal justice system. In fact, it would be a mistake, in my judgment, to provide law enforcement generally with the broad powers that may be necessary to the more specific and limited counter-terrorism intelligence mission. Requiring that all terrorists be tried in the criminal justice system, with its expansive rights providing defendants information from the government's investigative files, is counter-intuitive because it may compromise the long-term intelligence goals necessary to preempt terrorist violence.

Because of the importance and value of intelligence to victory, we must utilize all lawful means to promote its collection, preservation, analysis and appropriate sharing. For example, the use of military tribunals to adjudicate the responsibility of "unlawful belligerents" for so-called "war crimes" is an exercise of constitutional authority, clearly supported by Supreme Court precedent and deeply rooted in the law of civilized nations. How and when such tribunals are best used is a decision for the Executive as Commander in Chief and part of directing the military campaign of national defense.

Using military tribunals to adjudicate individual responsibility for acts of war against our civilian population is an important option. These lawful procedures may be critical to the government in both providing a fair adjudication and protecting

the sensitive sources and methods by which relevant evidence to be presented in the tribunal proceedings is obtained. That, in turn, can preserve our ability to collect and use the intelligence necessary to win the war. For this reason, as well as several others, the President's carefully drawn Order providing the option to use such tribunals is a wise choice.

The use of tribunals characterized by fair and reasonable procedures is consistent with our national commitment to the rule of law. Concerns that military tribunals somehow take away civil liberties or bypass the civil justice system are unfounded. One can understand that some, perhaps not having fully considered the lawful authority for the use of tribunals, might initially harbor such concerns. This is understandable, given that the state of war is itself an unusual circumstance, and that we have not before faced a foreign threat of this magnitude and nature on . our home soil. On reflection, though, I hope that responsible analysis will lead to an understanding that:

Responsibility for war crimes is not a matter of civil justice;
Military tribunals have been lawfully and successfully used throughout our history;
Tribunals can be fair; and
Preservation of sources and methods by which information, including evidence of responsibility for war crimes, is obtained is vital to victory;

Until we can establish the intelligence necessary to preempt terrorism reliably, we need to use all lawful means to prevent further acts of terrorist violence. This violence has the real and apparent present ability to kill thousands of innocent men, woman and children here in the United States. It is apparent that, in the judgment of those with awesome responsibility to prevent such attacks now, aggressive enforcement of immigration and other laws is necessary. In deference to their judgment, I support that vigorous enforcement. Simply because there is the danger of abuse, we should not assume that abuse is occurring. Rather, common sense suggests that we should presume good faith unless and until circumstances indicate otherwise. If the prevention mission and renewed vigor in intelligence gathering renders it appropriate, in the judgment of responsible officials, to seek interviews with 5,000 people, then I support that too. These are not easy judgments and I respect the burden, responsibility and accountability that attends to making them.

The key consideration here is the use of existing lawful authority to good effect. Lawful procedures are meant to be used-and used aggressively in times of peril. Today we face the presence of infiltrators in our midst who are prepared to kill and destroy indiscriminately, even at the cost of their own lives. That is a harsh and ugly reality. Dealing with this is not an option. It is the responsibility of government to provide for the national defense by determining who embodies this threat and capability, and rooting them out. The survival of the freedoms we cherish, for which many prior generations have paid dearly in blood, depends on our success. Truly, the greatest threat to our civil liberties is failure in the mission to secure America from terrorist violence. Thank you.

Senator SCHUMER. Our next witness is Professor Laurence Tribe. He is the Ralph S. Tyler, Jr. Professor of Constitutional Law at Harvard Law School. He graduated from Harvard College, Harvard Law School, holds many honorary degrees. Before joining the Harvard faculty in 1968 he clerked for Justice Matthew Tobriner at the California Supreme Court and for Supreme Court Justice Potter Stewart. Professor Tribe has published several books and numerous articles, and he has been the lead counsel in over 30 Supreme Court cases.

Thank you for being here, Professor Tribe. Your entire statement will be read into the record.

STATEMENT OF LAURENCE H. TRIBE, TYLER PROFESSOR OF CONSTITUTIONAL LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Mr. TRIBE. Thank you. And it is certainly an honor to be here on a very important occasion.

I want to say just at the outset that there are a great many things that have been said by Mr. Terwilliger and by Ambassador

Prosper that I think no one could disagree with. I certainly agree that al Qaeda is waging an unlawful war and a monstrous one at that, that we do not need to bring Mr. bin Laden or other al Qaeda leaders to the United States for trial. I agree that we need not rely on international tribunals. They are time consuming. It is extraordinarily difficult to put them together. I agree that military commissions are well founded in our history, and that they do not, per se, violate the Constitution. I agree indeed that whatever you call them, whether military commissions or tribunals, it is not even necessary under the Constitution that they necessarily follow all of the rules of evidence that are followed including the jot and tittle of the hearsay rule in the courts martial. I think Ambassador Prosper was eloquent at explaining why in a wartime situation, when the entire world is a theater of war and a crime scene, it would be ludicrous to demand exactly the same kind of evidence. I also agree that circumstances involved in these trials may require extraordinary measures to protect the anonymity of the jurors if there are to be jurors, that is extraordinarily hard to do. Sequestering them, I think as Senator Hatch points out, is not a solution. There they are, in some hotel, which then might get blown up. Following them home, which is what some of these terrorists would do, would take care of the problem from their point of view, but not unfortunately from that of the jurors. So I think you would have to be kind of pigheaded not to recognize that insisting on the ordinary rules, doing business as usual always in the civil courts or those like it, indeed always just like courts martial, would be too much. I agree with all of that.

I agree indeed that military commissions need not be held in secret, and I do not think that the President's Order need be read to require secrecy, although I think a little bit of creative reading is required to tailor it down the way it has been tailored down to say that closure will occur only for very limited and important purposes. I would love to see it whittled down that way by Congress if not by the Executive Branch.

I am not sure I agree with the statement of Ambassador Prosper that military commissions need not be under command influence. I would like to believe that, but I do not know that the whole world will. And I know one thing for sure, the appeal process provided in Section 4(c)(8) of this order is totally under command influence. It is an appeal to the Secretary of Defense if the President wants to let Donald Rumsfeld in on it, but otherwise the President and the President alone decides what conviction will be upheld and what sentence will be upheld. So one thing I think that ought to be done is a provision by Congress to insist on at least a limited appeal to the Court of Military Justice or to some other independent body that would mirror certiorari review in the U.S. Supreme Court.

I also think that Senator Specter's concern about the preclusive effect of the section that says "no judicial review" would be a practical concern if the White House counsel had not stated that he does not read it that way because in the *Quirin* case the U.S. Supreme Court, dealing with identical language from FDR, in effect ignored it and allowed habeas review. I wish the Orwellian technique, however, of saying one thing and meaning another were not

so common in Washington, and I do not think it is monopolized by any party or by any branch of the government.

I begin to seriously disagree on just two points. The first proposition is that these military commissions are now amply authorized and that you do not need anything more from Congress. I think Senator Durbin was right in pointing out that the joint force authorization resolution authorized the use of force for terrorist groups and terrorist activities directly linked to September 11. The President's Order manifestly goes beyond that. I think the Congress should authorize going beyond that.

Secondly, I think one cannot find in the language of 10 U.S. Code Sections 821 and 836, in the Uniform Code of Military Justice, direct authorization for military commissions. What that really does say is that the rules for courts martial do not preempt the possible use of military commissions and that they give the President the power, when military commissions are authorized, to promulgate rules. But the question is: are they really authorized?

Now, one point of view, Senator Hatch expressed it as ably as anyone could, is that the President in his Commander-in–Chief power can do it, even without congressional authorization. That is a question the Supreme Court deliberately left open in *Ex Parte Quirin* in 1942. It remains open. I would rather not see a cloud hang over convictions and sentences entered by these military commissions because of a question left open by the Supreme Court. I would rather see direct authorization of a limited use of military commissions with protections by habeas.

The other point that I do not really agree with is that the President's Order is not really an order. It is again not what it says it is. It is merely an announcement that we are going to cook up something in the Department of Defense. It reminds me of something that—when I was a kid—my mother used to say, "Worry now, letter to follow." Although we are now told in this Order that something may be cooking, we'll see what it is later. But the fact is, that this is an Order. It makes findings. Section 3 says, "Any individual subject to this Order shall be detained", shall be tried in certain ways. So I do not think it is an answer to say that we do not know all the details. We do know now that there is an Order broader than the joint authorization by Congress, an Order that has a cloud over it because I think such military commissions need congressional authorization, or at least that is an open question. And I think the open questions are questions that should be resolved not unilaterally by the Executive Branch but by a collaborative process in which this branch owns up to its important responsibility. The President, as Commander-in–Chief—and thank goodness this is so—has a single-minded desire to pursue certain goals here. We all share those goals in a broad way. But Congress alone can look over the landscape at all of the separate pieces of what the Attorney General is putting in place, and can put some reasonable curbs on it and a solid platform beneath it. Thank you.

[The prepared statement of Mr. Tribe follows:]

STATEMENT OF PROFESSOR LAURENCE TRIBE, TYLER PROFESSOR OF CONSTITUTIONAL LAW, HARVARD LAW SCHOOL

Mr. Chairman, Members of the Committee:

I am honored by the Committee's request that I testify at this very important hearing on the role Congress can and should play in our shared national effort to defeat global terrorism without inadvertently succumbing to our own reign of terror.

Although many of our constitutional freedoms would be rendered meaningless without freedom from terrorist attack, they may be equally threatened by undue governmental limitations and intrusions imposed in the elusive pursuit of national security. The choice we face is not that of liberty versus security. Our challenge is to secure the liberties of all against the threats emanating from all sources—the tyranny and terror of oppressive government no less than the tyranny of terrorism.

In the days following September 11, our journalists, academics, and citizens wondered whether our government and our courts would have the wisdom and courage to avoid the terrible mistake they made in ordering and ratifying the detention of over 70,000 Japanese Americans in internment camps during the Second World War.[1] Liberty from overreaching governmental power was central to the freedoms identified by President Bush in his address to Congress on September 20 as the very target of the terrorist attack.[2] I share with the President the belief that civil liberty includes liberty from terrorism. I hope we share the belief that the war against terrorism does not require us to sacrifice constitutional principles on the altar of public safety, We know what is the result of that sacrifice—in *Korematsu* v. *United States*, 323 U.S. 214 (1944), the Supreme Court permitted the government to intern American citizens purely on the basis of their ancestry in the name of national security. But liberty, properly understood, requires both protection from government and protection by government.[3] We must not permit ourselves to repeat the same mistake and, by pitting liberty against security, erase our freedom and equality in security's name. We are at the "Korematsu" crossroads. Congress can determine which path we take. And Congress has a special responsibility to act. No other branch of government can be relied on to perform that task as well. Congress alone can see the problem whole; courts necessarily see but one case at a time and in wartime tend to defer to the executive's greater knowledge and expertise,[4] and the executive tends to be blinded by the single-minded requirements of the military mission.

The real problem is not how much liberty to sacrifice to buy security; it is how properly to achieve freedom from the terrorism of all fanatics, foreign or domestic, who would challenge the living fabric of our society, including the constitutional compact that unites and gives it purpose. Fanatics have attacked the Pentagon and the Federal Building in Oklahoma and have toppled the towers of the World Trade Center, massacring thousands of innocent people. We must not allow them to tear down as well the structure of government, constituted by the separation of powers, that makes our legal and political system—and the liberties it embodies and protects—altogether unique. Our response to each threat must remain the same: a steadfast refusal to succumb to any attempt to force upon us a will, and a way of life, that offend the freedoms at our country's core. These freedoms, embodied in our Constitution, are our security against the fanatics' new tyranny of terror. To assert them here is to win at home the war we are waging so effectively abroad.

In the wake of the terrorist attack on the United States, the President has acted to ensure that the perpetrators of this crime against humanity are brought to justice—or, as he promised in his address to Congress, to bring justice to the terrorists. The terms of the November 13 Military Order represent the most dramatic Presidential step thus far in our effort to elaborate just what the content of this American justice is to be. The ostensible goal of the military tribunals to be instituted pursuant to that Order is to permit a "full and fair trial," § 4(c)(2), while at the same time ensuring that the process is as expeditious and secure as possible. The need to provide sooner rather than later for the detention and trial of those responsible for the terrorist attacks of September 11 is apparent from the rapid pace of our,

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[1] *See, e.g.*, David J. Garrow, *Aftermath: The Rule of Fear; Another Lesson From World War II Internments*, N.Y. Times, Sept. 23, 2001 § 4 at 6.

[2] "They hate our freedoms: Our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other. . . .These terrorists kill not merely to end lives but to disrupt and end a way of life. With every atrocity, they hope that America grows fearful." *Text of President Bush's Sept. 20 Speech As Prepared For Delivery to Congress*, U.S. Newswire, September 20, 2001.

[3] The current Supreme Court has been more reluctant than some believe is appropriate to hold government responsible for private violence—even violence that it easily have prevent. *See e.g., DeShaney* v. *Winnebago Cty*, 489 US 189 (1989). Ironically, it may be only an affirmative vision of government, capable of helping people attain decent levels of education, health, nutrition, shelter, and physical security in far-flung areas of the globe, that can do much in the long run to change the conditions in which fanaticism finds fertile breeding grounds.

[4] I develop these points in an article published in the current issue of *The New Republic* (Dec. 10, 2001), "Trial by Fury," at pp. 18–19.

and our allies', military victories in Afghanistan. To Congress falls the task of charting our next steps by giving content to a vision of justice that responds fairly yet firmly to the fanatics' threat to our nation.

Congress alone can avoid the constitutional infirmities that plague the Military Tribunal Order of November 13 and must do so not only to protect the constitutional rights of those threatened by that Order but also to shield any resulting convictions from judicial reversal on appeal—convictions which could properly be obtained by military tribunals constituted under a more narrowly drawn congressional statute.

As of two days ago, Secretary of Defense Rumsfeld had wisely sought to describe the Military Order issued by President Bush on November 13 as a blueprint made public, "so that. . .work could begin" designing the military tribunals and settling their jurisdiction and procedures. He insisted that the Order was announced simply because, in his words, "It may be that we will need that option" (NBC, "Meet the Press," Dec. 2, 2001). This is not, however, a blueprint that the United States Government is free to follow. The structure of executive power instituted by the November 13 Order is so constitutionally flawed at its base that it cannot be saved by nimble TV spin or by altering a detail here and a detail there.

As promulgated, the Military Order, by its express terms, is a direct threat to some 20 million lawful resident aliens in the United States. Almost any act by a resident alien, anywhere, could in some circumstances lead the President to believe the alien has or had some form of involvement with a terrorist organization.[5] The resident alien need not even know that he was involved with terrorists. All that is required is "aid[ing] or abet[ing]" terrorists "or acts in preparation [ ]for" terrorism. Hiring a car for a friend could be a terrorist act subject to trial by military tribunal, if it turned out that your friend is—or was—a terrorist. How many contributors to the African National Congress who supported sanctions against South Africa under apartheid in the face of government opposition "ha[d] as their aim to cause[ ] injury or adverse effects on. . .United States. . .foreign policy. . ."? § 2(a)(1)(ii). How many supporters of Irish nationalism contributed, for reasons of political conscience, funds that "aided or abetted" the Irish Republican Army before it began disarming on September 11?[6] The Military Order decrees that any such supporter might at any moment be turned over to the Defense Department for trial by a military tribunal on the mere stroke of the President's pen certifying that the President had "reason to believe" that the named individual was, or at one time had been, helping or harboring some organization that the President saw fit to regard as an example of "international terrorism."

Of course, as Secretary Rumsfeld must have recognized, any such threat, made in a manner that necessarily hangs like a Sword of Damocles over millions of lawful residents of this nation, cannot possibly be defended under our Constitution.[7] As Justice Marshall once wisely observed, such a sword does its work by the mere fact that it "hangs—not that it drops." *Arnett* v. *Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting). The Secretary's attempt to wish the sword away—to persuade us all that, until we feel the edge of its blade upon our necks, we need not worry—

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[5] It is, for example, difficult to know exactly what sort of act "threatens" an "injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy." § 2(a)(1)(ii). Almost any offense involving money, from counterfeiting currency to holding up a bank at gunpoint, to threatening to blow the bank up, could come under this description.

[6] Would the Senate itself be culpable for having "knowingly harbored" Gerry Adams? § 2(a)(1)(ii).

[7] The order as promulgated on November 13 stands utterly unprecedented in American history and is quite impossible to justify in constitutional terms. Unlike, for example, President Lincoln's use of military tribunals to supplant the civil courts, pursuant to congressional legislation enacted right after the South tried to secede from the Union, *see Duncan* v. *Kahanamoku*, 327 U.S. 304, 323 (1946), and President Roosevelt's use of military tribunals to try and execute the Nazi saboteurs who donned civilian garb to blend with the American populace they sought to injure, *Ex parte Quirin*, 317 U.S. 1, 25–27, 29, 35, 42 (1942) (underscoring the formal declaration of war that had triggered prior statutory authorization of precisely such military tribunals in wartime and leaving open the question of presidential power to create such commissions without leave of Congress, the Military Order lacks (thus far at least) any congressional authorization. Certainly, it cannot be justified by Congress's September 18 Use of Force Resolution., Pub. L. No. 107–40, 115 Stat. 224. That resolution authorized "the President. . . .to use all necessary and appropriate force against those . . .he determines planned, authorized, committed, or aided" entities that perpetrated the atrocities of "September 11, 2001" "or harbored" those who had done so. Nothing in the Resolution authorized creating any system whatsoever of anti-terrorist tribunals, a quintessentially legislative act. Moreover, it authorized nothing beyond "use of force" in pursuing and subduing those responsible for the September 11 attacks to prevent future acts of international terrorism by them against the U.S. Yet the Military Order extends to all groups that have "engaged in, aided or abetted, or conspired to commit, acts of international terrorism," § (a)(1)(ii), including many groups doubtless uninvolved in the September 11 attack even by the most capacious definition of involvement.

is no substitute for replacing that sword with a solid framework for the judicious use of executive force in bringing justice to the terrorists.

The next steps are for Congress to take—not in the direction of so flawed a blueprint, but towards a constitutionally sound regime that will withstand judicial review—if it hopes to obtain *swiftly and to defend from embarrassing judicial invalidation*, convictions by military tribunal of the leaders of Al Qaeda, or indeed of anyone else. For it is not within our government's power simply to threaten to detain and commit to a military tribunal or commission anyone who associates with agents of terror. After all, even today's hardly "liberal" Supreme Court not long ago held that the City of Chicago's response to terror gangs[8]—enacting legislation that threatened to arrest and prosecute anyone who, loitering near a known gang member, did not disperse upon police command—was flatly unconstitutional in essentially delegating to those who enforce the law the vaguely bounded power to make it on the spot. *City of Chicago* v. *Morales*, 527 U.S. 41, 62–63 (1999).

The November 13 Military Tribunal Order is the same sort of response and has the same kind of infirmity. Like terrorism itself even though far less violently, a threat of arrest and possible conviction, even in our fully protective civil courts, for offenses not clearly defined in advance but to be defined by the executive as events unfold, instills fear far beyond the ground zero of its actual implementation. The Supreme Court in *Morales* recognized as much by striking down on its face the ordinance that announced that threat and refusing to wait until particular individuals were convicted or even charged. *Id.* at 55. The judicial response to the November 13 Order, despite Bush administration efforts to describe it as more like a mere press release, than a real order, could be even harsher. For at least the Chicago threat carried with it the assurance that nobody would be arrested pursuant to its terms without first receiving a clear and individualized warning—and that anyone could assuredly avoid arrest and prosecution simply by heeding that warning and dispersing when ordered to do so. The November 13 Order is a threat that carries no such corresponding assurance: all those subject to it are exposed to prosecution, conviction, and possible execution for conduct they may have engaged in years ago—and the Order suffers from the compounding vice that it violates the separation of powers required by our Constitution of the federal government (although not of states and municipalities) by proceeding without the congressional authorization clearly required for any creation of a system of trials, military or otherwise.[9] It installs the executive branch as lawgiver as well as law enforcer and law interpreter and applier,[10] leaving to the executive branch the specification, by rules promul-

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[8] Justice Thomas explicitly characterized the gangs as quasi-terrorists, describing them as "fill[ing] the daily lives of many of our poorest and most vulnerable citizens with. . .terror. . ., often relegating them to the status of prisoners in their own homes." *City of Chicago* v. *Morales*, 527 U.S. 41, 99 (1999) (dissenting opinion).

[9] The November 13 Military Order goes far beyond the use of force authorized by Congress, which declared that the September 11 attacks "pose[d] an unusual and extraordinary threat to the national security and foreign policy of the United States" and granted the President discretion to use "all necessary and appropriate force against" all entities—whether foreign or domestic—only so long as "he determines [that they] planned, authorized, committed, or aided the terrorist attacks that occurred on "*September 11, 2001*" (Emphasis added) and so long as he does no "in order to prevent future acts of international terrorism against the United States by such [entities]." Joint Resolution to Authorize the Use of United States Armed Forces Against Those Resolution"), Pub. L. No. 107–40, 115 Stat. 224 (Sept. 18, 2001). The President's Military Tribunal Order applies to a potentially unlimited class of individuals, completely at the discretion of the President. The White House Counsel inadvertently conceded almost as much when he wrote several day ago that, "[u]nder the order, the president will refer to military commissions only noncitizens who are members or active supporters of Al Qaeda *or other international terrorist organizations targeting the United States*." Alberto R. Gonzales, "Martial Justice, Full and Fair," *The New York TImes*, Nov. 30, 2001, § A at 27 (emphasis added); *see also* Military Order §2(a)(1)(ii) (referring anyone who has "engaged in. . .acts of international terrorism" to the military commissions).

Although the President acting in concert with Congress, has the power to create certain military tribunals, *Ex parte Milligan* 71, U.S. 2, 136 (1866), he does not posses an independent power to create a system of such tribunals on his own but may only "carry into effect all laws passed by Congress. . .defining and punishing offences against the law of nations, including those which pertain to the conduct of war." *Ex parte Quirin* 317 U.S. 1, 10 (1942). In *Ex parte Quirin*, mistakenly invoked by the White House as precedent, the military tribunal's jurisdiction was "explicitly provided" by Congress and was limited to "offenders or offenses against the law of war." *Id*. at 11; *see also In re Yamashita*, 327 U.S. 1, 16 (1946) ("Congress, in the exercise of its constitutional power to define and punish offenses against the law of nations, of which the law of war is a part, has recognized the 'military commission' appointed by military command, as it had previously existed in United States army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.").

[10] The Order confuses the role of legislator, *see* §§ 4(b) and 6(a) (power to promulgate "orders and regulations" necessary for commission); policeman, *see* § 3 (power to "detain[] at an appro-

gated as it goes along, of what might constitute "terrorism" or a "terrorist" group, what would amount to "aiding and abetting" or "harboring" such terrorism or such a group, and a host of other specifics left to the imagination of the fearful observer. This "blending of executive, legislative, and judicial powers in one person or even in one branch of the Government is ordinarily regarded as the very acme of absolutism." *Reid* v. *Covert*, 354 U.S. 2, 11 (1957); Federalist No. 47 (James Madison).

Several days before Secretary Rumsfeld's attempted recasting of the November 13 Order, White House Counsel Alberto Gonzales opined in the pages of *The New York Times* that the order would not reach any but "foreign enemy war criminals," Alberto R. Gonzales, "Martial Justice, Full and Fair," *The New York Times*, Nov. 30, 2001, § A at 27,[11] and that each military tribunal's proceedings, which the Order had said could be conducted in secret at the President's option, § 4(c)(4), would of course be conducted in the open with exceptions only for "the urgent needs of national security." It is, to be sure, nice to have White House Counsel's promise that this is so, but "trust me" has never been enough for the American people. Our whole constitutional tradition is predicated on the proposition that not even the best intentions of the most benevolent leaders can substitute for the positive legal protection and preservation of freedom. Ours is "a government of laws, not men."[12] It is offensive to our founding values to have the powers of drafting the laws, and then prosecuting and adjudicating violations of those laws, embodied in one agency—here, one man. "Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." *Reid* v. *Covert*, 354 U.S. 2, 38–39 (1957).[13]

It is just not good enough for the executive branch to put a benign spin on this Order and to assure the nation that it will not mean in practice what it says on its face. Yet this is precisely what Mr. Gonzales sought to do when he "explained" in *The New York Times* that the Military Order's explicit bar of any judicial relief whatsoever for any person detained and tried pursuant to it[14] would, of course, not mean what it said, inasmuch as the Supreme Court half a century ago had refused to take identical language at face value in its *Ex parte Quirin* decision condemning the Nazi submarine saboteurs to death—but only after according them a judicial hearing of sorts.[15] What seems essential is less spin and more action—here, concrete legislative action to build a sound but narrow legal platform on which to construct the military tribunals and conduct the military trials that the President believes may prove essential in extraordinary cases where our civil justice system may be insufficient to the task of coping with the terrorist threat that became manifest with the monstrous events of September 11. That legal platform must make clear

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priate location"); prosecutor, *see* §§ 2 ("I determine from time to time in writing" who is a terrorist subject to the commissions) and 4(c)(5) (Secretary of Defense "designate[s]" person to "conduct. . .prosecution"); judge *see* § 4(c)(2); and court of appeal, *see* § 4(c)(8) ("review and final decision by me or by the Secretary of Defense if so designated by me for that purpose"), concentrating all these powers in the executive branch. In fact, the President himself is empowered to take on both the role of prosecutor, in determining who is to be subject to the tribunal under § 2(a), and of ultimate court of appeal under § 4(c)(8).

[11] "[I]t does not cover United States citizens or enemy soldiers abiding by the laws of war. Under the order, the president will refer to military commissions only noncitizens who are members or active supporters of Al Qaeda or other international terrorist organizations targeting the United States." *Id*. It is true that the Order as written applies "only" (some "only"!) to "any individual who is not a United States citizen,"§ 2(a), but the *Quirin* decision upon which the administration rests so heavily precisely *refused* to distinguish between the rights of citizens and those of non-citizens in the context of unlawful belligerency. *Ex parte Quirin v,* 317 U.S. 1, 15 (1942). Thus, on its own announced theory, the government potentially possesses the power to refer *citizens* who engage in terrorist acts to the military commissions for "trial" and possible execution.

[12] Usually attributed to John Adams.

[13] In fact, the Supreme Court considered that "[n]o graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people" than whether a military "tribunal [had] the *legal* power and authority to try and punish [a] man" "arrested by the military power of the United States, Imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced. . .by a military commission, organized under the direction of the military commander." *Ex parte Milligan* 71 U.S. 2, 118–19 (1966). This is precisely the issue presented by the President's Military Order, which contemplates "det[ention] at an appropriate location designated by the Secretary of Defense," § 3(a), and "tri[al] by military commission. . .and. . .punishment in accordance with the penalties provided under applicable law, including life imprisonment or death." § 4(a).

[14] "(1) Military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal." § 7(b).

[15] *see* Alberto R. Gonzales, *supra* note 8. Cf. George Orwell, *19894* (1949).

that its scope cannot be extended (a) to American citizens; (b) to individuals linked, however closely, to acts of terror wholly unrelated to September 11 (unless Congress affirmatively and expressly chooses to add such acts, or the specific organizations responsible for them, to the list of targets it empowers the President to pursue and try militarily); to individuals not closely linked to a specific terrorist event whose responsible agents Congress has authorized the President to pursue by force and try by military tribunal; or to mere foot soldiers captured on the field of battle and entitled, under the Geneva Convention, to treatment as prisoners of war rather than as war criminals.

Substantive limits must be established by law to constrain on the President's power to determine which aliens are to be subjected to the jurisdiction of a military tribunal or commission, and procedural guidelines must be established to ensure that defendants' due process rights are protected by such commissions. Congress must set those limits and draft those guidelines, presumably in consultation with the President.

At the forefront of our new agenda abroad, at least so far, has been an effort to help establish transparent, accountable, and hopefully democratic institutions with which to govern Afghanistan. The policy appears to rest upon the belief that democracy is the best check on terrorist activity, which requires a culture of repressive intolerance in order to thrive. Yet that same accountability must prevail at home as well. We are in the end more, not less, secure when we practice the democracy at home that we preach abroad.

The Military Order confronts Congress with two distinct problems to resolve. The first is the set of substantive limitations to be placed on the jurisdiction afforded military tribunals: who is to be subject to the tribunals, and for what wrongs? The second is the set of procedures that is to govern these tribunals. We must ensure the open and fair hearings witnessed in "A Few Good Men," not the kangaroo court seen in "Paths of Glory." It is especially troubling that even our extant system of courts martial has been besmirched by careless comparison with the far less protective military tribunals that the order plainly contemplated. *See William Glaberson, "A Nation Challenged: the Law; Tribunal* v. *Court-Martial: Matter of Perception*," *The New York Times*, Dec. 2, 2001, § 1B at 6 ("the proposed tribunals are significantly different from courts-martial, [military] lawyers say, adding that confusion between the two has distorted the debate over the tribunals and unfairly denigrated military justice ").

JURISDICTION

1. As a preliminary matter, Congress should note that we already have a system of justice under which to try terrorists: we successfully tried in criminal court the last members of Al Qaeda who attempted to bomb the World Trade Center. In the rush to convict and punish the perpetrators of the attacks on the World Trade Center and the Pentagon, it would be a mistake, although not necessarily a violation of the Constitution, to rely on military courts as a substitute for the intelligence agencies' ability to track terrorists and accumulate convincing evidence of their activities. Using a court designed to convict even when a weak case has been presented by the government—using it, in fact, to cover the failures of the executive—is hardly the way to fight terrorism in the long run.

Indeed, the entire plea for secrecy and anonymity—from concealing from the accused and/or the public the identity and nature of the witnesses and other sources behind the government's case, to keeping confidential the methods of investigation employed by the government to track down and identify the accused, to hiding the identity of jurors and judges who might reasonably fear reprisal from an accused terrorist's associates in terror who are still at large—can so easily become a cover, whether deliberate or not, for ineptly unreliable or otherwise unconscionable behavior by the executive, that it would seem wise for Congress to institute some sort of independent check on the President's assertion that the presumptively open and public civil trial system, which has had to cope often with needs for witness protection and informer anonymity and the like, is intrinsically ill-adapted to the task at hand.

Congress's goal should therefore be to channel as many suspected terrorists as feasible away from, rather than towards, military tribunals. Among the reasons justifying a military tribunal will of course be considerations of national security that may require closed proceedings to protect classified information from dissemination; concerns of overwhelming danger to the court, to jurors, or to witnesses that might require secure proceedings of a sort precluded even by the usual methods of witness or court protection; or circumstances surrounding the accused's capture while pros-

ecuting a military action on behalf of an enemy nation or group in a manner that allegedly violates the laws of war.

2. Although much of the current debate proceeds on the premise that these two should be treated differently, where these reasons are present there seems little principled basis to distinguish between an unlawful belligerent who is a resident alien, blending in with and hiding among the United States population, and one who is a non-resident alien, openly engaging in warfare on United States civilians from beyond our borders. Indeed, the reasons for favoring military tribunals do not appear to distinguish between citizens and non-citizens. As the Court held in *Ex parte Quirin*, 317 U.S. 1 (1942), when a citizen disavows his homeland and sides with the enemy, he may become an enemy belligerent. *See Id.*, 317 U.S. at 16 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war"). Indeed, being a traitor as well as an unlawful belligerent, the citizen who wages such warfare on his homeland may well be regarded as more culpable than the alien, not less.[16]

In sum, it seems wisest in practice to limit military tribunals—as the Bush Administration has all but promised it would likely do in practice—to a relatively small group of enemy alien leaders, captured abroad, of terrorist groups clearly identified by Congress, and an even smaller group of their colleagues who are reasonably believed to have played similar roles while concealed among our people. In theory, however, the two criteria essential to establishing military, as opposed to civilian, jurisdiction should not rest upon any such difference in status.

The first is that the person to be tried by a military tribunal or commission must be an enemy, see *Johnson* v. *Eisentrager*, 339 U.S. 763, 776 (1950)—that is, someone acting at the behest of a nation or other entity warring against the United States; the second is that the enemy must be charged with unlawful belligerency, or any other established offense against the laws of war, sufficiently serious to warrant such disfavored treatment. See *Ex parte Quirin*, 317 U.S. at 11.

Strikingly, the November 13 Military Tribunal Order extends the range of offenses that it subjects to military tribunals so as to include "any and all offenses triable by military commission," § 4(a), not just those that offend the laws of war, based, evidently, upon an unexplained finding that "prevention of terrorists attacks" requires the detention for, and trial by, military commissions not only "for violations of the laws of war" but also for "violations of. . .*other applicable laws*," of all "individuals subject to this order," § 1(e) (emphasis added). The law is settled, however, that an alien may be subjected to trial by a military tribunal only if he meets both of the criteria set forth above. *See Yamashita*, 327 U.S. at 26. Even though military rule is "properly applied. . .on the theater of active military operations, where war really prevails," *Milligan*, 71 U.S. at 127, trying a captured soldier as a criminal for merely fighting in accord with the laws of war on behalf of the nation or other entity he represents appears to be universally condemned. Under the Geneva Convention and other international instruments, such soldiers must be held as prisoners of war, to be repatriated at the war's conclusion. This could pose a problem in a case such as that of Taliban foot-soldiers, captured while engaged in combat against the Northern Alliance, whom our military leaders suspect of harboring, or working in close concert with, Al Qaeda. Unless such combatants happen to be among Al Qaeda's leadership, they are most unlikely to have been sufficiently responsible for that group's terrorist acts to count as war criminals, but viewing them as entitled to treatment as prisoners of war would seem to require their repatriation in the eventually reconstituted Afghanistan, to Saudi Arabia, to Pakistan, or to their mother country whatever it might be—none of which nations might be willing to welcome them. Even though the indefinite and potentially permanent detention of deportable aliens residing in the United States may well be unconstitutional even if no other nation will accept them, *see Zadvydas* v. *Davis*, 121 S. Ct. 2491, 2500–02 (2001), that protection does not seem to extend to "aliens outside our geographic borders," *Id.* at 2500 (and cases cited therein), much less to enemy aliens outside those borders, so it may well be that, since international law could hardly require the admission of such captured enemies into the United States, there is no alter-

[16] Congress is, however, free to exempt United States citizens from trial by tribunal altogether: "[O]ur law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens, nor between aliens of friendly and of enemy allegiance, nor between resident enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments". *Johnson* v. *Eisentrager*, 339 U.S. 763, 769–770 (1950).

native to their indefinite detention by the United States, at a suitable place outside our borders, unless and until their repatriation becomes possible.[17]

3. To enforce this basic jurisdictional boundary, Congress should provide for some form of tribunal—it need not be an Article III court in the first instance[18]—to review the President's threshold assertion of military jurisdiction, and should provide as well for some suitably expedited form of habeas corpus review in an Article III court if the initial review was by some lesser power. See, e.g., H.R. 3162 (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001) (signed into law October 26, 2001) § 412(b) (providing expedited habeas corpus review).[19]

4. In addition, of course, Congress would do well, acting under its Article I, § 8, ch. 10 power to "define and punish. . .offences against the law of nations," to define more precisely those violations of the laws or customs of war which the military tribunals may hear,[20] and to specify or otherwise monitor the penalties to be imposed. Punishments could perhaps be made proportionate to those meted out under the Federal Sentencing Guidelines.

PROCEDURE

5. Domestic law of course imposes due process safeguards on military tribunals of every possible form. Thus, in *Middendorf* v. *Henry*, 425 U.S. 25 (1976), the Court took note of the traditional categorization of courts martial (general, special, and summary—i.e., non-adversarial.), and required Fifth Amendment due process protections to be extended to a defendant even at the lowest (summary) of the three levels of court martial.[21] *Id.* at 43 ("plaintiffs, who have either been convicted or are due to appear before a summary court-martial, may be subjected to loss of liberty or property, and consequently are entitled to the due process of law guaranteed by the Fifth Amendment"). The two higher levels (general and special) are adversarial, and accordingly require heightened due process safeguards.

6. The court martial provisions of the Uniform Code of Military Justice (UCMJ) provide the minimum procedural safeguards required by military law, and may usefully be considered by Congress as setting a template against which to measure possible legislative proposals for creating new types of military tribunal.[22] "General

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[17] Nor is the prospect of trying terrorists in international tribunals a particularly promising one. As former Assistant Secretary of State Harold H. Koh recently observed, "As recent efforts to try international crimes in Cambodia and Sierra Leone show, building new tribunals from scratch is slow and expensive and requires arduous negotiations. Geopolitical concerns in this case would predominate, and the impartiality of the tribunal would inevitably be questions by some in the Muslim world. These tribunals are preferable only when there is no functioning court that could fairly and efficiently try the case, as was the situation in the former Yugoslavia and in Rwanda," *The New York Times*, November 23, 2001, Sec. A at 39 ("We Have the Right Courts for Bin Laden").

[18] This type of administrative solution parallels the manner in which the immigration statutes provide for determination of whether an alien fits a particular classification, while preserving habeas review of non-discretionary decisions for Article III courts.

[19] The provisions of the USA–PATRIOT Act also define, for purposes of that Act, what constitutes "engag[ing] in terrorist activity" and what organizations are terrorist. *See* §§ 411 (a)(1)(F) & (G). Congress should consider tightening those definitions, enacted there with great haste and vague enough to show the effects of the rush, as part of its determination of the categories of individuals who should be subject to trial by military tribunals.

[20] Under Article 3 of the International Tribunal for Yugoslavia, for example, the following acts would subject a terrorist to military jurisdiction:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.

[21] *General* courts martial require "a military judge and not less than five members" of the panel, and may impose capital sentences. 10 U.S.C. §§ 816, 818. *Special* courts martial require three panel members, and may not impose capital sentences. *Id.* at 816, 819. *Summary* courts martial require only one panel member, may impose only minimal sentences, and may be objected to by the accused, who may then received trial by either special or general court martial *Id.* at 816, 820.

[22] To suggest that such new tribunals should be less protective of the accused than are special and summary courts martial is to push the floor of protection quite low indeed. The dearth of procedural protections available at that floor is especially stark when compared with what is available in other jurisdictions. For instance, the Northern Ireland (Emergency Provisions) Act, 1996, permits trial of terrorists by a three-judge appellate tribunal, and specifies the full panoply of rights and procedures available. Of more immediate import are the procedures, including civilian appeal, available to United States military personnel in a court martial. *See* 10 U.S.C. 801 *et. seq*.

courts-martial. . .have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." 10 U.S.C. § 818. General courts-martial are, as noted, comprised of five judges. One of these must be a military judge—unless the defendant waives this requirement. 10 U.S.C. § 816. At least one trained lawyer sits on the court, 10 U.S.C. § 826, and, absent exigencies of war, the accused is entitled to counsel to defend him, § 827; to know the charges proffered against him, § 830; to be free from compulsory self-incrimination, § 831; and to conduct a limited investigation of the facts surrounding the charge, § 832.

7. A court martial also provides heightened protection for more serious charges. Section 852 of the UCMJ ensures that a defendant may be convicted of a crime punishable by death only where the commission's vote is unanimous. Any death sentence must be unanimous as well. While this would no doubt limit the number of death sentences that could be imposed—and the number of convictions that could be obtained in cases where that penalty was sought—if the military tribunals now being established were to follow the court martial model, the prosecution could keep the overall conviction rate from falling much by seeking a life sentence, and from falling at all by seeking a term of years less than life, which requires the same two-thirds vote that the November 13 Order would require. *See* § 4(c)(6).

8. Suggestions that military tribunals must, either as a matter of constitutional necessity or as a matter of sound international diplomacy, follow evidentiary rules and burden-of-proof rules fully as onerous to the prosecution, and protective of the accused, as apply in ordinary criminal trials and in courts martial, have much to commend them, but Congress may properly keep in mind that at least some of those rules are designed mostly to protect lay jurors from being unduly impressed by categories of evidence whose reliability those inexperienced in such matters may overestimate, or unduly swayed by emotional appeals for vengeance, and that the need for such rules may be correspondingly reduced when trained professionals are the finders of fact and law.

In addition, the classic requirement of proof beyond a reasonable doubt is chosen to reflect the old adage that it is better to free 100 guilty men than to imprison, much less execute, one innocent—a calculus that neither the Constitution, nor conventional morality, necessarily imposes on government when the 100 guilty who are freed belong to terrorist cells that slaughter innocent civilians, and may well have access to chemical, biological, or even nuclear weapons. Due process has been held, for example, to permit incarceration of potentially indefinite duration of those found, upon proof by less than the "beyond reasonable doubt" standard, to pose a grave danger to the safety of others. *See Addington* v. *Texas*, 441 U.S. 418, 424–29 (1979) ("clear and convincing" evidence standard held constitutional). To be sure, there is a very significant difference between involuntary civil commitment or quarantine of someone deemed dangerous to the public for reasons that entail no moral opprobrium and imprisonment or, most extreme of all, execution, of someone convicted as a war criminal. But in a legal universe where the option of permanent incarceration as a "probable once and future terrorist" is non-existent, to put decisive weight on the moral valence of the "war criminal" label may mean violating the maxim that our Constitution is not a suicide pact. For proof beyond a reasonable doubt—using those words in their criminal law sense and not with a wink—may be too much ever to expect in at least some categories of terrorism cases where intrinsic difficulties of gathering and presenting the needed evidence, particularly if the hearsay rule and other somewhat artificial obstacles are interposed, would predictably lead to the release of individuals likely to cause the avoidable loss of far more innocent life than would result from a somewhat softer standard of proof.

9. Congress should also ensure that an accuser not be given the final word as the court of last resort in the appeal of a conviction or sentence that the accuser obtained in his role as prosecutor or as the prosecutor's ultimate superior—a power currently granted the President by his Military Order. See § 4(c)(8) (trial record submitted for President's "review and final decision"). It has been an axiom of Anglo-American law for nearly four centuries that a "person cannot be judge in his own cause," *Dr. Bonham's Case*, 8 Co. 114a, 118a (1610), a principle applicable to appellate no less than trial judges. *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 821–25 (1986). The fact that no appeal at all is constitutionally mandated from a criminal conviction rendered by a civil court, *McKane* v. *Durston*, 153 U.S. 684 (1894), has never been taken to imply that an "appeal" to the chief prosecutor himself can satisfy due process where the judgment appealed from was rendered by a body "whose personnel are in. . .the executive chain of command," *Reid* v. *Covert*, 354 U.S. 2, 36 (1957), as is true of courts martial, *Id.*, and of any other military tribunal drawn exclusively from the President's military subordinates.

Unless Congress opts for the novel alternative of having one or more members of each military tribunal drawn from the Article III judiciary—as Congress did in setting up the U.S. Sentencing Commission, see *Mistretta* v. *United Sates*, 488 U.S. 361 (1989), and in creating the panel charged with the task of appointing the independent counsels, *see Morrison* v. *Olsen*, 487 U.S. 654 (1988)—it follows that Congress must probably guarantee an expedited appeal to some entity independent of the executive branch, such as the Court of Appeals for the Armed Forces. Ultimate discretionary review by the Supreme Court on writ of certioraris would be an optional feature in such an arrangement. Whatever system of appeals is provided, it seems plain that, if considerations of national security or witness protection so require, Congress could provide that any appeal to a body independent of the President be conducted as a closed proceeding, with the record of the appeal to be kept confidential.

10. Although the UCMJ provides a useful model, the power to set out procedures in the first instance might instead be delegated to the Department of Defense, provided that, within a specified time before such procedural regulations go into effect, they are reported to Congress. Such a mandatory waiting period would give Congress an opportunity to reject or amend the regulations by joint resolution (not, of course, by a mere concurrent resolution, or by a one-house resolution, both prohibited under *INS* v. *Chadha*, 462 U.S. 919, 952 (1983)). Indeed, if military commissions or tribunals outside the UCMJ framework are to be as rare an occurrence as the administration insists they are meant to be, Congress might simply decide to require such tribunals to be individually authorized by the President after a statutorily mandated consultation with congressional leadership to explain why existing institutions, including the Article III courts, are inherently insufficient in the circumstances. Such congressional oversight of the President's conduct of this war would draw in part, of course, on the War Powers Resolution of 1973, Pub. L. No. 93–148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541–1548 (2000)), as precedent—something to which the Bush administration, which invoked the War Powers Resolution as part of the foundation for the Use of Force Resolution that it proposed to, and obtained from, Congress on September 18, 2001, should have no objection. In any event, Congress would presumably want to require the President or his Secretary of Defense to submit regular periodical reports concerning the proceedings of the military tribunal, and the continued need for their existence.

OVERSIGHT

11. However, Congress could also ensure continued oversight of military tribunals in a variety of ways—for example, by controlling the manner in which the presiding officers are selected. It may require that presiding officers have certain minimum qualifications, and may permit civilians to serve. Alternatively, Congress may require the Secretary of Defense to submit a list of eligible candidates, from which Congress would select presiding officers to serve for a term of years. Congress could also establish procedures for the removal of such officers.

12. In addition, Congress should certainly provide for the "sun setting," or automatic expiration after a relatively few years (three or four would seem prudent), of whatever authorization it enacts for special military tribunals to deal with suspected terrorists, just as was done in the USA–PATRIOT Act, *see*, § 224, inasmuch as the war being waged against international terrorism, unlike a declared war against a sovereign nation, could go on indefinitely, with no plausible way of declaring it over at any given point.

CONCLUSION

13. Finally, it is worth noting that Congress occupies a privileged position not available to any court that may be asked to decide the constitutional issues arising from these tribunals. For Congress has before it questions concerning the prolonged and secret detention of aliens and the use of what appears to be a form of ethnic, or at least national-origin, profiling in the interrogation of immigrants; challenges to the conceded use of United States citizenship as a reward for providing information that might lead to the breakup of terrorist cells or the apprehension of terrorists; concerns going to possible abuses of prosecutorial discretion; issues regarding the alleged breach of the attorney-client privilege; worries triggered by Department of Justice indications that the FBI, now in a powerful new information-sharing arrangement with foreign intelligence agencies, may be on the verge of resuming practices, happily abandoned decades ago, involving keeping close tabs on, and even planting secret government informants in, political, religious, and civil rights-civil liberties groups; and, of course, all the fears and criticisms triggered by the November 13 Military Tribunal Order.

I believe Congress should seize this historic opportunity to investigate with care but with dispatch, and then to craft an integrated legislative package that protects individual freedoms while permitting, if truly necessary, a form of secure tribunal in which to try suspected war criminals who pose a particularly virulent threat. While I believe such tribunals may well be justifiable in extremely limited circumstances in which, among other things, the laws of war have been violated, we must be clear that facile distinctions between terrorists who kill our people with nefarious schemes incubated in caves located far across the seas, and those who do so by carefully hatching plots in the comfort of our cities, concealing themselves as civilians while they plan monstrous acts of mass murder, are worth very little in the larger scheme of things. Bin Laden, and the leader of the terrorist cell of aliens living in our midst after gaining lawful entry to this country who proceeded to turn our world upside down on September 11, are cut from the same cloth.

We must keep in mind, too, that the vast majority of individuals who may be subjected to scrutiny because of their previous affiliation with or support for terrorist organizations are guilty of at most run of the mill crimes, crimes properly punished in civilian court. We must not make martyrs out of petty criminals. Far better to show our foes that American justice will survive their assault than to sacrifice our core values through hasty overreaction.

This, then, is our *Korematsu*: the choices we face now—as then—are difficult ones. But I believe that Congress can rise to the occasion, resist the undue consolidation of power within the executive branch, and secure our freedom and our safety alike, requiring no more compromise of our liberty than is genuinely essential—and then only in ways that respect equality. These are the better angels of our nature to whom I bid Congress listen today.

Senator SCHUMER. Thank you, Professor Tribe, for excellent testimony.

Senator Hatch has to leave and wanted to make a final comment, so I am going to give him the prerogative of the ranking member and former chairman role.

Senator HATCH. Well, thank you, Mr. Chairman. I do have to leave, and I want to apologize to your other witnesses, because you are all important to me.

And I want to personally congratulate you, Professor Tribe. We have been together on a lot of occasions, on a lot of issues, and we have conflicted and we have been together as well. Much of what you have said I think is very profound and worthwhile for Congress to listen to.

Mr. TRIBE. Thank you.

Senator HATCH. And I just wanted to personally compliment you on your article in "The New Republic" as well as what you have said here today. I am not sure I agree with every point, but I—

Mr. TRIBE. I would worry if you did, Senator.

Senator HATCH. You should never say anything like that.

[Laughter.]

Mr. TRIBE. Well, I think we all have slightly different views.

Senator HATCH. That is right. I am just kidding. But much of what you have said has been very informative, as has Mr. Terwilliger's, and I am sure the rest as well. But it has also been helpful to the Committee, as you always have been. So I just wanted to tell you that.

And apologize to the rest of you, because I respect each and every one of you, and I apologize for having to leave. Thank you.

Senator SCHUMER. Thank you, Senator Hatch.

Our next witness is retired Major General Michael Nardotti. He graduated from West Point and from Fordham University School of Law, a native New Yorker as well. He is a decorated combat veteran. He served for over 28 years as a soldier and as a lawyer in the army. Most recently he served as the Judge Advocate General

from 1993 to 1997, and as the Assistant Judge Advocate General for Civil Law and Litigation from 1991 to 1993. Since 1997 he has been a partner with the D.C. law firm of Patton Boggs.

Thank you for being here, General Nardotti. Your entire statement will be read in the record.

STATEMENT OF MICHAEL J. NARDOTTI, JR., MAJOR GENERAL (RETIRED), FORMER ARMY JUDGE ADVOCATE GENERAL, AND PARTNER, PATTON BOGGS LLP, WASHINGTON, D.C.

General NARDOTTI. Thank you very much, Mr. Chairman, members of the Committee. Thank you for the opportunity to contribute to the dialogue on this extremely important issue. I will be brief in my comments because it would be more useful to use as much time as possible to respond to the Committee's questions.

I must make clear at the outset that my personal view on the issue of the President's authority to use military commissions in this instance, I side with those who support the President and believe that he does have the authority to so act. I believe the more debatable and more cautionary question is how he should implement any decision to go forward with military commissions.

I have been asked to provide the Committee with some highlights of differences and similarities between the Article III courts and courts martial, and to the extent that they might apply to military commissions in an effort to enlighten the debate and extend the knowledge base of those who are participating in it with respect to the particular practices and procedures in each of those fora. In doing so, perhaps I can assist in providing a better understanding of the President's decision to consider this alternative and the possible results of the practices and procedures about which DOD will provide further elaboration later.

It goes without saying, of course, as mentioned previously by members of the Committee, that there are differences between Article III courts and courts-martial. There are differences as well between courts-martial and military tribunals, as they have been and may be conducted. The fact that there are similarities and differences is not as critical as the reasons for those similarities and differences. I believe it is important, however, to focus on one aspect of that with respect to the differences between Article III courts and courts-martial.

When you think of the people who are subject to the jurisdiction of courts-martial, the men and women who are putting their lives on the line on a regular basis in the service of the nation, I do not think anybody would be able to state that there is a group that is more deserving of whatever benefits, whatever privileges, whatever protections that we can provide for them, particularly in the judicial process where so much would be at stake. Yet we do have differences, and there are aspects of the military justice system and the manner is which courts-martial operate that would appear to accord them lesser rights.

Why is this so? Well, this is so because Congress recognized that because of the peculiar needs of the military, there is a threefold purpose in administering military justice. Not only did the system have to promote justice and be fair to soldiers, but it also had to do so in a way which would assist in maintaining good order and

discipline and promote the efficiency and effectiveness of the armed forces. Congress recognized that when a military force operates throughout the world and in environments and challenges that have no parallel in the civilian environment, resort to the courts established under Article III is not a practical or workable option. So they did the next best thing in terms of developing a system in of law, a military justice system in which the public and Congress would have confidence and which would provide justice for members of the military.

I do not believe that anyone would contest that justice as administered under the Uniform Code of Military Justice and in the Manual for Courts-martial meets due process standards. It is different, however, from the due process one would find in the Article III Federal Courts for important reasons. My statement goes into more detail about some of the important differences and similarities, but I would highlight just a few points that I believe would be of particular relevance to this Committee.

I had not heard this view expressed today, but in some of the debate that has swirled around the issue of military commissions, there has been the suggestion that those who would be brought before the commissions for justice would in no way be able to receive fairness. The assumption is that the military officers who might take part in such an endeavor would be predisposed to go in a certain direction, and that conviction would be almost a certainty. I would suggest that the historical record does not support that conclusion.

While much focus and attention has been paid to the *Quirin* case, conducted during World War II, the commissions that were conducted after World War II, were conducted in Germany and in the Pacific, demonstrate quite a different picture. Approximately 1,600 military commissions were conducted in Germany, and approximately 1,000 were conducted in Japan. The conviction rates of those commissions was about 85 percent. Now, that compares with a felony conviction rate in the Federal Courts of about 93 percent. Courts-martial conviction rates are about 93 percent. Now, in the Southern District of New York, Senator Schumer, the conviction rate is a little bit higher. There are tougher prosecutors up there. But I think that that statistic speaks volumes in terms of what can be done in terms of fairness. And certainly the commentary on those commissions following the war also demonstrated and supported the conclusion that they were conducted with fairness.

I would suggest, as one of the members of the Committee asked before, I believe it was Senator Hatch, mentioned, who would want to sit on a jury in judgment of the perpetrators of the events of September 11th? Another question is: could you really find a jury that would not be biased in some way? Then, look to the military example. Look at what happened in World War II where you had officers, United States Army officers, sitting in judgment of those whom they had fought against, those who had killed their colleagues or were responsible for the deaths of their colleagues in Europe and Japan. Yet, they were able to administer justice in a way that, with respect to the conviction rates shown, certainly was very reasonable and fair.

When you take that example, then, and you take the next step and say, "All right, we understand why there are differences between courts-martial and Article III Courts. What about the military commissions versus courts-martial? Why shouldn't they be one and the same?" It certainly is worth underscoring several times that courts-martial and military commissions are not one and the same.

There is flexibility in the conduct of military commissions because they serve a different purpose. As has been compellingly argued and explained here previously, the basis for subjecting a person to the justice of a military commission is well-founded in international law and very specific in terms of the liability of someone to be placed before a commission because they have, by their actions, determined their status as unlawful combatants and made themselves subject to the jurisdiction of a commission that can administer justice more summarily than in other circumstances.

That is certainly not to suggest that because these people engaged in horrendous acts they do not deserve justice. That is not the point. One could point to many examples of criminal behavior where that might be said. Yet, we certainly do not suggest that with someone who commits a serious criminal act, the decision of how to deal with them is based on what they deserve.

The forum here is determined by what is authorized, established, and justified under international law. International law allows the President to make the decision to use this forum, a military commission, in this particular instance. And when you examine—I realize my time is up, but just to make this point further and I will certainly amplify on this in the opportunity for questions and answers—when you examine the reasons for differences with respect to the public safety, the very legitimate and sound public safety concerns, the intelligent compromise concerns, and the issues that, the problems that are inherent in gathering evidence, there certainly is a reasonable factual basis to administer justice in military commissions in a different way than other fora.

Thank you.

[The prepared statement of General Nardotti follows:]

STATEMENT OF MICHAEL J. NARDOTTI, JR., MAJOR GENERAL (RETIRED), UNITED STATES ARMY

INTRODUCTION

Mr. Chairman and Members of the Committee, thank you for the opportunity to contribute to this important dialogue. The possible use of military commissions, as ordered by the President in his role as Commander-in-Chief of our Armed Forces, to conduct trials of non-United States citizens for violations of the law of war as described in the Military Order of November 13, 2001, concerning the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," is a extraordinary measure in response to extraordinary events. Careful explanation of the justification and basis for this proposed action and related actions which will follow, certainly will inform the vigorous public debate. To assist in this effort, I have been asked to highlight and discuss some of similarities and differences between the prosecution of criminal matters in our Armed Forces in courts-martial under the Uniform Code of Military Justice and those matters prosecuted in Article III Federal courts. Further, I have been asked to relate these similarities and differences to military commissions as some of those tribunals have been conducted in the past and may be conducted in the future under the President's Order.

BACKGROUND

As a matter of background, I am a veteran of over twenty-eight active duty in the United States Army. Early in my career, I served as an infantry platoon leader in combat in Vietnam, and, later, in a variety of positions in the United States and overseas as a soldier and lawyer. I served as The Judge Advocate General of the Army from 1993 until my retirement in 1997. Since that time, I have been in the private practice of law in Washington, DC.

THE PRESIDENT'S PROPOSED USE OF MILITARY COMMISSIONS

Before describing the issues which will be the primary focus of my statement, I should make clear my view of the President's proposed use of military commissions to non-citizens who planned, perpetrated, or aided and abetted the attacks of September 11. Without restating the arguments previously made to this Committee in support of the President. I agree with those who believe the President, as Commander-in-Chief, has the authority under the Constitution to take these actions. The terrorist acts of the organization known as al Qaida, up to and including the horrendous attacks of September 11, 2001, leave no doubt that the United States is in a state of armed conflict with an outside enemy and that the President is most certainly correct in his conclusion that "an extraordinary emergency exists for national defense purposes." The Joint Resolution of the Senate and House of Representatives underscores this conclusion and supports the need for extraordinary action in authorizing the President, "to use all necessary means and appropriate force" against those who planned and perpetrated these acts to prevent them from committing future terrorist acts.

The use of military commissions under these circumstances is a lawful means available to the President, as Commander-in-Chief, to achieve this end. The justification for the use of military commissions is well-established in international law and the use of tribunals of this type has a lengthy history in times of extraordinary emergency in our country. Congress has recognized and affirmed their use, previously in the Articles of War, and currently in Articles 21 and 36 of the Uniform Code of Military Justice. The United States Supreme Court upheld the constitutionality of trial by military commissions of enemy saboteurs caught within the United States during World War II in *Ex Parte Quirin*, 317 U.S. 1 (1942). The Court's reasoning in that case with respect to the lawfulness of trying unlawful combatants—those who do not wear uniforms or distinctive insignia, who do not carry arms openly, and who do not conduct operations in accordance with the law of war—would appear to be particularly applicable to those who planned, perpetrated, or aided and abetted the attacks of September 11—acts of monumental and extreme violence against thousands of our civilian citizens.

The more debatable and critical issue may well be how the President chooses to exercise this option. The Quirin model is relevant to an extent, but it does not necessarily provide all the answers for a similar undertaking today. The Military Order of November 13, 2001, raises important issues which will need further clarification, and Administration officials have already begun to clarify some of those points. They have stressed repeatedly that the specifics of the rules to be applicable to military commissions in this instance are still under development and review by the Department of Defense. The President, nevertheless, has made certain basic requirements clear, including that there be a full and fair trial. The determination of what constitutes a full and fair trial under these circumstances should include particularly careful consideration to the extraordinary circumstances which justify the use of and compel the need for military commissions in this instance. Further, the significant evolution in the administration military justice since the Quirin decision and the extent to which that evolution should impact on the conduct of military commissions today also should be carefully considered.

The Unique Need for the Military Justice System

Before focusing on military commissions, I will explain, as a starting point, why there are differences between criminal prosecutions in Article III Federal courts and criminal prosecutions in the Armed Forces. Congress and the courts have long-recognized that the need for a disciplined and combat ready armed force mandates a separate system of justice for the military. Our Armed Forces operate world-wide in a variety of difficult and demanding circumstances which have no parallel in the civilian community. Military commanders of all services are responsible for mission accomplishment and the welfare of their troops. In the most difficult operational and training situations, they make decisions that can and do put the lives of their troops at risk. These commanders also are responsible for administering a full range of discipline to ensure a safe and efficient environment in which their troops must serve. They are able to accomplish this goal through the use of military law, the purpose

of which, as stated in the Preamble to the Manual for Courts-Martial United States (2000 Edition), is "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." The range of disciplinary options and circumstances under which commanders be able to employ them simply make resort to alternatives in the civilian community, whether through the Federal courts or other means, an unworkable and unrealistic option.

In recognition of this fact, Congress, acting under its Constitutional authority "To make Rules for the Government and regulation of the land and naval Forces," enacted the Uniform Code of Military Justice (UCMJ) in 1950 to set forth the substantive and procedural laws governing the Military Justice System. Congress enacted the UCMJ to make "uniform" what previously was not—the criminal law applicable to all the Military Services. Substantive law is contained in the various punitive articles which define crimes under the UCMJ. While Congress defines crimes, the President establishes the procedural rules and punishment for violation of crimes. The President's rules are set forth in the Manual for Courts-Martial. The Manual is reviewed annually to ensure it fulfills its fundamental purpose as a comprehensive body of law.[1]

ARTICLE III FEDERAL COURTS PROSECUTIONS AND COURTS-MARTIAL

A COMPARISON OF CERTAIN RIGHTS, PRACTICES, AND PROCEDURES

The administration of military justice under these authorities, by Congressional and Presidential design, is, by necessity, different in some respects from the civilian counterpart, but in other respects is similar. Several examples of differences and similarities in the pretrial, trial, and post-trial phases are the following: (1) Rights warnings against self-incrimination in the military are broader than those required in the civilian community and actually predated the requirement of the Miranda decision by many years. Rights advisement in the military is and has been mandated whether or not the interrogation occurs in a custodial session; (2) Right to counsel in the pretrial and trial phases in the military is broader than in the civilian community where counsel is appointed if the accused is indigent. Military counsel is provided regardless of ability to pay. Individually requested military counsel also may be provided if available. Civilian counsel may be appointed as well at the service members own expense; (3) In the pretrial investigation phase for felony prosecutions in the military, there is not the equivalent of a secret grand jury in which the defendant has no right to be present. An investigative hearing, which is routinely open, is conducted under Article 32 of the UCMJ to determine whether there are reasonable grounds to believe the accused servicemember committed the offense alleged. The accused servicemember has the right to be advised in writing of the charges, to attend the hearing with counsel, to examine the government's evidence, to cross examine witnesses, to produce witnesses, and to present evidence; (4) Pretrial discovery in the military is similar to that followed in federal criminal proceedings, but more broad. The government is required to disclose any evidence it will use in the sentencing phase of the proceeding if there is a conviction., or evidence that tends to negate the degree of guilt or reduce the punishment; (5) Unlawful command influence—an attempt by superior military authority to influence the outcome of a proceeding—is prohibited and is subject to criminal sanctions. There is no equivalent issue in federal proceedings; (6) In federal prosecutions a jury of peers is selected at random. General courts-martial must have at least five members selected, as required by Article 25 of the UCMJ, based on "age, education, training, experience, length of service, and judicial temperament." Civilian jury and military court-martial panel members may be challenged for cause or peremptorily; (7) With respect to trial evidence, the rules in both forums—the Federal Rules of Evidence in federal courts and the Military Rules of Evidence in courts-martial are almost identical. New Federal Rules of Evidence automatically become new Military Rules

[1] The UCMJ establishes three levels of military courts: (1) Courts-martial are the trial level courts. General courts-martial are the forums in which felony offenses are prosecuted. Lower level special and summary courts-martial have jurisdiction to try most offenses but are limited in the punishments which they may impose; (2) Four Courts of Criminal Appeals (Army, Navy/Marine Corp, Air Force, and Coast Guard) provide the first appellate review which is automatice in cases in which the sentence adjudged includes confinement of one-year or more or a punitive (Bad Conduct or Dishonorable) discharge; and (3) The United States Court of Appeals for the Armed Forces is the highest military appellate court. The five judges of this court are appointed by the President, with the advice and consent of the Senate, and serve for a term of 15 years. Decisions by this court are subject to review by the Supreme Court by a writ of certioraris.

of evidence unless the President takes contrary action within 18 months; (8) The burden of proof for conviction in both forums is beyond a reasonable doubt; (9) For conviction or acquittal in federal prosecutions jurors must be unanimous. Otherwise, a hung jury results and the defendant may be retried. In courts-martial, except in capital cases, two-thirds of the panel must agree to convict. The first vote is binding. If more than one-third of the panel vote to acquit, then there is an acquittal. A hung jury and retrial on that basis is not possible in the military. In capital cases in courts-martial, a unanimous verdict is required for conviction; (10) Sentencing in federal courts is done by the judge alone, and sentencing guidelines for minimum and maximum sentences apply. In courts-martial, sentencing is decided by the court-martial panel members or by the military judge (if the accused servicemember chose to be tried by a military judge alone). There are maximum sentence limitations but no minimums. The accused servicemember is entitled to present evidence in extenuation and mitigation, including the testimony of witnesses on his or her behalf, and may make a sworn or unsworn statement for the court-martial's consideration. Two-thirds of the panel must agree for sentences of less than 10 years. Three-quarters of the panel must agree for sentences of 10 years or more. To impose capital punishment, the panel must unanimously agree to the findings of guilt, must unanimously agree to the existence of an "aggravating factor" required for a capital sentence, and must unanimously agree on the sentence of death. Capital punishment may not be imposed by a military judge alone; (11) In federal prosecutions, appeal is permissible, but mandatory in cases of capital punishment. There are two levels of appeal—the Circuit Courts of Appeal and the United States Supreme Court. In the military, appeal is automatic for sentences which include confinement of one year or more or a punitive (Bad Conduct or Dishonorable) discharge. There are three levels of appeal—the Courts of Criminal Appeals of the military services, the Court of Appeals of the Armed Forces, and the United States Supreme Court. Sentences which do not require automatic appeal may be appealed to the Judge Advocate General of the convicted member's service; (12) Appellate representation in federal prosecutions is provided if the convicted person is indigent. In the military, appellate representation is provided in all cases regardless of financial status.

This comparison of the relative handling of pretrial, trial, and post-trial matters, respectively, in Article III Federal courts and courts-martial is not exhaustive. It demonstrates, however, that even in accommodating the needs unique to the administration of military justice, courts-martial, in many important respects, compare very favorably, even though not identically, to process and procedures accorded in the Article III federal courts.

COURTS-MARITAL AND MILITARY COMMISSIONS

Just as there are sound reasons for differences in rights, practices, and procedures between Article III Federal courts and courts-martial, there also are sound reasons for differences between courts-martial and military commissions. Courts-martial and military commissions, of course, are not one in the same. Courts-martial are the criminal judicial forums in which members of our Armed Forces are prosecuted for criminal offenses, the vast majority of which are defined in the Uniform Code of Military Justice. Congress and the President have given continuing attention to the development and growth of the Military Justice System to ensure that in seeking to achieve "good order and discipline in the armed forces [and] to promote efficiency and effectiveness in the military establishment," justice is also served in the fair treatment of soldiers, sailors, airmen, and marines.

Military Commissions serve a distinctly different purpose and have been used selectively in extraordinary circumstances to try enemy soldiers and unlawful combatants, among others, for violations of the laws of war. In the case of unlawful combatants —those who do not wear uniforms or distinctive insignia, who do not carry arms openly, and who do not conduct operations in accordance with the law of war—their actions and conduct determine their status and the type of action which may be taken against them as a result. Those who entered our country surreptitiously and who planned, perpetrated, or aided and abetted the attacks of September 11, causing death and destruction on an unprecedented scale, engaged in an armed attack on the United States in violation of customary international law. Their actions and offenses under the law of war allow them to be treated differently from lawful combatants and others who violate the criminal law.

Military commissions are the appropriate forum for dealing with these unlawful combatants. To reiterate the earlier-stated justifications, the use of military commissions is supported by international law, there is lengthy historical precedent for their use, the United States Supreme Court has upheld their use in similar circumstances, Congress has recognized and affirmed their use in the Uniform Code

of Military Justice and in the predecessor Articles of War, and the extraordinary emergency which the President has declared and Congress' support to the President in its Joint Resolution authorizing him "to use all necessary means and appropriate force" where there have been egregious violations of the law of war all compellingly support this conclusion.

The question of the rules and procedures to apply remains, nevertheless. While the President has determined that, "it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," the appropriate principles and rules of procedures prescribed for courts-martial may still serve as a useful guide. The propriety of these principles and rules should be measured against the legitimate concerns for public and individual safety, the compromise of sensitive intelligence, and due regard for the practical necessity to use as evidence information obtained in the course of a military operation rather than through traditional law enforcement means. Further, the principles and rules adopted also should take into account the evolution, growth, and improvement in the administration of criminal justice, in general, and of military justice, in particular, in determining the standards to apply with respect to the most compelling issues, such as those relating to the imposition of capital punishment.

I am confident that the President and the Department of Defense are mindful of the exceptional significance of these issues, and that they will take them into careful account as further decisions are made.

Mr. Chairman and Members of the Subcommittee, I am prepared to answer your questions.

Senator SCHUMER. Thank you very much, General Nardotti. Again, the testimony has just been excellent here.

And now let me move to our fourth witness. It is Professor Cass Sunstein. He is the Karl Llewellyn Professor of Jurisprudence at the University of Chicago Law School. He is a member of the University Political Science Department as well. Graduated from Harvard College, Harvard Law School, clerked first for Justice Benjamin Kaplan of the Massachusetts Supreme Judicial Court and then Justice Thurgood Marshal of the U.S. Supreme Court.

Before joining the University of Chicago Law faculty, he worked as an attorney adviser in the Office of Legal Counsel at the U.S. Department of Justice. He too is the author or numerous books and articles on topics such as constitutional law and democracy.

Professor Sunstein, welcome once again before this panel, and your entire statement will be read into the record.

STATEMENT OF CASS R. SUNSTEIN, KARL N. LLEWELLYN DISTINGUISHED SERVICE PROFESSOR OF JURISPRUDENCE, LAW SCHOOL AND DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF CHICAGO, CHICAGO, ILLINOIS

Mr. SUNSTEIN. Thank you, Mr. Chairman. It is a pleasure to be here.

These comments will be really a response to Senator Sessions' invitation, which is to try to give some details about how to make the process work better. The starting point for these remarks is that many of the abstract debates within the nation over the last weeks can be reduced and possibly even dissolved I think if we proceed to the level of detail. The suggestion is that the legitimate interest behind the President's Military Order can be accommodated, while also producing what the President wants, which is full and fair trials.

I am going to make three very simple suggestions. The first is that the scope of the Military Order is intended to be narrow, notwithstanding some of its loose language and steps should be taken

to narrow the scope to respond to some worries that American citizens have.

The second suggestion, beyond the issue of scope, is that the Order ought to be implemented with attention to the essentials of procedural justice, essentials that can be obtained by looking carefully at the best of our practice after World War II. The third suggestion is that steps ought to be taken to ensure neutrality with respect to the adjudication by attending closely to the composition of the adjudicators on the military commissions and perhaps by building in mechanisms for appeal.

Now to these three issues of scope, essentials of procedural justice and neutrality. The Military Order was obviously written under tremendous time pressure, and it is clear that the Executive Branch and the President do not intend to apply its terms to all those to whom it could be applied by its terms. The President has clarified, through his agents, that the laws of war are what concerns him, and the President indeed suggests that the constitutional authority that the President has under this Order applies to the use of military commissions when the laws of war have been violated. The laws of war are not violated by lawful combatants such as by the Taliban soldiers who were not involved in terrorist activities. The laws of war are violated when someone is engaged in attacks on civilian populations or in secret infiltration within the boundaries of the United States. If it is clarified that we are talking only about the laws of war, then in one bold stroke, the scope of the Order will be significantly narrowed.

The second suggestion I have with respect to scope is it is clear that the President intends to apply this Order, rarely if at all, to people who are arrested or charged inside the territorial boundaries of the United States. Even with respect to noncitizens, it is not the President's general intention to apply military commissions to people who have done evil deeds here. There is a narrow exception, which is if people have infiltrated the United States in order to foment or assist terrorist activities within the United States, if they are effectively spies, then the Military Order might apply to them. But at least as a strong presumption, this Military Order is not intended to cover people arrested within our boundaries.

A simple suggestion, that is, that the scope of the Order would be narrowed greatly if we understand that the laws of war are what are at stake and if foreign combatants outside our territorial boundaries are the people for whom we are mostly interested in using military commissions. This sort of clarification, now beginning informally, should be made formally, either by the Executive or by the Congress. If that is the case, then we will be going very close to the sort of action that President Roosevelt authorized after World War II.

The second suggestion is that the essentials of procedural justice should be specified, preferably by the Executive Branch quickly, even better by Congress acting with the Executive Branch. We could clarify the essentials of procedural justice by building on the best of our practices after World War II. This catalog has not been given in any document of which I am aware, but if we look through what we actually did, we can get some pretty good and specific guidelines. As a bare minima, the ideas are, first, a defendant

should know the nature of the charge against them. They should know as well the basis of the charge against them, and they should have a right to reasonable rules of evidence. Now, there might be some restriction on their knowledge of the basis of the charge against them in those narrow circumstances in which providing it would compromise legitimate security interests, but for the most part, just providing the nature and basis of the charge would give defendants in these tribunals, as in Federal Courts, a significant amount of what due process requires.

The second essential procedural fairness is a right to be defended by counsel and a chance to defend and respond to the evidence made, invoked against the defendant. So long as there is a right to be defended by a vigorous advocate and a chance to defend one's self by responding to charges, there will be a significant safeguard against what everyone wants to avoid, that is, false convictions, a very specific and narrow idea.

The third idea is a strong presumption in favor of public trials, at least public trials in the form of publicly-available transcripts, made available, perhaps, on the day that the trial occurred. Something of this general sort occurred after World War II, where the trials were compiled by transcript and are available right now. You can get them tomorrow if you like to see exactly what happened. Of course, when security interests are at stake, some parts of the trials might not be made public, but the vast majority of it has been in the past and should be in the future, as the White House Counsel has indicated.

The fourth simple suggestion is that there should be here, as everywhere else, a presumption of innocence, a particular part of the written and unwritten law of all civilized societies, and a standard of conviction beyond the preponderance of the evidence standard. All this means is that in civil trials, preponderance of the evidence is the appropriate standard; in criminal trials you need something a little tougher.

With respect to the neutrality of judges, we need not rely only on military judges, though no one should accuse them of bias or partiality. We might use state or Federal judges, as indeed were used in the aftermath of World War II. There is no reason to restrict the President's pool to military personnel if he wants to have a diversity of judges. We could also build in mechanisms of appeal. In fact, by using state and Federal personnel, either in an informal or a formal capacity to ensure that the rudiments of procedural fairness have been met.

By way of conclusion, when terrorism threatens national security, the nation's priority is to eliminate the threat, not to grant the most ample procedural safeguards to those who have created it. But it should be possible to respond to the President's legitimate concerns, while also complying with the basic requirements of procedural justice. There is no conflict between the war against terrorism and ensuring fair trials.

[The prepared statement of Mr. Sunstein follows:]

STATEMENT OF CASS R. SUNSTEIN, KARL N. LLEWELLYN DISTINGUISHED SERVICE PROFESSOR OF JURISPRUDENCE, LAW SCHOOL AND DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF CHICAGO

Mr. Chairman and Members of the Committee:

I am grateful to have the opportunity to appear before you today to discuss some of the issues arising from President Bush's decision to provide for military commissions as one option for trying suspected terrorists. President Bush has strongly emphasized the need to ensure that defendants receive "full and fair trials." Military Order of November 13, 2001, section 5(c)2. In these remarks, I explore ways to do what everyone agrees is most essential—to protect national security and to defeat terrorism—while also ensuring basic fairness in the relevant trials. There is no reason to doubt that sensibly designed procedures can be fair and at the same time promote the President's basic goals: to ensure expeditious trials, to avoid a "circus" atmosphere, and to keep sensitive information confidential.

I offer three basic suggestions, designed not as definitive solutions but as potential steps in the right directions. First, the President's order is intended to have a narrow scope, and steps should be taken to clarify and specify its anticipated range. Second, principles of procedural justice, adapted for the specific occasion, should be established for military commissions, so as to ensure against inequity and false convictions. Third, measures should be taken to ensure against the reality or appearance of unfairness in the relevant trials, perhaps through use of federal or state judges on military commissions, and perhaps through the creation of certain mechanisms for appellate review, either formal or advisory, by relatively independent officials.

Shared Goals and Concerns

There has been detailed discussion of the constitutionality of President Bush's military order of November 13, 2001. For present purposes I will assume, without discussing the point, that the order does not violate the Constitution. See Ex Parte Quirin, 317 U.S. 1 (1942). I will not engage the policy questions raised by the President's decision. I will also assume what is generally agreed: From the standpoint of both constitutional law and democratic legitimacy, it is far better if the President and Congress act in concert.[1] As a general rule, the executive branch stands on the firmest ground if it acts pursuant to clear congressional authorization. With this point in mind, my major topic is how best to respond to a question raised both here and abroad: how to ensure (a) that people will be convicted in military tribunals only if they are guilty, and (b) that everyone will receive the basic justice to which the President, the Attorney General, and their various critics are simultaneously committed.

Some people appear to fear that military commissions, simply by virtue of their status as such, will not be capable of providing fair trials. But this fear, and the contrast between civil and military tribunals, should not be overstated in this setting. In the past, there have been numerous acquittals in military tribunals. Perhaps remarkably, both German and Japanese defendants were acquitted in the aftermath of World War II. In any case civil courts would pose risks of their own: entirely neutral justice would not be altogether easy to assure for suspected terrorists, tried before an American jury.[2] On the other hand, it would be wrong to dismiss the concern of those who are troubled by the idea of military trials in this context. History suggests that war crimes tribunals do not always provide fair procedures and indeed that there is inevitably some danger of a miscarriage of justice. See Evan Wallach, The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials, 37 Colum. J. Transnat'l L. 851 (1999); In Re Yamashita, 327 U.S. 1 (1946). We do not have to say, in advance, that this is a serious risk in order to conclude that measures should be taken to reduce it. The key question, then, is how to design a system that will not compromise American security interests, but that will nonetheless ensure basic fairness. I outline several possibilities here.

Limiting the Scope of Military Commissions, Formally or Informally

An obvious possibility would be to limit the scope of military tribunals, either formally or informally, by making it clear that the discretion arguably authorized by the President's order will allow the use of military tribunals only on certain essential occasions, and not in every case in which the order's requirements might be met as a technical matter.

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[1] To be sure, the President has a range of powers under the Commander-in-Chief clause, and these powers enable him to do a great deal on his own. But the boundaries of that authority remain untested. See, e.g., Ex Parte Quirin, 317 U.S. 1, 29 ("It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation.").

[2] Imagine, for example, a trial before a jury in New York, or Chicago, or Washington, D.C., or Los Angeles. Of course the defendant could waive the right to a jury trial.

This idea appears to be fully consistent with the President's basic goals (as indeed recent informal statements suggest). The fundamental purpose of military commissions is to ensure an expeditious trial, one that does not compromise national security interests, for terrorists (a) captured abroad or (b) intimately involved with the planning and execution of attacks on the United States. It is not likely that the executive branch would seek many military trials of people lawfully within the United States, even if there is some reason for suspicion about their conduct. In short, the terms of the Military Order might be taken to apply in many cases in which the executive will not, in all probability, seek to use military tribunals. It would be useful to obtain clarification on this point—certainly through continued informal assurances, and perhaps through Defense Department guidelines, narrowing the scope of the order as, for example, through guidelines embodying presumptions[3] against military trials for people arrested within the territorial boundaries of the United States.

RULES OF EVIDENCE, FAIR PROCEDURE, AND (APPROPRIATE) OPENNESS

An additional possibility is to design rules of evidence and procedure that will ensure basic fairness. Of course the Department of Defense is actively investigating these issues, and it would not be sensible to attempt to provide a full catalogue here. The central goal should be to ensure compliance with minimal standards of procedural justice, adapted for the occasion. (I emphasize the need for adaptation: The ordinary principles of procedural justice, used in civilian proceedings, need not be carried over to this context, which obviously raises special considerations.) To achieve this goal, it would be desirable to build on the best of past practices by commissions of the kind proposed—and to ensure safeguards against the worst of those practices.

Drawing on the past, I suggest the possible candidates for inclusion. See United Nations War Crimes Commission, Law Reports of Trials of War Criminals 190–200 (1949), for a detailed account, on which I build here. These possibilities include:

the presumption of innocence (emphasized, for example, by British law in the context of war crimes, see British Law Concerning Trials of War Criminals by Military Courts, Annex 1, United Nations War Crimes Commission, Law Reports of Trials of War Criminals (1997));
a standard of proof beyond the "preponderance of the evidence" standard, ranging from "clear and convincing evidence" to the conventional "beyond a reasonable doubt" standard;
assurance of a neutral tribunal;
an opportunity to know the substance of the charge;
an opportunity to have the proceedings made intelligible by translation or interpretation;
an opportunity to know the evidence supporting conviction;
an opportunity to be represented by counsel;
the right to respond to the evidence supporting conviction, with the narrowest possible exceptions for reasons of national security (a relevant model here is the Classified Information Procedures Act);
the right to cross-examination of adverse witnesses;
the right to an expeditious proceeding and disposition;
the right to present exculpatory evidence;
specification of reasonable rules of evidence, designed to ensure admission only of material with probative value (see President Bush's Military Order, section 4(c)(3));
as much openness and as little secrecy as possible, including public availability of the transcripts of the trial, with the narrowest possible exceptions for reasons of national security.

Some of the most difficult issues here involve the conflict between the national security interest in maintaining secrecy and the traditional American antagonism to "secret trials." President Bush's Military Order has been criticized for requiring secrecy, but it does nothing of the kind. It remains to be decided how to handle the conflict between the relevant interests. Everyone agrees that as a strong presumption, trials should be kept public, to prevent injustice, to inform the public, and to provide some assurance that justice was in fact done. But in some cases, evidence that supports conviction is properly kept secret, certainly from the public and in truly exceptional cases from the defendant and defense counsel as well. It would be

[3] These presumptions could be rebutted under extraordinary circumstances, as, for example, if evidence suggests that those captured here were involved in the planning and execution of terrorist attacks.

a terrible mistake, in this context, to force the executive branch to choose between (a) letting a terrorist go free and (b) disclosing material that is likely to threaten the safety of the nation's people. The Classified Information Procedures Act attempts to deal with this problem, but in a way that is perhaps inadequate for this domain. Perhaps it would be possible to redesign the Act in a way that would respond to the government's legitimate concerns.

Ensuring a Mix of Military and Nonmilitary Judges

There is no requirement that the judges on military commissions must be military personnel. In fact there is precedent, in the aftermath of World War II, for including ordinary state and federal judges on the relevant tribunals. Of course we have no reason to question, in advance, the independence and neutrality of military personnel; recall that military judges produced acquittals of both Japanese and German defendants. But there is reason to say that a mixture of judges, from diverse backgrounds, is likely to increase the reality and appearance of fairness. Nor would such a mix intrude on the executive's prerogatives or on the President's legitimate goals: preventing a "circus" atmosphere, ensuring expedition, and ensuring against disclosure of classified information.

I do not discuss here the extent to which Congress should take an active role on this issue. My only suggestion is that to the extent that civilian judges are thought to offer certain safeguards, nothing in the President's order, or in past practice, is inconsistent with appointing civilian judges to serve on military commissions. Such appointments should be seriously considered as a way of counteracting the perceived risk of unfairness. Perhaps the civilian judges might be required to have had military experience, or experience in the military justice system, as in fact many have done.

Strengthening Review

Under American law, appellate review of criminal convictions is the rule, and exceptions are exceedingly rare. Of course the present context is one in which an exception, of one or another sort, might be well-justified. But it is also possible to imagine measures that would create at least some check on gross unfairness. I discuss two alternatives here.

Article III review. The first and perhaps most natural possibility would be to provide for some form of prompt appellate review from a specially designated panel of Article III judges. The purpose of such review would not be to retry the facts, but to ensure compliance with the minimal principles of procedural justice, as adapted for this occasion. There are many models for a procedure of this kind. This is the standard approach to Article III review of administrative action, with federal court review to ensure against arbitrariness and illegality. See *Crowell* v. *Benson*, 285 U.S. 22 (1932). It is also the standard approach to Article III review of the decisions of Article I courts, created by Congress for specialized purposes. See *Northern Pipeline Construction Co.* v. *Marathon*, 485 U.S. 50 (1982).

These precedents could be adapted to the context of an Article II tribunal of the sort contemplated here. Note that Article III review could be adapted to take account of the most serious concerns of the executive branch. A court could be asked to rule on any appeal within a specified time, thus ensuring expedition. Appellate review, unlike an ordinary trial, could reduce the risk of a "circus" atmosphere. If necessary, such review could be conducted solely in writing, without oral argument. Most important, judicial review could be limited so as to ensure compliance with the minimum requirements of fairness: a chance to know the basis for the action, a chance to contest the evidence, an evidentiary standard sufficient to ensure against error. See Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975). To be sure, an issue might be raised, under the Commander-in-Chief Clause, of the power of Article III courts to review Article II courts without presidential authorization; but so long as the President accepted such limited review, I do not believe that this arrangement would be unconstitutional.

2. *Informal advisory review*. Appellate review by an Article III tribunal appears not to be contemplated by the President's Military Order.[4] A more modest possibility

[4] Ex Parte Quirin, supra, allowed review of a broadly similar order, at least to test the question whether the relevant tribunal had the constitutional authority to conduct the trial. The President's Order does not purpost, in unambiguous terms, to extinguish the writ of habeas corpus, though it does restrict the remedies that defendants may have. Under section 7(b)(2), "the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i)

Continued

would be to create a less formal system of review, not from an Article III Court, but from Article III judges specially constituted as a panel of advisers to the President. On this approach, the system of review contemplated by the existing order would be given an additional layer, consisting of people with a degree of independence and charged with exercising the reviewing functions I have just described. An approach of this kind would maintain greater continuity with the process that the President has outlined, because it would not take the adjudicative process outside of the executive branch. But it would create an additional safeguard against the risk of arbitrary or unjustified action.

This approach might be thought to raise a constitutional question under Hayburn's Case, 2 Dall. 409, 1 L. Ed. 436 (1792), a case that forbids Article III judges from serving in an official capacity as executive branch officials, subject to review within the executive branch. But under Hayburn's Case, it appears to be acceptable to appoint judges in their personal rather than official capacity, and that is the arrangement I am describing here. The basic goal is to create a layer of review that would provide an expeditious but additional safeguard. If Article III judges are not to be used, for reasons of principle or policy, perhaps a panel of distinguished state court judges, enlisted for the purpose, could be used instead.

CONCLUSION

When national security is threatened, the nation's highest priority is to eliminate the threat, not to grant the most ample procedural safeguards to those who have created the threat. But whenever the United States is conducting a criminal proceeding, its highest traditions call for a full and fair trial, as President Bush has explicitly required. Those same traditions do not bar the use of military commissions under extraordinary circumstances; but they do require that steps be taken to ensure against gross unfairness and conviction of innocent people. I have attempted to outline several imaginable steps here. My basic suggestion is that it should ultimately be possible to design a system that responds to the legitimate concerns of the President and the nation, and protects the country's security, while also complying with the basic requirements of procedural justice.

Senator SCHUMER. Thank you, Professor Sunstein, again, for really excellent testimony.

Our final witness, and we appreciate your patience, is Timothy Lynch. He is the Director of the Cato Institute's Project on Criminal Justice, where he examines governmental policy for their constitutionality and efficacy. Mr. Lynch graduated from Marquette University School of Law, and since joining Cato in 1991, he has published and spoken widely on a variety of issues, criminal, constitutional law, and authored several amicus briefs in the United States Supreme Court.

Mr. Lynch, like the others, your entire statement will be read into the record.

STATEMENT OF TIMOTHY LYNCH, DIRECTOR, PROJECT ON CRIMINAL JUSTICE, CATO INSTITUTE, WASHINGTON, D.C.

Mr. LYNCH. Thank you, Mr. Chairman.

At the outset, let me say that I agree with those who have said that the attacks of September 11th were not just crimes, they were an act of war. Our country has been attacked by a technologically sophisticated band of barbarians who hold a philosophy that exhibits nothing but contempt for human life. This country stands for

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any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal." The ambiguity lies in the precise meaning of "any remedy or maintain any proceeding," though admittedly these terms seem broad. Cf *Johnson* v. *Robison*, 415 U.S. 361 (1976), narrowly construning terms that seem broadly to foreclose judicial review. I cannot discuss these complexities here, but it would be easy to imagine a judicial decision not to assume habeas corpus to have been suspended without express words to that effect, especially in light of continuing debates over the President's authority to suspend the writ without express words to that effect, especially in light of continuing debates over the President's authority to suspend the writ without specific congressional authorization.

the exact opposite of what they believe in. And I think that these people attacked America because they see our country as a symbol for respect for individual rights.

In my view, America is the greatest country in all of human history because it is founded upon a Declaration and a Constitution that acknowledge and enhance the dignity of individual human life. We must respond to this new threat without losing sight of what we are fighting for. Our troops in Afghanistan are not just fighting to protect the property and occupants of some geographical location here in North America. They are defending the fundamental American idea that individuals have the right to life, liberty and the pursuit of happiness. Our government must fight any enemy, foreign or domestic, who would destroy the rights of our people.

Having said that, I am disturbed by some of the actions that our government has taken here at home in response to the September 11th attacks. And I want to thank the Committee for inviting me here today so that I can share some of these concerns with you.

The Executive Order that President Bush signed on November 13th is very, very troubling. If there is one legal principle that I think everybody in this room can agree upon, it is that nobody in America is above the law. Not a Senator, not a Supreme Court Justice, not even the President of the United States. Not even, I might add, a President who enjoys very, very high approval ratings in the polls. But with this Executive Order, President Bush is announcing that he will not only be the policeman, not only be the prosecutor, but the legislator and the judge as well. Not just over Osama bin Laden and his lieutenants in Afghanistan. Not only over other people that our military might capture over there, but also over some 18 million people here on American soil. For anyone who is a noncitizen, the President has announced that you have no right to a jury trial, no right to a speedy trial, no right to a public trial, no right to due process of law, no right to habeas corpus, and no protection against unreasonable and warrantless arrest.

In my judgment, there is no question that this order sweeps far beyond the constitutional powers that are vested in the Office of the President. My written testimony sets forth in detail the constitutional flaws that I see in the executive order, and I would request that it be made part of the record.

Thank you again, Mr. Chairman, for inviting me so that I can share these concerns with the Committee.

[The prepared statement of Mr. Lynch follows:]

STATEMENT OF TIMOTHY LYNCH, DIRECTOR, PROJECT ON CRIMINAL JUSTICE, CATO INSTITUTE

I. INTRODUCTION

The horrific attacks of September 11th have made it painfully clear that a technologically sophisticated band of medieval barbarians have declared war on America. In my view, these barbarians hold a nihilist philosophy and have nothing but contempt for human life. They attacked America because our nation is seen as a symbol for respect for individual rights. America is a unique nation in all of world history because it is founded upon a Constitution that is designed to acknowledge and enhance the importance and dignity of human beings.

We must respond to this new threat without losing sight of what we are fighting for. Our troops are not simply defending the property and occupants of some geographical location. They are defending the fundamental American idea that individuals have the right to life, liberty, and the pursuit of happiness. Our government

must fight any foreign or domestic enemy who would destroy the rights of our people.

That said, I am disturbed by some of the actions taken by our government in response to the September 11th attacks. And I sincerely thank you for your invitation to come here and share my concerns with you.

II. Bush Order Violates Separation of Powers

On November 13, 2001 President George Bush signed an executive order with respect to the detention, treatment, and trial of persons accused of terrorist activities. The president declared a national emergency and claimed that Article II of the Constitution and the recent Joint Resolution by Congress Authorizing the Use of Military Force (Public Law 107–40) empowered him to issue the order.

In my view, the president cannot rely upon the Joint Resolution as a legal justification for his executive order. That resolution simply did not give the president carte blanche to write his own legislation on whatever subject he deemed necessary. And because Article I of the Constitution vests the legislative power in the Congress, not the Office of the President, the unilateral nature of this executive order clearly runs afoul of the separation of powers principle.

As I understand it, the primary purpose of this hearing is to explore the question of whether Congress can "codify" or "ratify" the substance of President Bush's executive order. Thus, the remainder of my statement and legal analysis will focus on other constitutional issues raised by the substantive content of that executive order.

III. Executive Arrest Warrants Violate Fourth Amendment

The Fourth Amendment of the Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The arrest of a person is the quintessential "seizure" under the Fourth Amendment. See *Payton* v. *New York*, 445 U.S. 573 (1980). In many countries around the world, police agents can arrest people whenever they choose, but in America the Fourth Amendment shields the people from overzealous government agents by placing some limitations on the powers of the police. The primary "check" is the warrant application process. By requiring the police to apply for arrest warrants, an impartial judge can exercise some independent judgment with respect to whether sufficient evidence has been gathered to meet the "probable cause" standard set forth in the Fourth Amendment. See *McDonald* v. *United States*, 335 U.S. 451 (1948). When officers take a person into custody without an arrest warrant, the prisoner must be brought before a magistrate within 48 hours so that an impartial judicial officer can scrutinize the conduct of the police agent and release anyone who was illegally deprived of his or her liberty. See *County of Riverside* v. *McLaughlin*, 500 U.S. 654 (1988).

It is important to note that while some provisions of the Constitution employ the term "citizens" other provisions employ the term "persons." Thus, it is safe to say that when the Framers of the Constitution wanted to use the narrow or broad classification, they did so. Supreme Court rulings affirm this plain reading of the constitutional text. See *Zadvydas* v. *Davis*, 121 S.Ct. 2491, 2500–2501 (2001); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Wong Wing* v. *United States*, 163 U.S. 228 (1896). Noncitizens have always benefitted from the safeguards of the Fourth Amendment. See *Au Yi Lau* v. *INS*, 445 F.2d 217 (1971); *Illinois Migrant Council* v. Pilliod, 540 F.2d 1062 (1976).

President Bush would like to be able to issue his own executive arrest warrants. Under his executive order, once the president makes a determination that a noncitizen may be involved in certain illegal activities, federal police agents "shall" detain that person "at an appropriate location designated by the secretary of defense outside or within the United States." See *Executive Order, Section 3, Detention Authority of the Secretary of Defense*. Under the order, the person arrested cannot get into a court of law to challenge the legality of the arrest. The prisoner can only appeal to the official who ordered his arrest in the first instance, namely, the president. The whole purpose of the Fourth Amendment is to make such procedures impossible in America. Thus, Congress cannot authorize the use of executive warrants with mere legislation. See Lynch, "In Defense of the Exclusionary Rule," 23 *Harvard Journal of Law and Public Policy* 711 (2000).

IV. NO PERSON CAN BE DEPRIVED OF LIBERTY WITHOUT DUE PROCESS

The Fifth Amendment to the Constitution provides that no person can be "deprived of life, liberty, or property, without due process of law." While no alien has a right to enter the United States, once an alien makes an entry into our country, his constitutional status changes. Any person threatened with deportation has a constitutional right to a fair hearing. See *Landon* v. *Plasencia*, 459 U.S. 21 (1982). See also Ludecke Watkins, 335 U.S. 160 (1948) (Black, J., dissenting).

President Bush would like to be able to seize and deport people without any hearing whatsoever. As noted above, under the executive order, the president can have people arrested outside of the judicial process and held incommunicado at military bases. Another section of the order provides: "I reserve the authority to direct the secretary of defense, at anytime hereafter, to transfer to a governmental authority control of any individual subject to this order." This means that any person arrested could be flown to another country at any time. The President can choose the time and country. The prisoner is barred from filing a writ of habeas corpus. The problem, as Justice Robert Jackson once noted, is that "No society is free where government makes one person's liberty depend upon the arbitrary will of another." *Shaughnessy* v. *Mezei*, 345 U.S. 206, 217 (1953) (Jackson, J., dissenting). Thus, Congress cannot enact a law that would let the President override the due process guarantee.

One should not forget that the power to deport has been abused. American citizens have been (intentionally or unintentionally) deported. See, for example, "Born in U.S.A.—But Deported," *San Francisco Chronicle*, October 22, 1993. Some people have become pawns in political machinations. Six Iraqi men who fought against Saddam Hussein are fighting bogus deportation charges that are tantamount to a death sentence should they be forced back to Iraqi territory. See Woolsey, "Iraqi Dissidents Railroaded—by U.S.," *Wall Street Journal*, June 10, 1998.

The federal government has great leeway in establishing the various grounds for deportation, but the only check on possible arbitrary and capricious action is the due process guarantee. That guarantee should not be nullified.

V. Congress Cannot Suspend the Trial by Jury Guarantee

Article III, section 2 of the Constitution provides, "The Trial of all Crimes, except in Cases of Impeachment; shall by Jury." The Sixth Amendment to the Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." To limit the awesome powers of government, the Framers designed a system where juries would stand between the apparatus of the state and the accused. If the government can convince a citizen jury that the accused has committed a crime and belongs in prison, the accused will lose his liberty and perhaps his life. If the government cannot convince the jury with its evidence, the prisoner will go free. In America, an acquital by a jury is final and unreviewable by state functionaries.

During the Civil War, the federal government set up military tribunals and denied many people of their right to trial by jury. To facilitate that process, the government also suspended the writ of habeas corpus—so that the prisoners could not challenge the legality of their arrest or conviction. The one case that did reach the Supreme Court deserves careful attention.

In *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Attorney General of the United States maintained that the legal guarantees set forth in the Bill of Rights were "peace provisions." During wartime, he argued, the federal government can suspend the Bill of Rights and impose martial law. If the government chooses to exercise that option, the commanding military officer becomes "the supreme legislator, supreme judge, and supreme executive." It is very important to recall that that legal stance had real world consequences during that period of our history. Some men and women were imprisoned and some were actually executed without the benefit of the legal mode of procedure set forth in the Constitution—trial by jury.

The Supreme Court ultimately rejected the legal position advanced by the Attorney General. Here is one passage from that ruling:

> "The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right to trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that 'in all criminal prosecutions the ac-

cused shall enjoy the right to a speedy and public trial by an impartial jury,' language broad enough to embrace all persons and cases. . ." *Milligan*, pp. 122–123 (emphasis in original).

The *Milligan* ruling is sound. The Constitution does permit the suspension of habeas corpus in certain circumstances and Congress does have the power "To make Rules for the Government and Regulation of the land and naval Forces;" and "To provide for organizing, arming, and disciplining, the Militia." To reconcile those provisions with the provisions pertaining to trial by jury, the Supreme Court ruled that the jurisdiction of the military could not extend beyond those people who were actually serving in the army, navy, and militia. That is an eminently sensible reading of the constitutional text.

President Bush would like to be able to deny noncitizens on U.S. soil of the benefit of trial by jury. Under his executive order, he will decide who can be tried by jury and who will be tried by a military commission. The only case in which the Supreme Court has explicitly upheld the constitutionality of using military tribunals in America to try individuals who were not in the military is *Ex Parte Quirin*, 317 U.S. 1 (1942). Because the *Quirin* ruling carved out an exception to the *Milligan* holding, it must be scrutinized carefully.

The facts in *Quirin* are fairly straightforward. In June, 1942 German submarines surfaced off the American coast and two teams of saboteurs landed on our shores—one team in New York, the other team in Florida. Those teams initially wore German uniforms, but the uniforms were discarded after they landed on the beach. Wearing civilian clothes, they proceeded inland to accomplish their mission. They were all subsequently apprehended by the FBI.

President Franklin Roosevelt wanted these men to be tried before a military commission so he ordered that the men be turned over to the military authorities. FDR set up a military commission and decreed that these prisoners would not have access to the civilian court system. The prisoners were tried before the military commission and found guilty. Although the Attorney General of the United States strenuously argued that the Supreme Court had no jurisdiction over the case, the Court did grant a writ of habeas corpus that had been filed with the court by the attorneys for the prisoners.

The attorneys that had been assigned to defend the prisoners contended that the military proceedings were inconsistent with the *Milligan* precedent and that the Supreme Court ought to order a new trial. The Supreme Court rejected that argument and sought to distinguish the *Milligan* ruling from the circumstances found in *Quirin*. The Court ruled that the jurisdiction of military commissions could extend to people who are accused of "unlawful belligerency." Under the rationale of *Quirin*, anyone accused of being an unlawful belligerent can be deprived of trial by jury. Even an American citizen who is found out on U.S. soil can be tried and presumably executed by U.S. military authorities as long as he or she is charged and convicted of "unlawful belligerency."

In my view, the *Quirin* ruling cannot be reconciled with the constitutional guarantee of trial by jury. The flaw that I see in *Quirin* (and in the writings of those who defend *Quirin*) is circularity. We are told that a prisoner is not entitled to trial by jury because he is an unlawful combatant. The prisoner denies the charge and demands his constitutional rights so that he can establish his innocence. The government responds by diverting the case to a military tribunal. And, we are told, the subsequent conviction confirms the fact that the prisoner is ineligible to appeal his sentence to the civilian court system. That is like saying that a convicted rapist should not be given a DNA test because he is a convicted criminal.

Because of the hastiness of *Quirin* proceedings, the record in the case is (intentionally or unintentionally) incomplete. The case does not disclose the circumstances under which the prisoners were detected and captured by the FBI. That omission obscures the legal issues that are being debated presently.

For what it is worth, here is my own legal analysis of the circumstances presented by *Quirin*. When the German u-boat surfaced off of the American coast, our country was in a declared state of war against Germany. Thus, our military forces would have been perfectly entitled to destroy the u-boat and its occupants. Similarly, when the saboteurs arrived on the beach, they could have been immediately shot by military personnel or by any American. However, once the saboteurs successfully made their way inland and infiltrated our society, their legal status changed.

Those who resist that conclusion need to recognize the dilemma posed by imperfect knowledge. A primary function of the trial process is to determine the truth. Anyone who *assumes* that a person who has merely been accused of being an unlawful combatant is, in fact, an unlawful combatant, can understandably maintain that such a person is not entitled to our constitutional safeguards. The problem, once

again, is that that argument begs the question under consideration. And the stakes here are not trivial. The lives of human beings are potentially on the line.

The basic rule ought to be that if the government wants to execute or imprison anyone on U.S. soil, the government must proceed according the procedures set forth in the Constitution.

There are, to be sure, some very limited exceptions. For example, if our Navy planes had discovered and attacked the German u-boat off the coast of Florida, and some German sailors abandoned their vessel and swam for shore. Reaching the beach would not, in my view, trigger constitutional protections for the sailors. Enemy personnel can be taken into custody as POWs. The legal distinction that I have drawn—whether a person has made an "entry"—is not new; it is a sensible distinction that also happens to run throughout U.S. immigration law. See *Zadvydas* v. *Davis*, 121 S.Ct. 2491, 2500 (2001).

To conclude, Congress should not attempt to exploit the misguided *Quirin* ruling and suspend the guarantee of trial by jury for people here in the United States. Note, however, that policymakers may have choices beyond criminal indictment and sheer helplessness. The federal government, for example, already has the power to deport people who may pose a threat to our national security. And the burden of proof in a deportation proceeding is properly much lower than the standard of proof in criminal trials.

VI. Forums for War Criminals Captured Overseas

There appear to be four possible legal forums to try suspected war criminals that are captured overseas: (1) trial in a civilian court here in America, according to our normal federal rules of criminal procedure; (2) trial by a non-Article III court; (3) trial in a international forum; (4) trial before a an ad hoc court based upon Nuremberg principles. Let me briefly address these possibilities in turn.

A criminal trial in a civilian court here in America does not require extended discussion. This procedure was used to try the Panamanian leader Manuel Noriega, the terrorists who bombed the World Trade Center in 1993, and the bombers of the Oklahoma City federal building in 1995.

A criminal trial in a non-Article III court here in America or overseas has precedent. After World War II, some German and Japanese POWs were accused of war crimes and were tried before military tribunals. See *Application of Yamashita*, 327 U.S. 1 (1946).

In recent years there has been much discussion surrounding the creation of an "International Criminal Court" (ICC). The idea here is to establish a permanent court that can try individuals for war crimes, genocide, and other crimes against humanity. To become effective, the ICC Treaty requires 60 nations to ratify its provisions. Thus far, only 43 nations have signed off on the treaty. However, even if the ICC treaty were ratified tomorrow, it provisions are not retroactive and could not be applied against terrorists for the vicious attacks on the World Trade Center. Thus, on closer examination, this is not a feasible possibility. There are, in any event, many good reasons to withhold U.S. support for such a tribunal. See Dempsey, "Reasonable Doubt: The Case Against the Proposed International Criminal Court," *Cato Institute Policy Analysis* no. 311 (July 16, 1998).

A temporary, ad hoc, tribunal based upon Nuremberg principles is another possibility. After World War II, the Allied Nations tried Nazi war criminals in Nuremberg. At present, the former dictator, Slobodon Milosevic, is being tried before the International Criminal Tribunal for the Former Yugoslavia, which is also based on Nuremberg principles.

Because a regular criminal trial in the United States is straightforward and the ICC seems unrealistic, let me briefly explain why I think a trial by an ad hoc tribunal based upon Nuremberg principles may be the best forum.

First, government prosecutors can avoid habeas corpus appeals in the U.S. court system, which absent congressional action, will almost certainly develop post-trial.

Second, a reasonable argument can be made that bona fide intelligence information should not have to be disclosed in a public forum. A non-Article III court proceeding must still comport with due process and intelligence sources likely would have to be disclosed in order to counter meritorious objections from defense counsel, and, thus, the possibility of a lengthy retrial.

VII. CONCLUSION

In sum, my view is that war criminals captured on U.S. soil must be tried in our civilian court system. War criminals captured overseas can be tried in a civilian court here in the United States or by a Nuremberg-type tribunal.

Senator SCHUMER. Thank you, Mr. Lynch.

First I want to thank, I imagine my panel members would, this was excellent testimony. You did not just read what you had come to give us, but tried to respond to the dialog and debate that had preceded you, and I want to thank all of you for it.

The only other general comment I would make, and it relates a little bit to what Professor Sunstein said, and that is that there seems to be, not that everyone agrees on everything, but there seems to be a little more consensus when you start asking the specific questions. The divisions are less broad than just the words "secret military tribunal", whether you agree with him or disagree. And I guess I would just say that the administration would have been better served, instead of just announcing in broad brush that they were going to do this, but by issuing specific rules, and then perhaps a lot of the parade of horribles that people are worried about would not have been the focus of the debate. And I just hope that they will issue those rules quickly, so that we can actually debate some real issues, not potential worries of what people have, and I would urge them to do that.

Let me ask a couple of points that both Professor Tribe and Sunstein made, but I would like to ask General Nardotti and Mr. Terwilliger if they would agree. Would you both agree that these tribunals should be limited to violations of the laws of war as opposed to other broader—I think Professor Sunstein mentioned this. Mr. Terwilliger?

Mr. TERWILLIGER. In general, yes, although what defines a violation of the law of war and the extent of responsibility for that, probably is something that could be subject to a lot of discussion and debate, but as a general proposition, of course.

Senator SCHUMER. How about you, Major Nardotti?

General NARDOTTI. I agree, Mr. Chairman.

Senator SCHUMER. You agree. What about the idea of people arrested within the boundaries of the United States; should these tribunals apply to them ever, once in a while, or whatever you think? Again to Mr. Terwilliger and Major Nardotti.

Mr. TERWILLIGER. I agree with most of what Professor Sunstein said, with that exception, Mr. Chairman, and for this reason. While I think the circumstances are different for someone who commits acts here that may make them subject to the order, than for someone who commits acts abroad, nonetheless, it is the nature of the acts that render someone subject to the order—the what, rather than the where. The difference is that under the where, the President may have the additional option of using, in appropriate cases, the criminal justice system. That use, however, may be inappropriate for reasons we, I think, have a consensus to recognize.

Senator SESSIONS. But you would entertain the possibility of, say, an illegal immigrant who is engaged in a major act of terrorism, but apprehended within the boundaries of the United States, still being subject to a military tribunal?

Mr. TERWILLIGER. Yes, yes, Mr. Chairman, and for one additional important reason. Many of the people who appear to be responsible for this, in essence lied their way into the United States. I do not know why we should give them the benefit of their fraudulent bargain in conning their way into the country and cloak them with

constitutional rights, including the right to a trial in a civilian court.

Senator SCHUMER. And I apologize, Major General Nardotti. You have such presence, I assumed you were a general and will go into your second rank, but do you agree with Professor Terwilliger?

General NARDOTTI. I agree that under circumstances where it is clear or you can establish that they fall into the category of unlawful combatants, they entered the country and were not wearing uniforms or insignia of their armed force, they do not carry arms openly or they do not comport of conform with the laws of war in their operational conduct, by their conduct they have placed themselves in that category, and I believe—and in fact, an even more compelling case could be made that they should be subject to the military tribunals than others caught out on the battlefield in open—

Senator SCHUMER. Would our other three witnesses disagree with what Mr. Terwilliger and General Nardotti said?

Mr. TRIBE. I agree.

Mr. SUNSTEIN. I agree.

Mr. LYNCH. I disagree, Mr. Schumer. In my view, almost any person captured on U.S. soil would be entitled to the constitutional procedure of jury trial. There might be some limited exceptions to that. I do not think bare entry into the country would be enough to trigger constitutional protections, but almost anybody captured here on U.S. soil, I think the Bill of Rights is triggered for those people.

Senator SCHUMER. Now, one just other one that was proposed by Professor Tribe. His view was that appeal to the Secretary of Defense and the President is insufficient. There needs to be some form of judicial appeal beyond just habeas. Mr. Terwilliger, what do you think of that?

Mr. TERWILLIGER. Well, I have a great deal of respect for Professor Tribe, but he is wrong once in a while. And I think on this one the reason he is wrong is because that is mixing two separate bodies of law. The authority to conduct military tribunals, without going into a long explanation, arises completely separate from the jurisdiction of Article III courts with the exception of the writ of habeas corpus. And for that reason, I do not think we can sort of design a customized constitutional procedure to accomplish that.

Senator SCHUMER. General Nardotti?

General NARDOTTI. Since we do not have the details of the procedures as they would apply to the review process, obviously, that will shed important light on this particular aspect. I believe, given the practicalities of the situation, if there are any number of cases reviewed by the Secretary of Defense and the President who have many other things that they need to be devoting their time to, they are going to need a great amount of assistance, and if there were established some type of review panels as part of that process, I think that would alleviate some of the concerns, but I would basically agree in terms of the legal issues that Mr. Terwilliger has cited, I would agree.

Senator SCHUMER. Let me ask now Professor Sunstein, Professor Tribe and Mr. Lynch. I guess it was Professor Koh wrote an article where he basically said we ought to use civilian courts, there ought

to be a strong, strong lean—I do not know if he said absolutely in every case; he did say you could use CIPA and other secrecy procedures, but there ought to be a strong lean to using civilian courts in just about every situation that this war confronts us. And what is your view of that basic view? Why don't we go right to left?

Mr. SUNSTEIN. I think that's excessive so long as the procedures in the military commissions are full and fair, and if you can ensure the essentials of procedural justice and an unbiased tribunal, as we did, witness the 85 percent conviction rate, not 100 percent, not close to it, after World War II. There is no reason to insist on civilian courts given the legitimate interest in avoiding a circus atmosphere, in promoting secrecy and ensuring expedition.

Senator SCHUMER. Professor Tribe.

Mr. TRIBE. Well, I agree with what Professor Sunstein has said. I think you may be over reading what Professor Koh, former Assistant Secretary of State said. As I understand his view, it is that we ought not simply to assume that the civilian trials will always be unsuitable. I think there is a difference in degree in the presumption, but I do not think he believes that the Constitution requires it and I certainly do not think the Constitution requires it.

Senator SCHUMER. But would you agree with him in his general view that civilian—

Mr. TRIBE. Well, certainly not for people actively involved in major acts of war against the United States, but I am not sure he would think his view applies there either.

Senator SCHUMER. He is not here, so we will—

Mr. TRIBE. I think it is the breadth of this Order that invites people to have broader differences. I very much agree with Cass Sunstein, that when you get down to the details, not only as to the procedure, but as to what it was really intended to have this sort of Damocles hang-over. Not all 18 million resident aliens, but a very tiny number that could be much more precisely defined.

Senator SCHUMER. So if you were advising the administration, you would say, get some specifics out here pretty quickly?

Mr. TRIBE. Although in its defense—it does not need me to defend it—but when you said you thought they should have come out with the details, I think they should have come out with something that is more like what an agency does, an NOPR, notice of proposed rule-making. That is, if they had done originally what White House Counsel and Secretary Rumsfeld have done in suggesting that, they're just floating a trial balloon here; they had made clear it was not an order—but it acturally is an order. Given what they did, I think they are stuck with it, and the Congress ought to fix it if they will not.

Senator SCHUMER. Mr. Lynch, you get the last word on the question that I had asked of the two, and you can respond to Professor Tribe as well if you would like.

Mr. LYNCH. I haven't seen Professor Koh's article, but I too would lean very heavily towards a civilian trial. But that is not to say that it is the only option. I think, in the alternative, what policy makers should be looking at is a tribunal, along the lines of the Nuremberg trials. I would lean heavily towards a civilian trial, but I think that that is the next best alternative which Congress should be looking at.

Senator SCHUMER. Thank you. I want to thank all the witnesses. My time is up.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

You know, about the issuing a final and complete Order, Mr. Chertoff suggested, and I think Rumsfeld, the Secretary of Defense, suggested Sunday in a TV interview, that this does allow us the time to have some debate and help the Department of Defense decide precisely what ought to be in the Order. If we had issued it incomplete, I suspect the critics would have complained that it was not perfect and they would not have any chance to have any input in it. So I think it is better to put it out publicly, let the whole country have a debate on it. Let us go back to the history and the Constitution and discuss these matters, and I believe that is a healthy approach.

With regard to the question, Mr. Lynch, of trying everyone that has any residency in this United States in a civil trial and never be subjected to a military commission, which you propose, the *Quirin* case specifically offered the opinion, did it not, that citizens could be even tried. So do you agree that the *Quirin* case did say that?

Mr. LYNCH. Yes, I agree that that is an implication from the *Quirin* case. That means that we could have a new Executive Order, perhaps next month, that would extend the class of the people subject to the order from noncitizens here on U.S. soil, to citizens, and to justify that extension by saying *Quirin* covers citizens.

Senator SESSIONS. And the President, by the Order he issued, limited that to noncitizens, and those who are connected to al Qaeda and/or international terrorism, is a fairly, I think, limited pool of people, and that would not cover 18 million people, would it, Mr. Lynch?

Mr. LYNCH. Well, the point is, that the Executive Order covers any noncitizen here on U.S. soil. Any time the government accuses somebody of being an "unlawful belligerent," then that person has essentially been stripped of many of the constitutional protections that I have listed here.

Senator SESSIONS. Well, the status of the case would have to be that he would have to be connected, or she, would be connected to international terrorism, I think, and I think it is unfair and inflammatory to suggest that we have got 18 million people that are here in this country that are subject to being tried in a military commission when we give resident aliens of all kinds all the panoply of constitutional rights that citizens get, and I just would take exception to that.

Mr. Tribe, on the history of the commission, in your testimony in your footnote, you state, "*Ex Parte Quirin* mistakenly invoked by the White House as precedent, the military tribunal's jurisdiction, was explicitly provided by Congress." In other words, they were saying that it was explicitly provided by Congress within the Order.

Mr. TRIBE. In *Quirin* they found explicit authorization. I am only saying that *Quirin* is therefore not very strong authority in this circumstance where the argument is much weaker that Congress has really authorized exactly this.

Senator SESSIONS. Well, Article 15 of the Articles of War that was relied on in the *Quirin* case, which gave use under the Military Orders, that stated that the provisions of these articles conferring jurisdiction on courts-martial shall not be construed as depriving military commissions of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by military commissions. So it affirms the right of military commissions to try offenses that by the law of war would be lawfully triable by such commissions.

Mr. TRIBE. Well, Senator Sessions, Article 15 of the Laws of War is very similar. Basically it was codified in Section 821 of the UCMJ, and that is not quite enough, because all that says is that the jurisdiction of courts-martial does not preclude these other things. That is why the court in *Ex Parte Quirin* did not rely solely on Article 15, but relied also on other legislation by Congress which essentially it interpreted as saying that once there is a declaration of war, the President has all of this authority. I think the court was right in that part of *Ex Parte Quirin*, but that just points out that it does matter whether we have a full-fledged declaration of war or not.

Senator SESSIONS. Well, I really appreciate your comprehensive view of this, and you mentioned this as one of your two concerns, this very point I believe. It strikes me that the *Quirin* case did rely on the Articles of War, did it not?

Mr. TRIBE. In part.

Senator SESSIONS. In part. And then when the Articles of War were passed by—or the UCMJ recodified the Articles of War in virtually identical language, the Congress would have been aware of the historical precedent of Lincoln and Roosevelt, and that therefore we would normally expect that they knew what they were doing in actually approving military commissions, would we not?

Mr. TRIBE. But, Senator Sessions, that very history shows—and I think the debate about the joint resolution of September 18th shows, that this Congress knows the difference between declaring war, which triggers a whole panoply of things, and authorizing the President to use force for a particular objective. That is what this joint resolution did. It did not quite declare war. I think we are "at war" in a sense sufficient to make the laws of war applicable once there is an authorization for the commissions, and that authorization can come either by a declaration of war or by a more specific authorization.

Senator SESSIONS. Well, I think the Prize cases says that essentially war is determined by the people who make it, and that it can be a unilateral declaration of war by the act of the attacking party.

Mr. TRIBE. Certainly. But, Senator Sessions, the issue in the Prize cases was whether Abraham Lincoln was in violation of the Constitution for waging war to prevent the dissolution of the Union. It was not whether, without congressional authorization, he could set up military commissions. When that issue arose in *Ex Parte Milligan*, the Court indicated was that there was no authorization by Congress for suspending the writ of habeas corpus, or for setting up military commissions, to try people like Milligan, and I say if it was good enough for Lincoln, it should be good enough for Bush.

Senator SESSIONS. Well I think it is. I think the authorization is there, and I would just plainly disagree with you. I think the UCMJ, as recodified, is clear authority, in addition to the probable inherent authority as Commander-in–Chief to protect the country from attack.

Thank you.

Senator SCHUMER. Thank you, Senator Sessions.

I am going to recognize Senator Feinstein, and just going to step out for a minute.

Senator FEINSTEIN. Thanks very much, Mr. Chairman.

It is good to see you again, Professor Tribe, Professor Sunstein, and gentlemen. Professors Tribe and Sunstein and I have worked on other things together, and I wanted to ask the two of you, just to further elaborate on this. When we passed the authorization legislation, it carried with it the full powers of a declaration of war. We were attacked by foreign elements on our soil. The Congress responded by giving the President the full authorization to use force against these elements, these elements related to the September 11th attacks. We were not declaring war against a country because there was not a country against which we could declare war, but against those elements, namely terrorists. Therefore, I do not understand why, this is not absolutely equal in standing to a full declaration of warn.

Mr. SUNSTEIN. I do tend to think that insofar as we are talking about military commissions, your question points in the right direction. Certainly about the Supreme Court's likely resolution of the question that Professor Tribe and Senator Sessions were disagreeing about. That is, my reading of *Quirin*—and here I have a mild disagreement with Professor Tribe—is that the authorization of force alongside 10 U.S.C. 821, invoked by Senator Sessions, as understood in *Quirin*, very broadly understood in *Quirin* as an authorization, would be taken by a majority, strong majority of the current Court to authorize the use of military commissions.

Having said that, I do not believe that Senator Sessions and Professor Tribe would disagree on the following question, which is, would it be better from this constitutional standpoint and from the standpoint of separation of powers, for there to be expressed rather than somewhat vague congressional authorization of the sort that you, Senator Feinstein, have just referred to, and of the sort that Senator Sessions earlier referred to. So basically I think you are correct, that as a legal matter, the authorization of force in September would carry the full effect of a declaration of war, though there's there was authorization, right after the South attempted to secede, Congress reason from my constitutional standpoint about being mildly uncomfortable about that. The only thing that could be said, I think, in defense of the authorization of war, as opposed to a declaration, is exactly what you have said, and it is a very important point, who are we going to declare war against? We have been attacked not by a nation, but by individuals and groups who have violated the laws of war.

Senator FEINSTEIN. Professor Tribe?

Mr. TRIBE. Certainly as a matter of predicting what the current Court would do, I think the odds are very good that it would defer to the Chief Executive. One of the points that I have made both

in my written testimony and in my recent article is that the Congress should itself recognize the gravity of the constitutional responsibility that it has before it, especially given the tendency of the Court to defer overwhelmingly to the Executive in wartime. Any suggestion that the Court will answer the question for us without such deference would be a mistake.

I do think that because we are not grappling with a sovereign nation, a classic declaration of war is not what would have been called for. That is why I think Congress did a sensible thing in crafting something narrower, but it crafted it narrowly enough so that I think a cloud hangs over the legitimacy of these commissions. That is, Congress could have made it clear, and still could, that trial by military commissions in certain limited circumstances is authorized. That would eliminate any risk that any of the al Qaeda lieutenants, if convicted by one of these commissions, would succeed in being released on habeas. Think of the international embarrassment for this country if in the pleasant discussion that we are having in this room, between Senator Sessions, Professor Sunstein, and me, if that converts into the issuance of a writ of habeas corpus by some rather more liberal judge than the current Supreme Court, out in the Ninth Circuit. He might get slapped down, but in the meantime it is not a healthy thing for this country to have that cloud hanging over this issue. There also was discussion on the floor, I think more in the House than on the Senate side, about the reluctance to wheel out the heavy artillery of a declaration of war, because war has been declared on non-nations before, on the Barbary pirates for example, but to wheel out that artillery and automatically trigger a whole range of consequences in the statute books of the United States was something Congress wasn't ready to do.

Given that, it seems to me that there's ambiguity about whether what Congress did do carried the day in terms of these commissions.

Senator FEINSTEIN. So, quickly before the red light, what is your remedy?

Mr. TRIBE. The remedy is for this Congress, although it may be unrealistic, given the differences of view, but for this Congress to authorize the use of military commissions in very narrowly defined circumstances involving violations of the laws of war, which can be more precisely codified—

Senator FEINSTEIN. As opposed to an Executive Order?

Mr. TRIBE. As opposed to merely an Executive Order.

Senator FEINSTEIN. So you are saying that if the Congress essentially authorizes it, states the scope and the—

Mr. TRIBE. That is right, and leaves to the Executive Branch a great deal of room. Certainly it has some room that cannot be restricted by this Congress. And by the way, I have not confused the Commander-in–Chief issue with the Article III issue. I did not say it is because of Article III that people should have a right to appeal to someone other than their accuser; it was because of fundamental fairness.

Senator SCHUMER. We have zero minutes left on a vote, so I appreciate—

Senator FEINSTEIN. If I could just say one thing.

Senator SCHUMER. Please.

Senator FEINSTEIN. Perhaps they would extend. They do for everybody else. Perhaps for us they would extend it a few more minutes.

If I could just ask one quick question. In Professor Sunstein's paper, and he mentioned this in his oral remarks, that a standard of proof beyond the preponderance of evidence, but ranging from clear and convincing to beyond a reasonable doubt, I the do not understand how you can say we did an authorization—and this is one of the points we wanted to address in it—how we could just simply make up a standard of proof.

Senator SCHUMER. And do it succinctly if you could, Professor.

Mr. SUNSTEIN. As part of the legislative power, it would be just fine so long as it met with the constitutional standards and certainly the beyond a reasonable doubt standard would, and almost certainly the clear and convincing evidence standard would, so it would be part of the legislation setting up the tribunals.

Senator FEINSTEIN. Do you gentlemen have a suggestion?

Mr. TRIBE. "Clear and convincing" I think is more realistic in the wartime situation than "beyond a reasonable doubt." And I also think that when you say I would rather have 100 innocent ones go free, that's not true if they have access to bioterrorism. It seems to me the ratio is a little different here.

Senator FEINSTEIN. That is correct. Do you agree?

Senator SCHUMER. A statement from the ACLU and letters from the Parkway Christian Fellowship and St. Mary's University will be included in the record.

And on that note, we will conclude.

We are going to miss our vote. Thank you. You were a great panel, and I think really helped. The hearing is adjourned.

[Whereupon, at 12:45 p.m., the committee was adjourned.]

DEPARTMENT OF JUSTICE OVERSIGHT: PRESERVING OUR FREEDOMS WHILE DEFENDING AGAINST TERRORISM

TUESDAY, DECEMBER 4, 2001 (AFTERNOON SESSION)

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 2:00 p.m., in Room SD–226, Dirksen Senate Office Building, Hon. Russell Feingold, presiding.

Present: Senators Feingold, Durbin, Hatch, and Sessions.

OPENING STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. The hearing will come to order. We, I believe, have a vote at about 2:20 or 2:25, so I will make an opening statement and if the ranking member is here, we will do that as well and perhaps be able to get through the first panel, at which time I will recess and we will come back and begin with the second panel as soon as we possibly can.

Welcome to the third of four hearings on "DOJ Oversight: Preserving our freedoms While Defending Against Terrorism." This hearing will focus on the issue of individuals detained in connection with the September 11 attack investigation. This hearing will explore the importance of the Attorney General's providing a full accounting of who is being detained and why, as well as other basic information about the status of individuals detained since September 11. We will also consider the Department of Justice's plan to question 5,000 individuals of Arab and Muslim backgrounds in connection with the investigation.

The terrorists struck the heart of our nation's financial capital when they struck New York City and took the lives of thousands of Americans. In the shadow of where the World Trade Center once stood is the Statue of Liberty, standing tall and proud with a torch raised to the skies. She shines her light on a city and a nation struggling to cope with this tragedy and working to prevent any such horrific act from ever happening again.

Most important, though, Lady Liberty is a reminder of why Americans and immigrants, who, like my forefathers and those of probably everyone in this room, arrived on our shores, desiring to be Americans one day. They love our nation and are proud to be a part of it. Her beacon at the golden door to America is a beacon to freedom, a beacon of hope, and a beacon of justice.

I fear that America's beacon of freedom and justice is threatened as we face almost daily revelations of extraordinary steps by the Justice Department that snub the rule of law and threaten to erode fundamental constitutional rights.

As my colleague, Senator Kennedy, eloquently stated last week, no Senator and no American has a monopoly on wanting to bring the perpetrators of the September 11 attacks to justice and doing all we can to prevent future acts of terrorism and the loss of American lives. I fully support our law enforcement officials in their tireless efforts to leave no stone unturned as they strive to protect our nation from future attacks.

But as we move forward in our fight against terrorism, Congress, and especially this Committee, has a responsibility to ensure that the constitutional foundations of our nation are not eroded. The beacon of freedom must continue to shine on our nation.

During the course of the investigation of the September 11 attacks, the Justice Department has detained over 1,100 individuals. The Justice Department recently began releasing some information about the people who have been detained on Federal criminal charges or immigration violations, but we still do not have a full picture of who is being detained and why, and there are reports that detainees have been denied their fundamental rights to due process of law, including access to counsel, and have suffered serious bodily injury. We simply cannot tell if those cases are aberrations or an indication of systemic problems if the Justice Department will not release further information about those being held in custody.

The Attorney General has repeatedly and strongly asserted that he is acting with constitutional restraint, but the Department of Justice has a responsibility to release sufficient information about the investigation and the detainees to allow Congress and the American people to decide whether the Department has acted appropriately and consistently with the Constitution.

We will hear today from Ali Al–Maqtari, who was detained by Federal officials in Tennessee for almost two months for a minor immigration violation that would not usually merit detention. We will also hear from his lawyer, Michael Boyle, who will discuss his experience in representing Mr. Al–Maqtari and the experience of his colleagues who are representing detainees.

Following Mr. Boyle, we will hear from Mr. Goldstein, who will talk about the challenges he faced in his representation of Dr. Al–Badr Al Hazmi, a radiology resident in San Antonio, Texas, who was detained following the September 11 attacks for nearly two weeks.

Finally, Nadine Strossen of the American Civil Liberties Union will talk about why disclosing basic information about the status of detainees is imperative and comment on the implications of questioning over 5,000 young men from Arab and Muslim countries.

This Friday, December 7, our nation will mark the 60th anniversary of the bombing of Pearl Harbor, a day that President Roosevelt then said "would live in infamy." While our nation made great strides for mankind as a result of our victory in World War II, we also lost something of ourselves when we interned over

120,000 Japanese Americans and thousands of German and Italian Americans. We later came to regret those acts.

I do not suggest that what is now going on rivals that deplorable action taken in the name of national security, but I do think we need to learn a lesson from this history to question our government when it appears to be overreaching. Such questions are not unpatriotic and they should not be viewed as an inconvenience by the executive branch. They are a crucial tool for Congress to play its constitutional role in protecting the great heritage of this country and the rule of law.

[The prepared statement of Senator Feingold follows:]

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

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But as we move forward in our fight against terrorism, Congress, especially this Committee, has a responsibility to ensure that the constitutional foundations of our nation are not eroded. The beacon of freedom must continue to shine on our nation.

During the course of the investigation of the September 11 attacks, the Justice Department has detained over 1,100 individuals. The Justice Department recently began releasing some information about the people who have been detained on federal criminal charges or immigration violations. But we still do not have a full picture of who is being detained and why. And there are reports that detainees have been denied their fundamental right to due process of law, including access to counsel, and have suffered serious bodily injury. We simply cannot tell if those cases are aberrations or an indication of systemic problems, if the Justice Department will not release further information about those being held in custody.

The Attorney General has repeatedly and strongly asserted that he is acting with constitutional restraint. But the Department of Justice has a responsibility to release sufficient information about the investigation and the detainees to allow Congress and the American people to decide whether the Department has acted appropriately and consistent with the Constitution.

Within a week of September 11th, the Department began releasing information on the numbers of people who have been detained as part of the investigation. On October 31st of this year, I, along with Chairman Leahy, Senator Kennedy and Representatives Conyers, Nadler, Scott, and Jackson-Lee, sent a letter to the Attorney General requesting information about the detainees. We wanted to know who is

being detained and why; the basis for continuing to hold individuals who have been cleared of any connection to terrorism; and the identity and contact information for lawyers representing detainees. We also wanted information regarding the government's efforts to seal proceedings and its legal justification for doing so.

In early November, the Department announced it would no longer release comprehensive tallies of the number of individuals detained in connection with the September 11 investigation and that it would limit its counts to those held on federal criminal or immigration violations. Thus, it would no longer keep track of those held on state or local charges, nor would it indicate how many people have been released after being detained.

Just before Thanksgiving, the Department provided copies of the complaints or indictments for about 46 people held on federal criminal charges. It also provided similar information on about 49 people held on immigration violations, but redacted their identities. Last week, the Attorney General announced the number and identities of all persons held on federal criminal charges and the number, but not the identities, of persons held on immigration charges. The total number of detainees is roughly 600 individuals. But the Department continues to refuse to identify the 548 persons held for immigration violations, or provide even the number of material witnesses, or the number and identities of persons held on state or local charges.

I am not satisfied with this response but we now know a lot more about the detainees than we knew at the end of October. This illustrates the crucial role of congressional oversight as a check on the executive branch.

The Department has cited a number of reasons for its refusal to provide additional information. Very troubling is the Department's assertion that those being held for immigration violations have violated the law and therefore "do not belong in the country." But without full information about who is being detained and why, we cannot accept blindly an assertion that each detainee does not deserve to be in the country. Do all of these immigration violations merit detention, without bond, and deportation? I doubt it, as some are very minor violations that under normal circumstances could be cleared up with a phone call. I hope that today's hearing will shed some light on this issue.

The Department also says it is protecting the privacy of the detainees by refusing to release their identities, and they are free to "self-identify" if they want. But as we will hear this afternoon, some of these individuals have been denied access to lawyers or family, for days or weeks at a time. So, it rings hollow to suggest that detainees are in a position to self-identify. My strong sense is that people in detention cannot just call the New York Times or this Committee if they want the public to know the circumstances of their cases. Our witnesses today should help us to assess whether the option of self-identification is a real option.

As this hearing will bring into focus, there are concerns that the Department's investigation has employed a clumsy, dragnet approach, which is increasingly proving to be offensive to the Arab and Muslim American communities and has come under criticism by a number of highly respected former FBI officials. I sincerely hope that the extraordinary effort to question immigrants from certain Arab and Muslim countries does not become counter-productive. In a rush to find terrorists, the Department appears to have disrupted the lives of hundreds of people, most of whom will prove to be wholly innocent of any connection to terrorism. Just as important, the trust of communities whose help is so crucial to preventing future attacks is being severely undermined.

We will hear today from Ali Al-Maqtari who was detained by federal officials in Tennessee for almost two months for a minor immigration violation that would not usually merit detention. We will also hear from his lawyer, Michael Boyle, who will discuss his experience in representing Mr. Al-Maqtari and the experience of his colleagues who are representing detainees. Following Mr. Boyle, we will hear from Mr. Goldstein, who will talk about the challenges he faced in his representation of Dr. Al Badr Al Hazmi, a radiology resident in San Antonio, Texas, who was detained following the September 11 attacks for nearly two weeks. Finally, Nadine Strossen, of the American Civil Liberties Union, will talk about why disclosing basic information about the status of the detainees is imperative and comment on the implications of questioning over 5,000 young men from Arab and Muslim countries.

This Friday, December 7th, our nation will mark the 60th anniversary of the bombing of Pearl Harbor, a day that President Roosevelt then said "would live in infamy." While our nation made great strides for mankind as a result of our victory in World War II, we also lost something of ourselves when we interned over 120,000 Japanese Americans and thousands of German and Italian Americans. We later came to regret those acts. I do not suggest that what is now going on rivals that deplorable action taken in the name of national security. But I do think we need to learn a lesson from this history to question our government when it appears to

be overreaching. Such questions are not unpatriotic and should not be viewed as an inconvenience by the Executive Branch. They are a crucial tool for Congress to play its constitutional role in protecting the great heritage of this country and the rule of law.

I will now turn to the ranking member, Senator Hatch, for his opening statement. Before I do, I want to thank the Chairman and Senator Kennedy for their leadership on this issue. I also want to thank Senator Hatch for his cooperation with Senator Leahy and myself in putting this hearing together.

Senator FEINGOLD. Whenever Senator Hatch arrives, perhaps after the break, we certainly will turn to him for his opening statement. I also want to thank the chairman and Senator Kennedy for their leadership on this issue and I, of course, want to thank Senator Hatch for his cooperation with Senator Leahy and myself in putting this hearing together.

I think this gives us an opportunity, then, to begin the first panel. I would ask Mr. Viet Dinh to join us.

Our first witness this afternoon is Mr. Viet Dinh, the Assistant Attorney General for Office of Legal Policy. The Justice Department asked that Mr. Dinh be permitted to testify at this hearing to give the Department's views. He has served as Assistant Attorney General since May 31 of this year. Prior to his government service, he was a professor of law at Georgetown University Law Center. He also served as special counsel to the Senate Whitewater Committee and to Senator Domenici during the impeachment trial of President Clinton.

I welcome you, sir, but I would ask that you limit your oral remarks, if you could, to five minutes so that we can make sure we have time to get to the next panel, in light of the problem with the vote interrupting us for some time. I appreciate your being here, and certainly, without objection, your full written statement will be placed in the record.

Mr. Dinh?

STATEMENT OF VIET D. DINH, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, UNITED STATES DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. DINH. Thank you very much, Senator, members of the Committee, and I thank you for putting the full statement in the record. Let me say first that it is not an inconvenience for me to be here. Rather, it is an honor, and thank you for having me here to answer the questions that the Committee has and continues to have and it is a great opportunity to answer some of these questions.

Your opening statement was quite moving, and so if I may, I will enter my written statement into the record and just very briefly touch upon the theme that you started with your opening statement about the nature of liberty in America. It is a question that has revolved in my mind since September 11, and more honestly, September 12, because September 11 was a day of numbness for me.

But on September 12, I began to ask the question that I think most Americans have started asking themselves in this period also. That is, why? Why is it that these zealots are willing to give up their own lives in order to take the lives of thousands of innocent Americans and freedom-loving people around the world in that hor-

rendous attack of September 11? Is it because we are somehow better than the people of the world? I do not think so.

Americans—look around this room—Americans are the people of the world, as you say. The inscription at the base of the Statue of Liberty, it says, "Give me your tired, your poor, your huddled masses." It does not say, give me your highest SAT. It does not say, give me your best and brightest. It says, give me your lowest. Give me the ordinary people of the world and I will promise you something special. I will promise you liberty. I will promise you freedom. and with that liberty, with that freedom, America lets the ordinary people of the world do their ordinary things but achieve extraordinary things as Americans.

So as we go forward in responding to the threat of terrorism in the future and responding to the attacks of September 11, we are very mindful that we would not sacrifice these values of freedom and liberty and institutions that safeguard this freedom. At the same time, however, America is asking us to deliver to her people a different kind of freedom, freedom from fear, for without the safety of their persons and the security of their nation, Americans would not be able to go about doing those ordinary things that make America an extraordinary nation.

And as we go forward in this process since September 11 and continue to prosecute this war on terror, we have tried and we have committed to preserving this balance in order to defend freedom through law, which is the work, after all, of the Department of Justice.

I will speak very briefly to three areas that are of interest to this Committee. First, with respect to the detentions, as of last evening, there are 608 persons in Federal custody on criminal or immigration charges growing out of our investigation into the September 11 attacks. Of that total, 55 are being held on Federal criminal charges. The remaining 553 are being detained on immigration-related charges. The Department has charged a total of 105 persons for violation of criminal law. Some of those indictments or complaints have been filed under seal by order of court. The names and charges against all others have been publicly released.

Every one of these detentions, let me assure you, is fully consistent with established constitutional and statutory authority. Each of the 608 persons detained has been charged with a violation of either immigration law or criminal law or is the subject of a material witness warrant issued by a court.

Every one of these individuals has a right of access to counsel. In criminal cases and in cases of material witnesses, of course, the person has a right to a lawyer at government expense if he or she cannot afford one. Persons detained on immigration violations have a right to access to counsel, and the INS provides each person with information about available pro bono representation.

Every person detained has a right to make phone calls to family members and attorneys. Under INS procedures, once they get into custody, aliens are given a copy of the Detainee Handbook, which details their rights and responsibilities, including their living conditions, clothing, visitation, and access to legal materials. In addition, every alien is given a comprehensive medical assessment. Detainees are informed of their right to communicate with their na-

tion's consular or diplomatic officers, and for some countries, the INS will notify those officials that one of their nationals has been arrested or detained. Aliens are permitted access to telephones.

Finally, immigration judges preside over legal proceedings involving aliens and aliens have a right to appeal any adverse decisions, first to the Board of Immigration Appeals, and then to the Federal Court.

Second, let me address the Justice Department's plan to conduct voluntary interviews of individuals who may have information relating to terrorist activity. On November 9, the Attorney General directed all United States Attorneys and members of the Joint Federal and State Anti–Terrorism Task Forces, the ATTFs, to meet with certain non-citizens in their jurisdiction. The Deputy Attorney General, Larry Thompson, issued a memorandum outlining the procedures and questions to be asked during those interviews.

We seek to interview those who we believe may have information that is helpful to the investigation or to disrupting ongoing terrorist activity. The names were compiled using common sense criteria that take into account the manner in which al Qaeda has traditionally operated, according to our intelligence sources.

Thus, for example, the list includes individuals who entered the United States with a passport from a foreign country in which al Qaeda has operated or recruited, who entered the United States after January 1, 2000, and who are males between the ages of 18 and 33.

The President and the Attorney General continually has emphasized that our war on terrorism will be fought not just by our soldiers abroad, but also by civilians here at home. Last week, the Attorney General announced a new plan to enable our nation's guests to play a crucial part in this ongoing campaign. Non-citizens are being asked on a purely voluntary basis—

Senator FEINGOLD. Mr. Dinh, I am going to have to ask you to conclude.

Mr. DINH. I will. Let me just describe this one particular program and I will conclude—on a purely voluntary basis to come forward with useful and reliable information about persons who have committed or are about to commit terrorist attacks. Under this Cooperators' Program, aliens may then be eligible to receive S visa and other immigration status adjustments in order to facilitate their stay in this country and/or help us with our continuing fight, and with that, I would love to answer any questions.

Senator FEINGOLD. Thank you, Mr. Dinh, and, of course, your full statement will be placed in the record.

[The prepared statement of Mr. Dinh follows:]

STATEMENT OF VIET D. DINH, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE

Good afternoon, Mr. Chairman and Members of the Committee. Thank you for the opportunity to testify today on the Department of Justice's response to the terrorist attacks of September 11 and our continuing efforts to prevent and disrupt future terrorist activity.

September 11 was a wake-up call to America and, indeed, to freedom-loving people around the world. To ensure the safety of our citizens and the security of our nation against the threat of terrorism, the Department has undertaken a fundamental redefinition of our mission. The enemy we confront is a multinational network of evil that is fanatically committed to the slaughter of innocents. Unlike en-

emies that we have faced in past wars, this enemy operates cravenly, in disguise. It may operate through so-called "sleeper" cells, sending terrorist agents into potential target areas, where they may assume outwardly normal identities, waiting months, sometimes years, before springing into action to carry out or assist terrorist attacks. And unlike ordinary criminals the Department has investigated and prosecuted in the past, terrorists are willing to give up their own lives to take the lives of thousands of innocent citizens. We cannot wait for them to execute their plans; the death toll is too high; the consequences are too great.

To respond to this threat of terrorism, the Department has pursued an aggressive and systematic campaign that utilizes all information available, all authorized investigative techniques, and all the legal authorities at our disposal. The overriding goal of this campaign is to prevent and disrupt terrorist activity by questioning, investigating, and arresting those who threaten our national security. In doing so, we take care to discharge fully our responsibility to uphold the laws and Constitution of the United States. All investigative techniques we employ are legally permissible under applicable constitutional, statutory and regulatory standards. As the President and the Attorney General have repeatedly stated, we will not permit, and we have not permitted, our values to fall victim to the terrorist attacks of September 11.

Before responding to your questions, I will speak briefly to three areas that are of interest to this committee. First, the Department's detention of individuals since September 11; second, the directive that our Anti-Terrorism Task Forces conduct voluntary interviews of individuals who may have information relating to our investigation; and finally, the Bureau of Prison's regulation to permit the monitoring of communications between a limited class of detainees and their lawyers, after providing notice to the detainees.

With respect to detentions, as of Monday, December 3, there are 608 persons in federal custody on criminal or immigration charges growing out of our investigation into the September 11 attacks. Of that total, 55 currently are being held on federal criminal charges; the remaining 553 are being detained on immigration-related charges. The Department has charged a total of 105 persons for violations of federal criminal law. Some of those indictments or complaints have been filed under seal by order of court. The names and charges against all others have been publicly released. Every one of these detentions is fully consistent with established constitutional and statutory authority. Each of the 608 persons detained has been charged with a violation of either immigration law or criminal law, or is the subject of a material witness warrant issued by a court.

Every one of these individuals has a right to access to counsel. In the criminal cases and in the case of material witnesses, the person has the right to a lawyer at government expense if the he or she cannot afford one. Persons detained on immigration violations have a right to access to counsel, and the Immigration and Naturalization Service provides each person with information about available pro bono representation. Every person detained, whether on criminal or immigration charges or as a material witness, has the right to make phone calls to family members and attorneys. No one is being denied their right to talk to their attorneys.

Under the Immigration and Naturalization Service's generally applicable procedures, detainees enjoy a variety of rights, both procedural and substantive. Once taken into custody, aliens are given a copy of the "Detainee Handbook," which details their rights and responsibilities, including their living conditions, clothing, visitation, and access to legal materials. In addition, every alien is given a comprehensive medical assessment, including dental and mental-health screenings. Aliens are informed of their right to communicate with their nation's consular or diplomatic officers, and the INS will notify those officials that one of their nationals has been arrested or detained. Aliens are permitted access to telephones—which they may use to contact their family members or attorneys—during normal waking hours. Finally, Immigration Judges preside over legal proceedings involving aliens, and aliens have the right to appeal any adverse decision, first to the Board of Immigration Appeals, and then to the federal courts.

Second, let me address the Justice Department's plan to conduct voluntary interviews of individuals who may have information relating to terrorist activity. On November 9, the Attorney General directed all United States Attorneys and members of the joint federal and state Anti-Terrorism Task Forces, or "ATTFs", to meet with certain noncitizens in their jurisdictions, and the Deputy Attorney General issued a memorandum outlining the procedures and questions to be asked during those interviews.

The names of approximately 5000 individuals that were sent to the ATTFs as part of this effort are those who we believe may have information that is helpful to the investigation or to disrupting ongoing terrorist activity. The names were compiled

using common-sense criteria that take into account the manner, according to our intelligence sources, in which Al Qaida has traditionally operated. Thus, for example, the list includes individuals who entered the United States with a passport from a foreign country in which Al Qaida has operated or recruited; who entered the United States after January 1, 2000; and who are males between the ages of 18 and 33.

The President and Attorney General continually have emphasized that our war on terrorism will be fought not just by our soldiers abroad, but also by civilians here at home. Last week, the Attorney General announced a new plan to enable our nation's guests to play a part in this campaign. Noncitizens are being asked, on a purely voluntary basis, to come forward with useful and reliable information about persons who have committed, or who are about to commit, terrorist attacks. Those who do so will qualify for the Responsible Cooperators Program. They may receive S visas (or deferred action status) that will allow them to remain in the United States for a period of time. Aliens who are granted S visas may later apply to become permanent residents and, ultimately, American citizens. The Responsible Cooperators Program enables us to extend America's promise of freedom to those who help us protect that promise.

Third, the Bureau of Prisons on October 31 promulgated a regulation permitting the monitoring of attorney-client communications in very limited circumstances. Since 1996, BOP regulations have subjected a very small group of the most dangerous federal detainees to "special administrative measures," if the Attorney General determines that unrestricted communication with these detainees could result in death or serious bodily harm to others. Those measures include placing a detainee in administrative detention, limiting or monitoring his correspondence and telephone calls, restricting his opportunity to receive visitors, and limiting his access to members of the news media. The pre-existing regulations cut off all channels of communication through which detainees could plan or foment acts of terrorism, except one: communications through their attorneys. The new regulation closes this loophole.

This regulation permits the monitoring of attorney-client communications for these detainees only if the Attorney General, after having invoked the existing special administrative measures authority, makes the additional finding that reasonable suspicion exists that a particular detainee may use communications with attorneys to further or facilitate acts of terrorism. Only 12 of the approximately 158,000 inmates in federal custody would be eligible for monitoring.

In taking this action, the Department has included important procedural safeguards to protect the attorney-client privilege. First and foremost, the attorney and client will be notified in writing that their communication will be monitored pursuant to the regulation. Second, the regulation erects a "firewall" between the team monitoring the communications and the outside world, including persons involved with any ongoing prosecution of the client. Third, absent imminent violence or terrorism, the government will have to obtain court approval before any information from monitored communications is used for any purpose, including for investigative purposes. And fourth, no privileged information will be retained by the monitoring team; only information that is not privileged may be retained.

The Justice Department has two objectives in the war on terrorism: to protect innocent American lives, and to safeguard the liberties for which America stands. We have enhanced our national security by immobilizing suspected terrorists before they are able to strike. And we have respected civil liberties by detaining, on an individualized basis, only those persons for whom we have legal authority to do so. Those whom we suspect of terrorist activities and who are in violation of the law will be prosecuted to the fullest extent with every resource at the Justice Department's disposal.

Since the atrocities of September 11, the Department of Justice has worked hand-in-hand with members of this Committee in our common effort to protect innocent Americans from additional terrorist attacks. I thank you for this unprecedented cooperation, and we look forward to continuing our partnership. I would be happy to answer any questions that you may have.

Senator FEINGOLD. Without objection, I will submit for the record statements from Amnesty International, the Arab American Institute, and letters from Randall Hamud and Terry Feiertag, lawyers who represent individuals who have been detained in connection with the September 11 investigation who have also taken issue with the Attorney General's assertion that detainees have not been denied fundamental constitutional rights.

At this point, I am going to turn to our ranking member of the full Committee, Senator Hatch, for his opening statement. I am going to withhold questions for Mr. Dinh. I plan to question the Attorney General on Thursday about these issues. Then we will recognize the Senators present here for a five-minute round, and then hopefully after the vote, proceed to the other panel. Senator Hatch?

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman. I want to thank you for holding another Department of Justice oversight hearing, this one on the detention of aliens in connection with the September 11 attacks. I also want to thank you for acceding to the Department's request that one of their officials be permitted to testify. While there is much about which we may disagree, there should be no question that a balanced and fair examination of the Department's actions requires the presence of a Departmental witness.

This is the third oversight hearing this Committee has held in the past week and we have another scheduled with the Attorney General this Thursday. The topics I expect we will cover today were covered extensively last week and doubtless will be revisited yet again on Thursday. We are, of course, entitled to continue asking questions, but the legal analysis remains unassailable.

As Assistant Attorney General Michael Chertoff explained last week, every person detained has been charged with a violation of either immigration law or criminal law or is being lawfully detained on a material witness warrant issued by a judge in connection with a grand jury investigation. Every one of these individuals has a right to counsel. Every person detained is able to make phone calls to family and attorneys. Nobody is being held incommunicado.

To the extent that detainees are not being released on bond, it is because a judge has determined that they are likely to flee, will likely pose a danger to the community, or in the case of immigration detainees, are alleged to be deportable from the United States on the basis of criminal, including terrorist, activity.

To the Department of Justice's credit, it understands its obligation to treat these detainees fairly and lawfully. Mr. Chertoff acknowledged last week that, "It is not acceptable to have a situation where their attorney cannot get in touch with a detainee and that it is not the policy of the government to try to interfere with attorney-client communication. We want everybody to have access to their lawyers and we want to play by the rules." I take the Department at its word and expect that any problems will be promptly remedied.

Mr. Chairman, not surprisingly, there is a growing concern among the public that these rapid-fire oversight hearings are aimed less at providing information and more at demonizing the administration and/or Attorney General for partisan purposes. I would like to believe that all of the criticisms the administration is receiving on these issues stem from a bona fide concern for civil liberties.

But sometimes, I am afraid to say, it appears that this administration cannot take any action, however innocuous, without being

second-guessed by pundits who fancy themselves armchair directors of the FBI. For example, I am surprised and saddened that some critics of the administration have seen fit to criticize the FBI's decision to seek voluntary interviews with individuals who have recently entered our country from countries that are known havens for terrorists. I cannot imagine a less-intrusive means of investigating these crimes than to ask people if they are willing to talk voluntarily with investigators. Yet, even this measured initiative has drawn, in my opinion, unwarranted criticism.

The recent terrorist attacks on Israeli teenagers will, one hopes, serve as an urgent reminder of the terrorist threat we face. If more is needed, I urge everybody here to spend some time with last Sunday's Washington Post. This article describes in horrible detail, excruciating detail, the terrible injuries suffered by so many in the attack on the Pentagon. I cannot shake from my mind the picture of Louise Kurtz, who has undergone more than 30 operations since being horribly burned in that attack, but the Post did a very good job in showing the suffering of these people.

Mr. Chairman, the fundamental obligation of government is to protect its citizens from such harm. It is the solemn duty of this Congress and the administration to do everything consistent with our constitutional freedoms to stop terrorists from ever again striking in this country. And as some of our witnesses will make clear, we face a real and present danger from terrorist cells in this country.

With that in mind, I urge my colleagues to rethink the focus of our upcoming hearing with the Attorney General. Let us put aside any partisanship and focus on the people's business. Let us ask General Ashcroft what the American people really want to know. I think what they want to know is, are we doing everything we can to protect ourselves from terrorists? To me, that is the big question. Are we doing everything we can to protect ourselves from terrorists?

Mr. Chairman, I have great fondness and regard for you and I know that you will conduct these hearings fairly and I also know that it is important that we get these matters on the record, and so you are doing the country a favor.

But I am really concerned that we get about doing what we need to do to protect this country and worry a little bit more about that. I know you are as worried as I am, but let us just keep doing everything we can to support those who have this tremendous burden on their shoulders, not the least of whom is our Attorney General, whom we all know very, very well and who I think is giving a tremendous effort to make sure that our American public is protected.

Thank you, Mr. Chairman.

Senator FEINGOLD. I thank the Senator from Utah. The Senator and I get along exceptionally well, considering the lack of correlation in our voting records.

[Laughter.]

Senator FEINGOLD. I know that the Senator knows very—

Senator HATCH. I am hoping. I am hoping.

Senator FEINGOLD. Keep hoping.

[Laughter.]

Senator FEINGOLD. But I can tell you that I know that the Senator knows that the purpose of this hearing is not to demonize the Attorney General—

Senator HATCH. I agree with that.

Senator FEINGOLD. —for partisan purposes, nor do I believe that that is the case with our chairman or the other members of the Committee who are genuinely concerned about what, at a minimum, people would have to admit are unprecedented proposals. Perhaps they are justified, but they certainly are in most cases unprecedented. So I just wanted to clarify that on the record.

And second, with regard to the interviews of the 5,000 men proposed, even the police chiefs in places like Portland, Oregon, and Ann Arbor, Michigan, are very uncomfortable with the requests there because of their concern that it would amount to the kind of racial profiling that their departments have tried so hard to avoid.

So I would simply add those items to the record and I would ask the ranking member if he would like a five-minute round with Mr. Dinh.

Senator HATCH. Yes, if I could just ask one or two questions. The Attorney General has released the number, but not the names, of those detained on immigration violations from the investigation of the September 11 attacks. Now, would you elaborate on the reasons that these names have not been released?

Mr. DINH. Yes, Senator, and thank you for the opportunity to comment on that. The Executive Office of Immigration Review has discretion under 8 U.S.C. Section 3.27(c), I believe, under that regulatory provision, to close its proceedings for certain conditions, under certain criteria. In these 105 cases, the Executive Office has determined to, at the request of the Deputy Attorney General, to close those proceedings because of concerns about the security of the information and the privacy of the individuals involved.

These are civil immigration charges and we are very, very cognizant that where a person is of interest to the investigation arising out of the September 11 attack, we will do everything in our power in order to detain these persons and deport them if they do not have a right in this country. But at the same time, we are cognizant not to create a black list of some sort that would unfairly taint them in this process in order for us to carry out our investigation. Independent of that, we have obviously strong law enforcement interests and security interests in maintaining the security of these proceedings.

And so for all those reasons, we have made the determination that it would be inappropriate for us to release the names and charges with respect to these individuals.

Senator HATCH. Thank you. In the written statement of one of the upcoming witnesses, he states that the recent regulation providing that an alien must be charged with an immigration violation within 48 hours after commencement of detention, except in the event of an emergency or other extraordinary circumstance, allows the Attorney General to hold an alien "for virtually any period of time that the jailer chooses with no recourse of explanation."

First of all, do you agree or disagree with that statement, and secondly, to your knowledge, has the government relied on this exception and what are the circumstances involved if it did?

Mr. DINH. No, sir, I do not agree either with the premise or the conclusion of the statement. As you know, the rule permits the INS to make a determination within 48 hours with exceptions for exceptional circumstances. I believe those exceptional circumstances include a massive influx within a particular district so that the determination cannot be made within that time or the transfer between the offices.

I believe that some exceptions have been made. I do not know the exact number and magnitude of those exceptions, but I do believe that they are the exception and not the rule, that people are charged outside of the 48 hours. But in any event, it is not an unlimited exception. It has to be within a reasonable period of time and we interpret that to be as a matter of days. And in any event, any person under detention, for whatever reason, under United States detention, always has the right of habeas corpus to challenge that detention.

Senator HATCH. Now, the Attorney General recently promulgated a regulation providing for the automatic stay of an immigration judge's order releasing an alien on bond in any case in which the INS initially either opposed bond altogether or set a bond of $10,000 or more. Now, what concerns with the adjudicative process prompted this regulation?

Mr. DINH. Yes, sir. There is a very specific operational problem that the INS faced and the Department faced immediately after the September 11 attacks. That is, where a person is determined to have bond above $10,000, under the normal criteria of danger to the community or a flight risk while out of detention, and that decision, that bond determination is reversed by an immigration judge, there is no provision, there is no ability for the INS to keep that person in detention pending appeal of that decision except for if they are fortunate enough to do an emergency stay that is granted prior to the release, the posting of bond release of the person.

This operational loophole, really, creates a significant problem for the Department because the person, if posting bond and released, will create, in our opinion, a danger and a threat to our society and a flight risk. We will have to go then out and reapprehend the person if the Board of Immigration Appeal determines that the bond was erroneously set by an immigration law judge.

The rule was revised in order to accommodate this operational need. Let me assure you that it has been used in very limited circumstances. The automatic stay provision has only been invoked nine times since the rule was promulgated. Four of those times were for persons previously subject to the previous version of the rule, that is, those persons detained under Section 236(c) of the INA. For the other five cases, two of the automatic stays became moot because the order of deportation became final before their appeal of the bond was effected, and for the other three, for one reason or another, the INS dropped the automatic stay invocation and did not pursue the appeal of the bond.

Senator HATCH. Thank you very much.

Mr. DINH. And each of the five, by the way, were terrorism related and were of interest to the 9/11 investigation.

Senator FEINGOLD. Thank you, Senator Hatch, and thank you, Mr. Dinh.

The vote has started and so the most orderly thing I can think of is we will go over and vote and come right back and begin with the next panel.

[Recess.]

Senator FEINGOLD. I will call the Committee back to order. Thanks for your patience.

Before we begin with panel two, I would just like to take a moment to say a few things in response to Mr. Dinh. First, it is my understanding that the Chief Immigration Judge has closed immigration proceedings at the direction of the Attorney General, not on his own accord, and without objection, I would like to place in the record an e-mail from the Chief Immigration Judge to all immigration judges to make this clear.

Let me also comment briefly on the new rules mentioned by Mr. Dinh, the new ability of the INS to obtain what amounts to an automatic stay of a decision to release a detainee set for bond for that release. Once again, the Department has made itself judge and jury. Prior to this ruling, all the Department had to do was file a motion for a stay and then convince the Board of Immigration Appeals that the detainee presents a flight risk or a danger to the community. Those requests for stay are routinely granted.

But now, as I understand it, the stay is automatic, meaning that the INS itself makes the decision without any judicial review at all, and I think this is also troubling and I think perhaps the next panel may actually want to comment on it, as well.

Our first witness on this panel is Ali Al–Maqtari. Mr. Al–Maqtari was born in Yemen, studied in France, and came to the United States on a tourist visa last year with hopes of becoming a French teacher. On September 15, his life and dreams of freedom would change forever.

Mr. Al-Maqtari arrived at Fort Campbell, Kentucky, to drop off his wife, American Tiffany Hughes, who was reporting to active duty with the U.S. Army. He was ordered out of his car, questioned, and then detained by the INS for two months at a detention center in Mason, Tennessee. He is now free on bond, but only after a harrowing experience with the American justice system.

Mr. Al-Maqtari, I know this has been a very difficult last couple of months for you and your wife. I do appreciate your willingness to appear before us and to share your experience with the Senate and the American people. I thank you and I would like you to proceed.

STATEMENT OF ALI AL–MAQTARI, NEW HAVEN, CONNECTICUT

Mr. AL-MAQTARI. Thank you very much. Senators, Mr. Chairman, I want to thank you very much for letting me testify before your Committee today. My name is Ali Al–Maqtari and I want to tell you in brief the story of how I was jailed by the INS for almost eight weeks. Thanks to the fairness of your immigration court and appeal system and the hard work of my wife, Tiffany, and my attorney, my story has a good ending. However, even though I did nothing wrong and cooperated with the INS, FBI, and Army in every way possible, I spent many weeks in difficult jail conditions, cut off from my wife, and my wife had to give up her Army career.

I tell you my story in the hope that it will help other innocent people avoid the problems that I had.

I came to the United States in June 2000 to visit my uncle, a U.S. citizen, in Brooklyn, New York. Before that, I was a student in France for a year. I graduated from the University of Sana'a in Yemen in 1997 with a degree in education. I was a French teacher in Yemen for two years and I was interested in getting more education from France and the U.S.

I spent about a month in New York and I came to Connecticut to stay with a family friend, where I studied English at a local education center and helped in my uncle's store. I began to make inquiries into jobs as a French teacher, and since my English needed some improvement and I also wanted to get my master's degree in education, I enrolled at Southern Connecticut State University and I was accepted.

In March 2001, I met my wife, Tiffany, in a French chat room on the Internet, and because we had so much in common, such as our shared religion, our studies in France, and our interests, we exchanged e-mail addresses and began a brief courtship over the telephone, in which we discovered we both wanted the same thing, a serious marriage with no dating, something necessary in our religion.

We met each other's family, then we were married in June with a double ceremony, once by the Justice of the Peace and once in the mosque. In July, because of frustration with delay in her transfer from the National Guard in North Carolina to Connecticut, my wife suggested going into the regular Army. I agreed because I respect my wife's decision.

We moved from Connecticut on September 15 and arrived at Fort Campbell, Kentucky, on September 15 with a big surprise. We were ordered out of my wife's car immediately for search, and until my release, we were never alone again. We were interrogated by the INS, FBI, and Army personnel from 4:00 p.m. until 4:00 a.m. The questioning was harsh. The INS investigator screamed at me that I would be deported and said I was lying about my application, that there was nothing about me in the computer, and that I would be deported. An FBI investigator, Bill Frank, also told me that the Springfield, Massachusetts, recruiting center where Tiffany had received her orders had been blown up by terrorists 20 minutes after we left it.

The investigators said many, many times that our marriage was fake and that Tiffany must be married to me because I was abusing her. This accusation was totally false and very painful for me. They also made many negative remarks about Islam, things like Islam being the religion of beating and mistreating women. They asked us about the box cutters that we had among our things and we explained how I had used mine in the store and Tiffany had used hers when she worked in the shipping department of a nursery.

The interrogators were so angry and were so wild in their accusations that they made me very frightened for what might happen to me. The interrogators also had letters that I had brought with me from my family and from a friend in Yemen, a woman who is a doctor. Those letters were in Arabic. The FBI agent insisted that

these letters should show that I was somehow involved with a terrorist from Russia. This was crazy and false.

The following Monday, my wife and I were given polygraph tests. I was arrested and put in jail in Nashville and my wife continued to be followed 24 hours a day by three military police. My wife and I were harassed by prison guards and Army personnel. My wife finally agreed to a discharge when her captain suggested it.

I spent eight weeks in jail, far from my wife and family. She was not able to come to my hearing more than once because of the distance, and my lawyer had to fly from Connecticut to Tennessee, a State which is not even my home. I was kept in a segregated unit in jail with convicted criminals. I was treated as a guilty man by prison guards and immigration officers. Yet, the INS and FBI had no evidence against me. I was given one 15-minute call per week.

Finally, my bond was reduced from $50,000 to $10,000 and I was released, but I am concerned for other detainees like myself who have no means to pay this high bond.

I hope you will do whatever you can to try and fix this problem. I have been back together with my wife for almost a month and our lives are healing, but I hope that you will protect other innocent people from the INS, and thank you very much.

Senator FEINGOLD. Mr. Al–Maqtari, thank you for your testimony. You have been through an awful lot in the last couple of months, and what is just so striking is that this is not some story from America's distant past. This just happened. The treatment you received is a shame, and even more shameful because we have reason to believe that your story is not unique. So it cannot be easy to appear here before the U.S. Congress to tell your story, but I want you to know that I think you have done your country a tremendous service by courageously coming forward to educate us and all Americans, so I just want to thank you again.

Mr. AL-MAQTARI. Thank you.

[The prepared statement of Mr. Al–Maqtari follows:]

STATEMENT OF ALI AL-MAQTARI, NEW HAVEN, CONNECTICUT

Senators, Mr. Chairman, I want to thank you very much for letting me testify before your committee today. My name is Ali Al-Maqtari, and I want to tell you the story of how I was jailed by the INS for almost eight weeks. Thanks to the fairness of your immigration court and appeal system, and the hard work of my wife, Tiffinay, and my attorneys, my story has a good ending. However, even though I did nothing wrong, and cooperated with the INS, FBI, and Army in every way possible, I spent many weeks in harsh jail conditions, cut off from my wife, and my wife had to give up her army career. I tell you my story in the hope that it will help other innocent people avoid the problems that I had.

I came to the United States in June 2000 for a long visit. I had just spent a year in France where I had completed a diploma as a teacher of French. Before going to France, I had worked as a French teacher at the Kuwait High School in Sana'a, Yemen for several years. I graduated from Sana'a University with a degree in French in June 1997.

I have an uncle, who is a U.S. citizen, who lives in Brooklyn, New York, with his family. Visiting my uncle and his family was my first goal on my trip, but I also wanted to see what the United States was like and improve my English. I also hoped that perhaps I would have an opportunity to student teach or teach French. Gaining this experience in the United States would be something that would really help my career as a teacher in Yemen, because American education is highly-respected in my country.

I spent about a month in New York, visiting my Uncle's family and sightseeing. I liked it very much. My uncle has a close friend - so close to our family that I call him "uncle" too, even though he is not actually a member of our family, who lives

in New Haven Connecticut. My uncle urged me strongly to visit him. I did, and the visit worked out very well. My "uncle" owned a small market and had a second apartment where several young men lived. It was easy for me to stay there without inconveniencing him or his family. I was able to attend English classes at a local adult education center, and I helped out at the market. Although I was not paid a salary, my "uncle" gave me money for my expenses, and I bought a computer that a customer of the store was selling. I discovered the internet, and this helped improve both my English and French. I was really enjoying my visit, and I wanted to extend it. A friendly woman, who was a mentor to many of the students at the adult education center, helped me by filling out the INS application to ask for a longer visit, and I sent it in to the INS in Vermont.

In my first few months in New Haven, I also made contacts about student teaching or teaching French. I visited Kay Hill, the language coordinator of the New Haven Public Schools several times. She invited me to visit several schools in New Haven and gave me advice about taking the TOEFL test and studying here. Later on, in May or June 20011 had my degrees evaluated and applied for admission to a language teaching program at Southern Connecticut State University in New Haven, which accepted me.

However, the most important thing which happened to me in the United States, is that I met my wife, Tiffinay. We first met in a French language internet chat room in March or April 2000. Tiffinay also speaks French well. Like me, she has studied in France. We met only once in the chat room. We traded email addresses and began to exchange emails. Then we spoke by telephone.

Because we speak French, we were able to communicate well. My wife had previously become a Muslim, and this was something else that we shared and was important to us. It continues to be now, as we share the holy month of Ramadan. In May 2001, Tiffinay invited me to visit her in North Carolina. I stayed with her and her parents, and invited her to visit me in Connecticut. She did this very quickly, and this showed me that her intentions were serious. We decided to get married and were married in Hamden, CT on June 1, 2001. Neither of us is in favor of extended social dating or living together before marriage. We wanted to marry and begin our life together. This is common for Muslims. My own parents met only a day before their wedding and have been happy for many years.

After our marriage, Tiffinay moved to New Haven, and we rented our own apartment. At first, we thought that both of us would get jobs in New Haven, and Tiffinay would transfer from the North Carolina National Guard to the one in Connecticut. (I didn't really know exactly what the National Guard was. Tiffinay explained to me that it was like the part-time army.) We went to an attorney to begin work on a marriage application to allow me to stay here. She told us to write to the INS to withdraw my request to extend my tourist visit, because I now planned to live here, not just to visit. We did this in early July.

Because of delays with transferring Tiffinay's National Guard membership from North Carolina to Connecticut, she thought that it would be best if she enrolled in the full-time army. I agreed. This would mean living in another part of the country further away from my uncle and his family, but we are young, and I wanted to respect Tiffinay's decision. In August, we learned that Tiffinay would be in the army at Fort Campbell, Kentucky for a long time, for up to three years, starting in the middle of September, and we made plans to move there. We also filed our marriage application with the INS.

On September 12, the local Army recruiting office called Tiffinay to let her know that the recruiting center in Springfield, Massachusetts where she was to pick up her final orders was closed, but that she should go there on September 13 to pick up her orders. When we went there, a sergeant at the recruiting center spoke to each of us separately about Tiffinay not wearing a hejab—the head scarf that many Muslim women wear. He was not unfriendly to either of us. We explained to him that Tiffinay would be wearing her uniform when she got to base, and soon after, we left. We did not think that anything was wrong, and we began the three day drive to Fort Campbell. We had ended our lease in New Haven, and we had all of our things packed in Tiffinay's car.

When we arrived at Fort Campbell on September 15, Tiffany's car was stopped as soon as we got to the gate. We were separated and taken by officers to separate cars, and Tiffinay's car was emptied and searched three or four times by bomb-sniffing dogs.

We were then taken to a building like a police station and separately interrogated by INS, Army, and FBI investigators—nine of them, I think—for more than twelve hours. Although we were separated, we had the same thought: to cooperate and answer all the questions they put to us. We did this although the questioning was very harsh. An INS agent screamed at me that I was illegal and could be deported imme-

diately and he refused to listen to me when I told him about my applications. He said I was lying, that there was nothing about me in the computer, and that I would be deported. An FBI investigator, Bill Frank, also told me that the Springfield, Massachusetts recruiting center where Tiffinay had received her orders had been blown up by terrorists twenty minutes after we left it. (He told Tiffinay that there had been a bomb alert and that they found suspicious materials after we left.) They told her that we were suspicious because she was wearing a hejab and we had been speaking in a foreign language. French was the only language other than English that we had spoken together, but it must have made them nervous. The investigators said many, many times that our marriage was fake, and that Tiffinay must be married to me because I was abusing her. These accusations were totally false and very painful for me. They also made many negative remarks about Islam, things like Islam being the religion of beating and mistreating women. One acted out a fist hitting his hand, another said my wife had written a letter saying that I beat her, which I knew was false, and another insisted he would beat me all the way to my country because I mistreated my wife.

They asked us about the box cutters that we had among our things, and we explained how I had used mine in the store, and Tiffinay had used hers when she worked in the shipping department of a nursery. The interrogators were so angry and wild in their accusations that they made me very frightened for what might happen to me. I learned later that Tiffinay was asked very similar questions. They also asked her if I spent large amounts of time on the internet and/or sent emails to terrorists. The interrogators also had the letters that I had brought with me from my a family, and from a friend in Yemen who is a doctor. These letters were in Arabic. They had a translator review them. He would read passages from the letters, and Bill Frank from the FBI insisted that the letters from my friend, the doctor, showed that she was my terrorist controller and that I was somehow involved with terrorists from Russia. This was silly and completely false, and I think they knew it, but at the same time it made me frightened because it seemed like they intended to accuse me of being involved with all the enemies of the United States.

After this long interrogation, at about 4:00 am, they let us speak to each other in a room for a few minutes while they waited outside. We would not be alone again until November 8.

Tiffinay was taken to a barracks where she was kept on a separate floor apart from the other women soldiers. From that time through Wednesday of the following week, she had three guards with her at all times, day and night, no matter what she did: even bathing and sleeping. All of these soldiers but one were men. After that she was not so mistreated. She was able to live with the other women, and she started to make friends with people. Still, she learned many negative things: that her photo had been distributed to the gates of the base before we arrived, that handmade posters with her photo were circulated around the base, and that many people had heard local television news broadcasts that said that I was a spy at Fort Campbell.

I was taken to a hotel near the base, where I spent the weekend. People watched me from the parking lot.

On Monday, September 18, both of us were taken were taken to the FBI office in Nashville, Tennessee, where they gave us polygraph tests. Although many of the questions were very strange (Have you ever embarrassed your family? Have you ever lied?. . .) we both answered them the best that we could. I was given deportation papers charging me with overstaying my visa. In what seemed like a positive thing, both the INS agent and Mr. Frank from the FBI said that they knew that I had told the truth and that I would probably be released the next day. I learned later that Tiffany had been told the same thing by army people, and the INS had given similar news to Attorney Maria Labaredas, who works with Attorney Boyle and who faxed copies of all my immigration papers to the INS. It was strange that these men, who had been wild and full of anger on Saturday, were now very calm.

However, I was not released. Army people told Tiffinay that someone in the FBI had ordered that I not be released. I really do not know what happened. I was never spoken to again by the FBI, Army or INS, but I spent more than seven weeks in jail.

At the jail near Nashville where I spent my first week in detention, one guard was very difficult. He kept saying that I was a terrorist and asking if I knew bin Laden. Then I was transferred to a jail in Mason, Tennessee, near Memphis. For my first two weeks there I was put with normal inmates, and the staff and other inmates treated me normally. However, it was upsetting to be in jail. I had never been arrested or had any kind of problem with the police anywhere. I did not want to be in jail, and was concerned that I had not been released quickly, once the INS

and FBI had confirmed that I had told them the truth. I was also unable to speak to my wife, and was worried about her.

I learned later that my wife was also very upset and concerned about what was happening to me. She was afraid that I would still be in jail when she was sent overseas. Also, she was concerned that some people seemed to distrust her because she was my wife and that many people at Fort Campbell seemed to believe the local television reports about me being a spy. When her officers suggested to her that she should request a discharge because of these problems, she agreed. She was granted an honorable discharge on Friday morning, September 28, and drove to the prison to visit me that afternoon.

Things were harder for me after that. The prison moved me to a segregated unit with very serious criminals. They said that it was for my protection, but it made me feel very unsafe. The other prisoners had committed very serious crimes, and a guard there accused me of being a terrorist. He would whisper to these bad criminals, and they would threaten me and taunt me. One, who said that he had murdered someone and spent twenty-five years in jail threatened me in the shower. Others told me that I should confess, that I would never leave the jail, and things like that. Because I was in the segregated unit, I could only make one phone call a week. One of my attorneys, Michael Boyle, visited me twice and could call me before I had hearings. However, things were very frightening and very difficult. What was happening to me was totally different than how I thought America worked. As things seemed to get worse and worse, I became fearful of what would happen to me.

My first bond hearing, early in October, was difficult. Tiffinay and I answered questions for a long time, and the INS presented no evidence. Still, the Judge set a very high bond, $50,000. The INS said that they would immediately try to stop even this high bond from taking effect, and they did. It was very hard to wait while the appeals board considered the case. My next bond hearings were also disappointing, as the Judge said that he was giving the INS a "last chance" to bring in more evidence. I was glad that he said he was thinking of a lower bond, but I was concerned that the INS seemed to get so many chances even when they had told me that Monday in Nashville that they knew that I had told the truth.

My lawyers assured me that things would get better for me, that the Judge and the appeals board judges had to be very careful because of what happened on September 11, and would be very generous to the INS at first, but that they would not let the INS hold me for months without having any evidence.

I am very grateful that in the end this is what happened. I am grateful that the appeals court judges were willing to make a decision based on the facts, not on fear. And I am grateful that the INS was worried that the Immigration Judge in Memphis would give me a low bond and decided to settle my case. Still, I spent almost eight weeks in jail, and my wife lost her army career because people were angry and nervous and I am from Yemen. My experience with the INS was very bad. They lied to me and locked me in jail for eight weeks with no evidence against me. I told them all there is to know about my life, my lawyer gave them many documents from Yemen and France to prove the truth of what I said, and my wife testified all about our marriage. I should not have been held for weeks. In the end, we had to agree to the $10,000 bond that the INS offered because there is a new rule that could have let the INS keep me for many more weeks if the Judge had given me a lower bond than the INS wanted. Because Tiffinay had saved enough money to pay the bond, this was not a problem for me, but I am worried that there will be many other people whose wives do not have $10,000.

I hope you will do whatever you can to try and fix these problems. I have been back together with my wife for almost a month, and our lives are healing, but I hope that you will protect other innocent people from the INS.

Senator FEINGOLD. I turn now to Michael Boyle. Mr. Boyle represents Mr. Al–Maqtari. Mr. Boyle has had a distinguished career as an immigration attorney and is an active member of the American Immigration Lawyers Association. I thank you for joining us and you may proceed.

STATEMENT OF MICHAEL J. BOYLE, LAW OFFICES OF MICHAEL J. BOYLE, NORTH HAVEN, CONNECTICUT, ON BEHALF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Mr. BOYLE. Thank you, Mr. Chairman and members of the Committee. I am really honored to have come here from Connecticut to be with you. I am here as Mr. Al–Maqtari's attorney and as a member of the American Immigration Lawyers Association.

The Department of Justice is engaged in a critically important law enforcement effort and we support that effort. However, we are deeply concerned about the new policies and regulations that have been issued unilaterally in the next two months. These policies go way beyond the existing law and the parameters that Congress and the administration set in the USA PATRIOT Act last month. They have been instituted without debate, without notice, and without comment.

Our Constitution was written to protect everyone in our country and these practices limit our freedoms in dangerous ways. Widespread arrests based on ethnic profiling, secret court hearings, long detention based on suspicion rather than on concrete evidence, and wiretapping conversations between attorneys and clients are not the American way. Yet, the Justice Department's new practices and regulations allow the local INS officers and Justice Department officials around the country to employ these tactics without accountability.

Our democracy was founded on openness. Despite that history of openness, we have gotten very, very little information about who is detained, why they are detained, what are the charges against them, how many of them are being held without counsel, and the trend, unfortunately, is in the wrong direction.

In October, the Attorney General issued a memo essentially encouraging Justice Department officials to deny Freedom of Information requests. Then this month, the Justice Department stopped revealing the full counts of who has been detained in connection with the post–September 11 investigation.

We have had a similar problem in our immigration courts. We have never had before this consistent pattern of secret hearings. Hearings were closed only in asylum cases or battered spouse type cases. Suddenly, all kinds of cases are being held secretly and you cannot even learn the date and time of your own hearing. It makes it incredibly difficult for people to get lawyers and for their family members to understand how their case is going on and it is completely unprecedented. The regulation was never invoked in this way before. This information was always something you could dial up and get or look on the wall of the immigration court to get.

Except for the ten or 15 people out of the 1,200 who the Justice Department has identified as having some connection to al Qaeda, it is wrong to hold secret hearings and it is wrong to withhold this type of information.

Based on what we learned in our case and from talking to other immigration attorneys around the country, we are finding a pattern of excessive detention and disrespect for the rights of non-citizens. As in Mr. Al–Maqtari's case, he was arrested with an invalid warrant. He was not given any rights to counsel, none of these

booklets and extensive protections you have heard about. And in virtually every other case we have heard, it has been the same—no warnings, no right to counsel, people are discouraged from getting attorneys, they are told they will get out quicker or their case will be resolved quicker if they do not.

Countless cases, as you hear, over 500 are being designated as so-called special interest cases. Yet at the same time, the Department admits that only ten to 15 people have any connection to al Qaeda whatsoever, and most of those are sympathizers. There is a huge disconnect there.

Our system is based on open court hearings. Our system is based on the press and the public being able to see what is going on, being able to understand. The black list excuse is simply that. It is not a black list to have an open hearing and perhaps be cleared in open court. The real problem is when, as in our case, family members cannot come to court. The only way we were able to have any witness to be with us in court was to have another local immigration attorney kindly sign on to come with us so that we would not have a complete star chamber proceeding.

All over, there are these kinds of violations. Women are being given pat-down searches. Men are being told, how much torture can you take before you answer? There are all kinds of problems.

Detention without charges—again, even the Assistant Attorney General who just testified does not know how many people have been held and for how long. It is one thing to say, we are reasonable people and we are going to be reasonable, but even the Assistant Attorney General cannot tell us who is being held and for how long, and this regulation facially has no limit either on how long you can be held or on what kinds of offenses.

Even the most straightforward immigration offenses, and for example, in Mr. Al–Maqtari's case, simple overstay case while he was waiting for his marriage application to be processed. There are tens of thousands of people in that situation. I hope to God they are not all picked up, but it is certainly not a justification for the kind of experience that he has gone through. It goes way beyond the PATRIOT Act, it goes way beyond Zadvydas.

I want to go on quickly to talk about, as I close, this new automatic stay regulation. In the end, the FBI said that they had cleared Mr. Al–Maqtari. The INS, however, would only agree to a $10,000 bond and the immigration judge, according to my co-counsel, was willing to grant us something like half that. We could not contest. We could not let the immigration go forward and enter that $5,000 order, because if we had, the INS would have invoked this automatic stay and he would still be in jail today and he would probably be in jail for three or four months more.

It is wrong to let the INS win when it wins and win when it loses. It is wrong to use a phony operational problem. The idea that they would let people out is absurd. It takes hours to enter a bond, and the Board of Immigration Appeals has granted these stays almost immediately. There was no problem. This is a classic case, just like the thing about wiretapping attorneys. It is a problem that does not exist. It is fixing something that is not broken. The Board of Immigration Appeals granted the stays. They were easily avail-

able. Where there are rogue attorneys, the courts entered orders against them.

So in conclusion, I want to thank you for the opportunity for coming here. I want to ask you to support the legitimate efforts of the Justice Department but to rein in these measures which are corrosive of our civil rights and freedoms.

Senator FEINGOLD. Thank you, Mr. Boyle, for your strong and informative testimony.

[The prepared statement of Mr. Boyle follows:]

STATEMENT OF MICHAEL BOYLE, AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Mr. Chairman and distinguished Members of the Subcommittee, I am honored to be here. My name is Michael Boyle. I appear here today as one of the attorneys for Ali Ai-Maqtari, whose compelling story you just heard. I also appear here today as a member of the American Immigration Lawyers Association, the national bar association of nearly 8,000 attorneys and law professors who represent the entire spectrum of applicants for immigration benefits. I appreciate this opportunity to present our views on current U.S. immigration policy and practices related to the detention of noncitizens.

The Department of Justice is engaged in a critically important law enforcement effort. AILA supports every effort to identify, prosecute and bring to justice the perpetrators of the heinous crimes of September 11. However, we are deeply concerned about a series of new policies and regulations issued unilaterally by the Department of Justice in the last few months. These policies go far beyond existing law and the parameters set by Congress and the Administration in the USA PATRIOT Act. These procedures have been instituted without notice and comment or public debate.

Our Constitution was written to protect everyone in our country. The sweeping, new practices limit our freedoms in dangerous ways. Widespread arrest of noncitizens based on ethnic profiling, secret court hearings, long detention based on suspicion rather than concrete evidence, and wiretapping conversations between attorneys and clients are not the American way. Yet the Justice Department's new practices and regulations allow local INS and other Justice Department employees to employ them on a widespread basis, with little accountability to the American people. While every step must be taken to protect the American people from further terrorist acts, we need to preserve the basic rights and protections that make American democracy so unique and precious. Reining in excessive practices that corrode those basic rights is critical to the defense of our democracy.

The five new practices that I will discuss damage our democracy and Constitution. First is the unprecedented level of secrecy under which detentions now occur. Second is the question of whether these detainees are being provided meaningful access to counsel. Third is a new regulation issued by the Justice Department that allows people to be detained for an unspecified period of time without even being charged with an immigration violation. Fourth, a new regulation has been issued that allows the government to eavesdrop on the conversations between lawyers and clients who are in federal custody, including people who have been detained but not charged with any crime... Finally, I will discuss a new regulation issued by the Justice Department that authorzes the continued detention of noncitizens who have been ordered released on bond by an immigration judge.

THE VEIL OF SECRECY OVER THE DETENTION OF NONCITIZENS VIOLATES FUNDAMENTAL PRINCIPLES IN OUR JUDICIAL SYSTEM

Our judicial system is founded on the principle of openness. Since the birth of this country we have recognized that only through an open process and an informed society can justice be achieved. As James Madison said, "Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both."

Despite our history of openness, one of the most disturbing developments in the government's current course of action has been the refusal to provide information about the more than 1,200 people who have been arrested since September 11. To illustrate, the Attorney General issued an internal memo, on October 12, which appears to encourage agency efforts to withhold information sought under the Free-

dom of Information Act (FOIA). The memo stated, "When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records." On November 8, after conflicting statements from the White House and the DOJ about the status of the detainees, the DOJ announced they would no longer release the number of detentions. Although the Justice Department recently released a list of the number of people who been charged with specific immigration violations and their countries of origin, questions remain unanswered. Who is being detained? Where are they being held? How many remain in INS custody without being charged? How many detainees remain unrepresented by counsel? These and other questions remain unanswered more than two months after the initial arrests and despite repeated inquiries and the filing of formal FOIA requests. This silence is unacceptable.

A similarpattern of secrecy has arisen in immigration courts. Chief Immigration Judge Michael Creppy, on September 21, issued a memo instructing immigration judges to hold certain hearings separately, to close these hearings to the public, and to avoid discussing the case or otherwise disclosing any information about the case to anyone outside of the immigration court. These restrictions also apply to confirming or denying whether such a case is on the docket or scheduled for a hearing. These new policies have obviously made it very difficult for the lawyers representing these clients, and for the families that have been torn apart by this sweeping investigation. This new policy is also disturbing in that the Department of Justice is not required to provide any basis or explanation for why proceedings will be closed. Any case involving any immigration matter may be closed simply because the Department of Justice wants it to be closed.

In testimony before this committee last week, the Justice Department defended its actions by asserting that "nothing prevents any of these individuals from identifying themselves publicly or communicating with the public." This view abrogates the responsibility that the government has to disclose who it is holding.

The government has given the following reasons for not disclosing information about detainees. First, that immigration law prohibits such disclosure. Second, that such disclosure would violate the privacy of the detainees. And three, that releasing the information would provide valuable information to Osama bin Laden. Let me address these concerns. There is nothing in immigration law to prohibit the disclosure of information about detainees. In fact, this information has been routinely made available in the past. In addition, detainees who have gone missing from their families and communities will surely not benefit from continued secrecy regarding where and why they are being held, and the conditions of their detention. Finally, senior law enforcement official have said that of the more than 1,200 reported detentions, only 10 to 15 are suspected as A1 Qaeda sympathizers, and that the government has yet to find evidence indicating that any of them had knowledge of the Sept. 11 attacks or acted as accomplices. However, the government continues to justify the refusal to provide information on grounds that the release of information would hann the investigation of the September 11 attacks. With the exception of the 10-15 suspected terrorists, it makes little sense to continue refusing to release information about the detainees.

The government's statement that the detainees themselves can publicize their detention also ignores the realities that these detainees face while imprisoned in the immigration system. In many cases, detainees have been limited to only one collect call per week and are denied visits from even close family members. This severely limits their ability to find an attorney to represent them. In all of the confusion and fear surrounding their detention, and in the face of isolation from friends and family, the idea that detainees are free to make their cases and conditions known to the outside world is simply not believable. Holding secret hearings compounds these problems. Secret hearings should not be the norm, and should not be granted without input from both parties. Open hearings, subject to the scrutiny of the public and press, are a fundamental American right.

THE EXPERIENCE OF DETAINEES AROUND THE COUNTRY RAISE QUESTIONS ABOUT THE TREATMENT OF OTHER DETAINEES AND THEIR ACCESS TO COUNSEL

Based on reports from immigration attorneys and newspapers around the country, we are concerned that the cases you have heard today are not isolated, exceptional incidents, but are part of a pattern of excessive detention and disrespect for the rights of noncitizens. Here are some examples:

In Ohio, 11 Israelis were arrested in the early morning hours of October 31 by federal law enforcement agents with guns drawn. They were charged with violating the terms of their tourist visas by selling toys and trinkets in shopping malls. Upon arrest, they reported that law enforcement officials told them that they did not need to contact counsel and that things would be more "complicated" and the detention would be "longer" if counsel was retained in their defense. None of the detainees were advised that they had the right to retain counsel or that any statements they made could be used in a "subsequent proceeding", as is required by regulation. At least one detainee was asked "how much torture" he could endure before "telling the truth." Two of the female detainees were subjected to a degrading and humiliating "pat down" search by a male INS officer as a prerequisite to using the restroom.

After nearly a week in detention, they were able to retain counsel who filed a motion for bond before an immigration judge. At the hearing, the government designated the case a "special interest case" claiming that the 11 were suspected of terrorist activity. Yet, in two separate bond hearings the government failed to produce any evidence in support of its assertions. Indeed, the only evidence produced to the Immigration Judge were documents reflecting possible unauthorized employment.

After giving the INS every opportunity to present evidence of terrorist activity or a national security threat, including the option of an in-camera inspection, the immigration judge ordered bond in each case. She issued a written memorandum concluding that the government had produced no evidence of terrorist activity or danger to the community. However, despite the complete lack of evidence, the INS, under the direction of the FBI, immediately stayed the release of the 11 through a newly amended INS regulation that effectively gives the Justice Department the power to stay custody, possibly for months. Two days later, after the press began to inquire into the situation, the FBI authorized INS to allow the release of nine of the eleven detainees. Two weeks later, after an Immigration Judge granted all eleven voluntary departure, the other two Israelis were released but ordered by the FBI to remain in the United States under a "Safeguard Order."

To this day, the Department of Justice has not presented a scintilla of evidence justifying these detentions. All eleven had valid documents that were easily verifiable by the Israeli Consul. All had entered the US legally. All were within the respective periods of stay authorized by the Attorney General. And none had a criminal record of any kind anywhere in the world. The FBI continues to refuse two of the Israelis permission to depart for Israel.

On September 13, Tarek Mohamed Fayad was arrested after stopping at a gas station near his home in Colton, California. The 34-year-old Fayad, an Egyptian dentist who came to the United States in 1998 to study, says four agents ordered him to lie on the ground, telling him INS "thinks you're illegal." He was driven back to his home where he surrendered his passport and immigration papers. The officers searched his home and then arrested him on charges that he had violated the terms of his student visa.

Mr. Fayad was originally held on $2,500 bond in a Los Angeles, California jail. Four days after his arrest, Mr. Fayad's American girlfriend and another friend, Mahmoud Bahr, came to post the bond. When they arrived, they were told that the bond had been rescinded. At the same time, Mr. Bahr was detained and questioned for eight hours.

After September 17, he was transferred to unknown locations that were later determined to be a Lancaster facility and the Metropolitan Detention Center in Los Angeles were he was questioned by FBI agents. Around September 20, he was taken to New York and held in Brooklyn's Metropolitan Detention Center, where the FBI again questioned him. Guards there would frequently taunt him by calling him a terrorist. At night, they woke him every half an hour. Despite this treatment Mr. Fayad cooperated fully and even agreed to take a lie detector test.

Back in California, the friends who tried to post bond became very concerned when they could no longer locate Mr. Fayad. They contacted the Egyptian embassy, but they were also unable to locate him (in fact, the Embassy did not learn of his whereabouts until November). Mr. Fayad's friends hired attorney Valerie CurtisDiop to find and represent Mr. Fayad. Ms. Curtis-Diop called INS, and the U.S. Marshall's office, but was unable to determine where he was being held. At some point, Ms. Curtis-Diop was given a federal register number for Mr. Fayad, and was told that he was being held in "witness security." Even with that number, Ms. CurtisDiop could not confirm where he was being held. Despite information that Mr. Fayad was in the custody of the Bureau of Prisons, the Bureau refused to acknowledge to Ms. Curtis-Diop that they had Mr. Fayad. It would be more than a month before Ms. Curtis-Diop was able to locate her client. To this day, calls to the Bureau of Prisons result in a denial that Mr. Fayad is in their custody.

When Mr. Fayad had originally asked about an attorney in late September, he was given a list of 16 agencies. It wasn't until early October that Mr. Fayad was allowed to make phone calls to try and secure counsel. Phone calls to attorneys are restricted and "social" calls are allowed only once a month. Only two of the agencies on the list provided to Mr. Fayad provide legal counseling to detainees, and one of those numbers was not working. It was not until October 18, on his first "social call", that Mr. Fayad learned that Ms. Curtis-Diop had been retained to represent him. It wasn't until sometime later that he was allowed to speak directly with his attorney.

Mr. Fayad continues to be held in the Special Housing Unit, where he remains in a cell 24 hours a day - even meals are served in his cell and he has no access to newspapers, television or radio. It wasn't until the end of October that he was allowed to outside - at 7 am, for an hour. Despite representations to Ms. Curtis-Diop by the U.S. Attorney's office that the FBI in New York are no longer interested in Mr. Fayad, he continues to be held in custody. Immigration proceedings have been continued, but even if an immigration judge makes a final determination in his case he will remain in custody until FBI issues an official clearance.

Having a right to counsel is meaningless unless those imprisoned in our immigration system are made aware of that right, and given the opportunity to actually exercise the right in a timely fashion. Furthermore, lawyers need to be able to contact their clients. Transporting detainees, sometimes across the country, without any opportunity for lawyers or family to determine where they are raises serious questions about whether detainees have access to counsel.

In light of the refusal to provide information about who has been detained and where they are held, we remain concerned that many detainees are unrepresented by counsel. Anecdotal evidence from detainees who are represented by counsel, and lawyers who have been in immigration court and jails where detainees are held suggests that this is the case.

DEPARTMENT OF JUSTICE AUTHORIZES DETENTION WITHOUT CHARGES

In testimony before this committee last week, the Justice Department stated that every person detained has been charged with a violation of either immigration law or criminal law. Yet we know from first hand accounts that this is not the case. An AILA member in New York currently represents three men who have been detained for as long as a month without being charged with any violations. Unfortunately, these are not isolated cases.

In fact, these practices are part of a pattern reflected in a new regulation issued by the Attorney General on September 20. This new regulation purports to grant the INS authority to detain a noncitizen for an unspecified period of time "in the event of an emergency or other extraordinary circumstances" without so much as a determination as to whether to pursue proceedings. This exceptionally vague and open-ended provision allows detention without reason for virtually any period of time that the jailer chooses, with no recourse or explanation. It, in effect, allows an individual to be held for long periods for no better reason than that someone in government thinks they look suspicious. What could be more offensive to our Constitution and to the democratic way of life that we seek to defend?

It was only a few months ago that in the case of Zadvydas v. Davis (533 U.S. , 121 S.Ct. 2491 (2001)) that the U.S. Supreme Court found unconstitutional the practice of indefinitely detaining individuals who had been found to have violated the immigration laws and ordered removed. Yet here is a regulation that would indefinitely detain those who have not even been charged, much less been found removable. That the Zadvydas court imposes a reasonable time standard on detention of those found removable does not mean that the INS can adopt the same standard for those who have not even been charged. We owe the Constitution and our democracy better than that: we owe those under scrutiny the right not to be deprived of liberty without due process of law. Holding someone for an unspecified period without even deciding whether to charge him deprives him of liberty with no process of law.

Congress also has spoken to the issue of how long an individual can be detained, and has done so even more recently than the Zadvydas decision. In the USA PATRIOT Act, Congress limited to seven days the time that an individual suspected of terrorism can be held without being charged with a crime or brought under removal proceedings. Allowing persons not necessarily even suspected of terrorism to be held for an undefined period is a clearly an end-run around the limitations that this Congress felt were necessary to secure the rights of the accused.

Monitoring Communications Between Detainees and their Lawyers

October 30, 2001, the Department of Justice authorized the monitoring of mail and other communications between lawyers and clients who are in federal custody, including people who have been detained but not charged with any crime. Despite government assertions that this broad authority will be applied in only a limited number of cases, nothing in the regulations prohibits it from being applied broadly. According to a summary published in the Federal Register, the monitoring will be conducted without a court order in any case the Attorney General certifies "that reasonable suspicion exists to believe that an inmate may use communications with attorneys or their agents to facilitate acts of terrorism." Such certification will last for up to one year, and is not subject to judicial review. The new regulations also expand the definition of "innate" to cover anyone "held as witnesses, detainees or otherwise" by INS agents, U.S. marshals or other federal authorities.

Other than vague and general assertions that these new measures are necessary to protect the public, the Department of Justice has failed to demonstrate the need for these rules to protect against attorneys who may help to facilitate future or ongoing criminal activity. Under existing law, federal authorities can seek appropriate remedies under the wellestablished "crime-fraud" exception to attorney-client privilege. In a closed-door hearing before a federal judge, and in the absence of the offending attorney, the court can take immediate and effective actions, including ordering the monitoring of communications if necessary. Other options include removing the attorney from the case and prosecutors are always free to initiate criminal proceedings against attorneys where appropriate. These procedures ensure judicial review in the narrow band of cases where an attorney is abusing the attorney-client privilege, protect legitimate attorney-client communications, and ensure that authorities have the power to investigate and prevent criminal activity without obstruction.

DETAINEES WILL REMAIN IN CUSTODY DESPITE BEING ORDERED RELEASED BY AN IMMIGRATION JUDGE

On October 29, the Department of Justice implemented without comment new regulations that allow INS to obtain an automatic stay of an immigration judge's order releasing many immigration detainees from custody, whether on bond or without bond. In order to stop the decision of the impartial immigration judge from taking effect, the INS must simply complete a form (EOIR–43), indicating that the INS is considering appealing the judge's order. The INS then has 10 days to decide whether to appeal; meanwhile the judge's release order is stayed and the person cannot be released. If the INS appeals the immigration judge's order, the stay of the judge's order continues indefinitely, until the Board of Immigration Appeals decides the merits of the appeal. It is not unusual for Board of Immigration Appeals to take months to decide a bond appeal.

The regulation fixes a system that is not broken. The Immigration Courts and the Board of Immigration Appeals administered the preexisting bond redetennination system in a cautious, careful manner. There were no incidents in the aftermath of September 11 where noncitizens were released on bond because the BIA did not respond timely to an INS request for a stay: The Board promptly granted stays on an interim basis as requested by the INS via brief, summary motions. It also granted the INS time to thoroughly brief its position, and even add evidence to the record as part of its appeal.

Two examples of noncitizens who were held on very slim suspicions related to September 1 I suggest that if anything operation of the preexisting system was cautious in the extreme. Mr. Al-Maqtari's case is one. As you have just heard, there was no rush to judgement in his case. Despite the fact that the evidence against him was minimal, and the INS committed serious procedural violations in his case, arresting him with an invalid warrant, serving him an invalid charging document, and changing his bond status without notice, the Immigration Judge and the Board of Immigration Appeals gave the INS every opportunity to make its case. The Judge granted repeated continuances for the INS to come forward with evidence against Mr. Al-Maqtari. The Board of Immigration Appeals allowed the INS ample time to brief its case and let the INS submit its only documentary evidence, an FBI agent's affidavit, on appeal, after the evidentiary hearing had closed.

In a similar case, Hady Hassan Omar, an Egyptian antiques dealer, was held from September 12 until November 23, 2001. The principal evidence against him was that he had made travel reservations on travelocity.com for a flight from Florida to Texas using a computer at a Kinko's branch in Boca Raton, Florida that two terrorists had previously used. On October 19, 2002, an Immigration Judge in Oakdale, Louisiana held a bond hearing and set a $5,000 bond in Mr. Omar's case. Despite the weakness of its case, the INS sought a stay of the Immigration Judge's

order. The BIA granted a temporary stay that day. More than a month later, Mr. Omar was released on bond.

In these cases, the government was given every courtesy, while innocent people spent weeks in detention even though the cases against them were very weak. This is not a system that needs to be tilted further in favor of the government. The preexisting system gave the INS a fair opportunity to present its case, and eventually, the system brought a fair result for the detained noncitizens. It should be restored.

In the end, the INS dropped its insistence on detaining Mr. Al-Maqtari because it had no evidence. Unfortunately, because of the new automatic stay regulation, even when it has no evidence, the government retains the upper hand. By invoking the automatic stay, the government can insure weeks - and usually months - of continued detention for a noncitzen regardless of how weak its case is.

On November 6, 2001, the INS reported to the Immigration Court in Memphis that the FBI had ended its investigation of Mr. AI-Maqtari and offered to stipulate to a bond of $10,000. Mr. Al-Maqtari had little choice but to agree to the INS' offer. If the immigration judge had granted a lower bond, and the INS had filed the automatic stay form, he would have remained in jail for weeks and probably months more. Fortunately, Tiffany Al-Maqtari had $10,000 to pay her husband's bond. They accepted the INS' deal and he was freed. How many other noncitizens will be granted a fair bond by an Immigration Judge, but suffer months of unwarranted detention, in the kinds of degrading conditions that Mr. Al-Maqtari described, because of the automatic stay regulation?

CONCLUSION

The rules that were in place prior to promulgation of these new regulations by the Justice Department provided procedures for the government to deal quickly and effectively with any exceptional problems that arose. An aberrant bond order could be stayed by filing a motion with the BIA, a wiretap order could be obtained against a rogue attorney, etc. These preexisting regulations were the rules that Congress understood and relied on when it passed the USA PATRIOT Act. The new rules erode the rights of noncitizens in the United States. As the examples I have discussed show, the problem is not theoretical, but real, with innocent people suffering unjust treatment daily. Most likely, many more people—those without attorneys or family members to press their case—are also suffering injustice.

We must fact the difficult challenges ahead with this important understanding: we are a nation of immigrants, with a Constitution and due process rights that distinguish us from the rest of the world. Our diversity and our Constitution have given us our identity. They are central to who we are as a country, and help explain our success as a people and a nation. We need to protect those rights and reject the excessive measures instituted by the Department of Justice.

Thank you again for this opportunity to testify, and I will be happy to answer any questions that you may have.

Senator FEINGOLD. Our next witness is Victoria Toensing. Ms. Toensing was a Deputy Assistant Attorney General in the Criminal Division during the Reagan administration, where she helped establish the Justice Department's Anti–Terrorism Unit and was responsible for investigating and indicting several high-profile terrorists. She is currently a partner at the Washington, D.C. law firm of diGenova and Toensing and she has had a very recognizable face from having appeared on many television news programs to discuss legal issues. I thank you for joining us and the floor is yours.

STATEMENT OF VICTORIA TOENSING, DIGENOVA AND TOENSING, LLP, AND FORMER DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Ms. TOENSING. Thank you, Mr. Chairman, and thank you very much for inviting me to testify. I assume the invitation was not only because, as a former Justice Department official, I supervise many international terrorism investigations, but also I am a student of the Senate. I was former Chief Counsel for Barry Goldwater for the Senate Intelligence Committee and I understand that

relationship between law enforcement and intelligence issues, a relationship that really is at play in the aftermath of September 11.

You have my complete statement, so I will spare you the reading of it, but I do want to make a few points, and one of them is an overall—two overall observations about what we are going through right now, and I say this as a veteran law enforcement lawyer.

We need to appreciate the context in which we are discussing these initiatives. September 11, I hope we can all agree, was an illegal act of war. It was not a crime. And so when we are trying to decide responses off the battlefield, non-military responses to September 11, we do have to start thinking outside the box of the criminal justice system.

Also, never before in my 15 years as a government lawyer or in my 13 years as a defense attorney have I seen prevention of the next act the primary goal as opposed to the investigation of the malfeasance that has occurred, and that is very different for me and I have a sensitivity to that, but I can see it from the Justice Department and I can see it from the conduct and for the need for different tools because we have never really fought that way in an investigation, if I may call it that, because it is an investigation to prevent as well as an investigation to find people responsible for September 11.

I want to just touch on the military tribunal. I know you had a thorough hearing this morning. I enjoyed every minute of it. But I have been there. I have been when I know the foreign government has the tape and on the tape is the terrorist's words showing he was responsible for a terrorist act where a U.S. citizen was a victim, and yet we could not get the tapes. We should have prosecuted. We could not get the tape because the foreign government said, I am not giving it to you if it is going to become public in a U.S. trial, and I say in this situation of the terrorism war, I do not think we can let the guilty go free.

Let me talk briefly about the detention of aliens, and there are a number of issues here which is probably better saved for the questions and answers, but I just want to touch on one, and that is I know that the ACLU will later argue that the names of the detainees should be released to the public, and I say that there are valid, not only just law enforcement reasons why they should not, but also privacy interests of the detainees.

Every one of those detainees, as is Mr. Al–Maqtari, is free to come and announce that he or she has been detained, but I find it also of quite valid law enforcement interest. What if one of those detainees agrees to cooperate and then we want to release that detainee to go out and work back into a cell that he says is existent in the United States? The fact that it would be known that he would be detained and has been working or talking to the U.S. Government is a very valid law enforcement rationale for not releasing the names.

One last point I would like to touch on is the monitoring of attorney-client conversations. When I was Deputy Assistant Attorney General, we monitored conversations of clients with their attorneys, but these were unconvicted targets in organized crime and their counsel. So as a matter of government policy, this is not new. That privilege has been pierced long ago when there is evidence

that the lawyer may be furthering the crime. And so with the proper safeguards that I agree are necessary not to chill the attorney-client privilege when there is valid legal information being communicated, we need that tool, also, in our arsenal.

Senator FEINGOLD. Thank you very much, Ms. Toensing.

[The prepared statement of Ms. Toensing follows:]

VICTORIA TOENSING, ATTORNEY, DIGENOVA & TOENSINGFORMER DEPUTY ASSISTANT ATTORNEY GENERAL

The carnage of September 11, 2001 was neither a crime nor an act of war. The attack on civilians was an illegal act of war intended to destroy our American society. As such, it is beyond the scope of our criminal laws. Just as important, our goal in responding to September 11 cannot be limited to punishing the perpetrators. Foremost, the goal is prevention. The U.S. government must fulfill the nation's primary responsibility: protection of its citizens.

Because of these considerations, the Department of Justice and White House have initiated three proposals: 1) the option to try non-U.S. citizen belligerents before military tribunals, 2) detention of aliens for immigration violations and, for a reasonable time, to investigate suspicious facts of terrorism involvement, and 3) monitoring inmates' conversations with counsel when there is a basis to believe the inmate may use such communications to facilitate acts of terrorism. With proper safeguards, all are necessary tools in our response to the terrorism attacks and threats of future violence.

MILITARY TRIBUNAL

The Supreme Court has upheld military tribunals for unlawful belligerents charged with acts of war. The constitutionality of tribunals is not at issue. The relevant discussion is whether the policy is wise. As a former Justice Department official who supervised international terrorism cases, I know the President must have that option.

A federal trial in the United States would pose a security threat to the judge, prosecutors and witnesses, not to mention the jurors and the city in which the trial would be held. We do not have sufficient law enforcement personnel to provide these trial participants round-the-clock armed protection, the type of security still in place for the federal judge who tried Sheik Rahman in 1993. A federal trial in the United States may preclude reliable evidence of guilt. When the evidence against a defendant is collected outside the United States (the usual situation for international terrorism investigations) serious problems arise for using it in a domestic trial. The American criminal justice system excludes evidence of guilt if law enforcement does not comply with certain procedures, a complicated system of rules not taught to the Rangers and Marines who could be locked in hand-to-hand combat with the putative defendants. For sure, the intricate procedures of the American criminal justice system are not taught to the anti-Taliban fighters who may capture prisoners. Nor to the foreign intelligence agencies and police forces who will also collect evidence.

At just what point is a soldier required to reach into his flak jacket and pull out a Miranda rights card? There are numerous evidentiary and procedural requirements of federal trials that demonstrate the folly of anyone thinking such trials should be used in wartime for belligerents. Below is a sampling of the legal questions facing the prosecutor:

Does the Speedy Trial Act start running when the combatant is captured?

Should the Miranda rights be given in Arabic? Which dialect?

If the belligerent wants a lawyer and cannot afford one should she be sent at taxpayer expense to Kabul to confer with her client?

Does the requirement that an arrested person must appear before a federal magistrate within several days to enter a plea apply?

What happens when all the evidence showing guilt is not admitted because it was collected by a foreign police force using procedures not in compliance with United States Constitutional standards?

What happens when all the evidence showing guilt is not turned over to the United States because a foreign intelligence agency does not want to reveal sources and methods?

For evidence to be used against the defendant, how does the prosecution establish chain of custody, an impossible procedure on the battlefield?

In the aftermath of September 11, it is not necessarily true that an American jury would be the fairest deciders of guilt. If the judicial system thought Timothy

McVeigh could not get a "fair" trial in Oklahoma, where in the United States is there an impartial jury for September 11?

DETENTION OF ALIENS

Our federal investigators have been assigned a mission that requires Divine prescience: they are being asked to know when the Middle-Eastern Muslim with the box cutter and immigration violation is a potential murderer or a peaceful, loving husband.

Law enforcement is charged with preventing future attacks, a task burdened with quick decisions and instant analysis. Law enforcement is also charged with investigating the crime, a task calling for thorough, thoughtful investigation. Sometimes the two tasks occur simultaneously with the same person as the subject. Unfortunately, there are times law enforcement gets it wrong as they did with Ali Al-Maqtari. But, ultimately the system worked and he was released.

The responsibility of the U.S. government is to establish and follow procedures to ensure the detainees have access to counsel so that cases lacking evidence proceed swiftly through the process. The cure is not to release detainees back out on the streets of America when suspicious conduct remains unchecked. The solution is to make the process responsive so any irregularities can be brought to the attention of the Department of Justice or Congress, if the Department does not resolve the problem. All detainees charged with crimes should have counsel, paid for by U.S. taxpayers if appropriate. All detainees charged with immigration violations should have access to counsel and be provided lists of pro bono attorneys if they cannot afford one.

MONITORING INMATE CONVERSATION WITH COUNSEL

Perhaps we could find points of agreement on this issue. I suggest the following:

The attorney-client privilege was created as integral to the Sixth Amendment right to counsel.

The attorney-client privilege is not absolute.

The attorney-client privilege protects only discussions about legal matters.

If an inmate uses his or her counsel to further a crime, specifically an act of terrorism, there is no privilege for the conversation.

If the government has credible evidence an inmate is using his or her lawyer to abet a terrorist plot it has the responsibility to learn of the crime and must act to prevent it.

Government conduct should not chill an inmate's right to counsel for all matters legal.

The problem is how to balance the government's responsibility to protect Americans from terrorism without chilling legitimate counsel conversations. The Attorney General established safeguards to protect privileged communication where, based on credible information, there is evidence the attorney-client relationship is being misused to further terrorism. Those safeguards are as follows:

The inmate must be subject to SAM (special administrative measures), which is a prior finding the inmate's "communications or contacts with persons could result in death or serious bodily injury. . .or substantial damage to property that" includes "risk of death or serious bodily injury. . . ."

The inmate must also be detained in a terrorism related case.

The Attorney General must receive information from the head of a federal law enforcement or intelligence agency that reasonable suspicion exists to believe a particular detainee may use communications to further or facilitate acts of terrorism.

The Attorney General must make a separate finding of reasonable suspicion to believe the communications may be used in furtherance or to facilitate terrorism.

Before monitoring begins, the inmate and counsel must be given notice of the monitoring.

The monitoring personnel cannot be involved in the underlying investigation.

The monitoring personnel shall use procedures to minimize hearing privileged conversations.

Unless disclosure has been approved by a federal judge, the monitoring personnel shall not disclose any information except where violence is imminent.

In addition to these guidelines, I suggest the following be considered:

Upon notice of potential monitoring, the detainee could be given the option to change counsel to one having a government security clearance.
Congress could pass legislation enabling a FISA like court (or, without legislation, use the FISA court) to review the finding of reasonable suspicion to believe the inmate may use communications to further acts of terrorism.
No matter what judicial-type body is used, the standard should not be the more onerous probable cause of a Title III wiretap.

Senator FEINGOLD. Now we turn to Gerry Goldstein. He is a highly respected criminal defense lawyer, past President of the National Association of Criminal Defense Lawyers and was named outstanding criminal defense attorney by the State Bar of Texas in 1991. Mr. Goldstein represents Dr. Al–Badr Al Hazmi, a radiologist in Texas who was detained in connection with the September 11 attack investigation. I thank you also for joining us and you may proceed.

STATEMENT OF GERALD H. GOLDSTEIN, ESQ., GOLDSTEIN, GOLDSTEIN AND HILLEY, SAN ANTONIO, TEXAS, ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Mr. GOLDSTEIN. Thank you, Mr. Chairman, distinguished members of the Committee.

Let me begin by responding briefly to the able and eloquent colleague who spoke on the previous panel and described the inscription at the base of the Statue of Liberty. Perhaps in retrospect we should amend that inscription to, bring me your poor, your huddled masses, and we will jail them as illegal aliens, subject them to secret proceedings, and eavesdrop on their conversations with their lawyers.

My concern in this process is the description that I keep hearing from the Department of Justice, lawyers who I have known and respect, that no one's right to counsel has been interfered with. On September 12, the day after these tragic events both in our country's capital and the City of New York, I was retained to represent Dr. Al Hazmi, who at some 5:00 a.m. in the morning—he is a radiologist in residency at the University of Texas Health Science Center. He was studying those early morning hours for his medical boards. They were two days hence. Federal agents entered his home, searched for some six hours, and took him into custody.

Later that afternoon on September 12, he was allowed a brief telephone call to my office. He told me that he was in immigration custody and requested that I ascertain why he was being held. The phone was immediately taken by an INS special agent, who advised me that he could give me no other further information, including the whereabouts of where my client was being held, and referred me to a supervising agent.

I then immediately began telephoning that supervising agent that afternoon and the next day. There is a letter which the Committee has as part of my testimony, which I appreciate and acknowledge has been made a part of the record, and expressed my concern about the whereabouts of my client and requested an opportunity to speak with my client, and at that time, that supervising agent advised me that he would be unable to give me any information about my client, the reasons for his detention or his

whereabouts, and, in fact, referred me again to an attorney with the Immigration Service Trial Litigation Section.

My client advises that he repeatedly requested an opportunity to speak with his counsel, to talk to his wife and call his wife, that those requests were denied. Rather than facilitating those requests, the request to speak with his counsel, in fact, the government agents, in this case, FBI agents, continued to interrogate my client, and I think all lawyers would agree, in clear violation of Edwards v. Arizona and Minnick v. Mississippi.

I then hired an immigration lawyer, an able lawyer by the name of Bob Shivers, who is a member of Mr. Boyle's association, and both of us, Mr. Shivers and I, filed Form G–28 notices of representation on behalf of Dr. Al Hazmi. So the government now had a letter and our formal notices of appearance.

In the meantime, the immigration lawyer notified on September 14 the Director of Immigration Service for our district. He sent a letter to him detailing our efforts to find our client, locate his whereabouts, and consult with him, as he had requested.

When I reached the supervising agent finally the next day, he advised me that he would be unable, again, to give me any information and I received a return call from the attorney with the Litigation Section. He advised, as well, that he could not speak to me about my client, could not give me any information with respect to his whereabouts or why he was being retained.

Thereafter, the District Director of Immigration did call us back. He advised us that he, as well, could not give us any information about why our client was being detained, but informed us that by this time, our client had been, as he put it, removed from the jurisdiction.

I then sent a letter to the appropriate Department of Justice officials, including the Assistant United States Attorney who I had been advised was assigned the case, again, detailing our efforts to speak with our client, our desire to locate his whereabouts, which we still did not know other than he had been taken out of our jurisdiction, and our need to consult with him.

Some three days later, I was informed that my client had been taken by FBI agents by airplane from San Antonio, Texas, to the detention facility in Lower Manhattan in New York City. I then immediately retained a local attorney, another former President of the National Association of Criminal Defense Lawyers, in an attempt to contact my client. However, he was informed the following day when he went to the detention facility in Manhattan that, in fact, he would not be allowed to see my client because the court had appointed another attorney to represent my client, I might add, without my client's knowledge.

What concerns me, in closing, is that the Department of Justice has denied that—by the way, four days later, on September 24, my client was cleared by the FBI and released. What concerns me is the statement that no detainees have been held incommunicado, suggesting that any interference with the right to counsel has been due to time constraints and administrative shortcomings.

Dr. Al Hazmi was not someone who simply slipped through the bureaucratic cracks. He was someone whose lawyers had entered a formal notice of appearance and representation, whose lawyers

had communicated in writing with the appropriate investigative agencies and the Department of Justice of their concerns, of their desire to locate and know the whereabouts of their client, of their interest in consulting and speaking with their client. But rather than facilitating these requests, the FBI sends us on a wild goose chase, as did the Immigration Service and the Department of Justice officials, while they continued their interrogation.

I might add that by denying Dr. Al Hazmi access to his retained counsel, Federal law enforcement officials not only violated his rights and perhaps would have jeopardized a prosecution had he been guilty of something, but perhaps more important to them, they deprived themselves of valuable information and documents that we had that would have explained many of the concerns that they later expressed.

Senator FEINGOLD. Mr. Goldstein, I have to ask you to conclude.

Mr. GOLDSTEIN. In essence, they prolonged the investigation and wasted valuable time at a time they had very little time to spare.

Senator FEINGOLD. I thank you very much for your testimony.

[The prepared statement and attachments of Mr. Goldstein follow:]

STATEMENT OF GERALD H. GOLDSTEIN, ATTORNEY, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, SAN ANTONIO, TEXAS

Gerald H. Goldstein, of San Antonio, Texas, is a Past President of the National Association of Criminal Defense Lawyers (NACDL) and its Texas affiliate. He graduated from Tulane University in 1965, and then attended the University of Texas School of Law. Since graduating in 1968 from law school, he has dedicated his practice to the representation of those accused of criminal offenses. He is a certified Specialist in Criminal Law, and a Fellow in the American College and the International Academy of Trial Lawyers.

His law firm, Goldstein, Goldstein & Hilley, devotes approximately 15–20% of its time to *pro bono* work. He has served as counsel in numerous civil rights cases, many of which vindicated the rights of prisoners to be free from excessive (and sometimes fatal) force, inadequate medical care, and inhumane living conditions. He has also served as appellate counsel for death row inmates and has defended the First Amendment rights of farmers and religious organizations. In several important matters before the United States Supreme Court, he has served as counsel of record for the National Association of Criminal Defense Lawyers as *amicus curiae*.

In addition to his practice, for the past twenty years he has served as adjunct professor of advanced criminal law at the University of Texas School of Law in Austin, Texas, and St. Mary's University School of Law in San Antonio, Texas. He is a member of the Board of Regents of the National Criminal Defense College and lectures frequently on criminal law and procedure at continuing legal education seminars throughout the United States.

Mr. Chairman and Distinguished Members of the Committee:

In the early morning hours of September 12, 2001, Dr. Al-Badr Al Hazmi, a fifth-year radiology resident at the University of Texas Health Science Center in San Antonio, Texas, was studying for his upcoming medical board exams, when federal law enforcement agents entered his home, searched the premises for some six hours, and took Dr. Al Hazmi into custody. Immigration authorities transported Dr. Al Hazmi to the nearby Comal County Jail.

Later that afternoon, Dr. Al Hazmi was allowed a brief telephone call to my office, at which time he explained that he was being held by United States Immigration authorities and inquired as to the reasons for his detention. Almost immediately, an Immigration and Naturalization Agent took the telephone and told me that he could provide no information regarding the reason for my client's detention, nor his whereabouts; he then referred me to his "supervisor."

After my numerous telephone calls to the supervising agent on September 12th and 13th went unanswered, I wrote a letter to the Immigration and Naturalization Service, seeking to ascertain the whereabouts of my client and requesting an opportunity to communicate with him. In no uncertain terms, my letter explained:

I am concerned with regard to the status of [Dr.] Al Hazmi and am requesting that information regarding his status and provisions for my office to communicate with him be provided at your earliest convenience. . . .In light of your unavailability and my expressed concern regarding the need to communicate with [my client], I am copying this letter to the United States Attorney's Office in the hopes that they may help facilitate same. (See attached letter to INS Agent, dated September 13, 2001).

Dr. Al Hazmi's repeated requests to consult with his attorney were ignored, as authorities continued to interrogate him. As he would later tell a reporter, "Nobody explained to me anything, they just kept saying, 'Later, later,'. . .I said, 'I need to call my lawyer.' They said, 'Later.' 'I need to call my wife.' They said, 'Later.'" Macarena Hernandez, *Prayers Answered, Dr. Al-Hazmi Details How Faith Aided Him During His Detention*, San Antonio Express-News, Sept. 30, 2001, at 1A.

On September 13, 2001, my office retained an immigration attorney, and both counsel filed formal "Notice[s] of Entry of Appearance as Attorney" on INS Form G–28. (See attached Forms G–28, Notices of Appearance as Attorneys for attorneys Gerald H. Goldstein and Robert A. Shivers).

When I was finally able to reach the "supervising" INS agent, on September 14, 2001, he advised that he too was unable to provide me with access to, or any information regarding my client, referring me instead to an attorney with the Immigration Services' Trial Litigation Unit.

However, when I reached the Immigration Services' attorney, he advised that he could not speak to me about Dr. Al Hazmi and would not provide any information regarding the whereabouts of my client.

On that same day, Mr. Shivers, the immigration attorney hired by our firm, sent a letter to the District Director of the Immigration Service, detailing counsels' repeated attempts to determine the whereabouts of our client, again requesting an opportunity to consult with Dr. Al Hazmi, and expressing his concern that "misrepresentations were knowingly made to prevent our consulting with our client." (See attached letter to INS District Director, dated September 14, 2001).

I then sent a letter to the acting United States Attorney for our district (copying the Assistant United States Attorney whom I had been advised was assigned the case), again attempting to ascertain the whereabouts of my client and making a "formal demand" for an opportunity to consult with him, thus:

What is of particular concern to me is that despite prior notice to your office . . .of my client's desire to communicate with counsel and my attempts to locate and speak with him, my numerous calls to your offices have gone unanswered. A . . .trial counsel for INS did call me back only to advise that he could not talk to me or even advise me where my client was being detained. . . .After both Mr. Shivers and I filed our respective representation forms, and after Mr. Shivers spent the better part of the day attempting to locate and visit our client, [the] INS District Director . . .advised that our client had been placed on an airplane and removed from this 'jurisdiction.' Even an individual being deported . . .is entitled to be represented by counsel, and a reasonable opportunity to consult with their counsel. Accordingly, I am hereby making another formal request for same. (See attached letter to U.S. Attorney, dated September 14, 2001).

Earlier that day, Dr. Al Hazmi had been taken by FBI agents to New York, and held in a lower Manhattan detention facility, without an opportunity to contact his family as to his whereabouts or have any contact or consult with his attorney.

The following sequence of events brought this Kafkaesque experience to a conclusion:

On September 17, 2001, almost a week after my client had been taken into custody, I was advised that he was being detained by Federal authorities in New York City.

On September 18, 2001, local New York counsel, hired by my office, was advised by the detention facility authorities that he would not be permitted to visit with Dr. Al Hazmi, because the court had appointed a different lawyer to represent him, without Dr. Al Hazmi's knowledge.

On September 19, 2001, the local counsel hired by my office was permitted to visit with Dr. Al Hazmi at the Manhattan detention facility. On September 24, 2001, the FBI cleared and released Dr. Al Hazmi. He returned home to San Antonio the following day.

The Department of Justice has denied that any of the detainees are being held incommunicado, suggesting that any interference with the right to counsel was due to time compression and administrative shortcomings. However, as the above scenario demonstrates, Dr. Al Hazmi was not someone who simply "slipped through the cracks." Dr. Al Hazmi was represented by retained counsel who had filed formal notices of appearance on behalf of their client. Moreover, Dr. Al Hazmi's attorneys had

notified the appropriate law enforcement agencies and the Department of Justice in writing, requesting the whereabouts of their client and expressing their desire to communicate with him. Despite these efforts—and despite Dr. Al Hazmi's repeated requests to consult with his counsel—Federal authorities stonewalled and continued to interrogate Dr. Al Hazmi in the absence of his counsel.

By denying Dr. Al Hazmi access to his retained counsel, Federal law enforcement officials not only violated my clients rights, they deprived themselves of valuable information and documentation that would have eliminated many of their concerns. Their obstructionism prolonged the investigative process, wasting valuable time and precious resources.

Dr. Al Hazmi's experience, when viewed in conjunction with the Department of Justice's and various law enforcement agencies' policies that interfere with attorney-client relations, suggests that this Committee's continued vigilance is warranted.[1]

The right to the assistance of counsel is the cornerstone of our adversarial system. One need only read *Miranda* v. *Arizona*, which recounts the widespread abuses that plagued our nation's interrogation rooms, to fully appreciate the risks that accompany any abrogation of the right to counsel. *Miranda* v. *Arizona*, 384 U.S. 436, 445–446 & n.7 (1966) (providing examples of abuses and explaining that "[t]he difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado. ").

These are among the concerns that mandate a right to representation not only when one is charged with a crime, but when one is subjected to custodial interrogation as well. It is well-established that once an individual in custody requests counsel, all further questioning must cease. Edwards v. Arizona, 451 U.S. 477 (1981); *Minnick* v. *Mississippi*, 498 U.S. 146 (1990).

The government's current dragnet-style investigation—characterized by ethnic profiling, selective enforcement of criminal and immigration laws, and pretrial detention for petty offenses—heightens the important role counsel plays from the very inception of custody.[2]

The interests protected by defense counsel go beyond the procedural protections guaranteed by the Bill of Rights. As recognized by the Innocence Protection Act, introduced by Chairman Leahy and supported by NACDL, without the effective representation of counsel, not only are innocent persons incarcerated or worse, but the guilty go free.

The right to counsel also serves as an invaluable check on the illegitimate or indiscriminate use of government power. At no time is this right more important than when the government has acquired or claimed sweeping new powers. As Justice Brandeis said in his famous dissent, "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . .The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead* v. *United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

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[1] For example, eleven Israeli Citizens were presumably mistaken for Arabs and arrested in Ohio for working without authorization while visiting the United States on tourist visas. They were visiting this country after completing military service in Israel, where several had served in counter-terrorism units. In hours-long interrogation by the FBI, the Israelis were told that getting counsel involved would only complicate things and prolong their detention. Nine of the eleven were detained for more than two weeks and two were detained for a month. All have now been granted voluntary departure. John Mintz, *60 Israelis on Tourist Visas Detained Since Sept. 11,* Washington Post, Nov. 23, 2001, at A22; Tamar Lewin & Alison Leigh Cowan, *Dozens of Israeli Jews Are Being Kept in Federal Detention,* New York Times, Nov. 21, 2001; NACDL interview with David Leopold, Esq., Cleveland, Ohio, counsel for the detainees.

According to counsel for the detainees, during the course of the questioning at least one of the Israelis was asked "how much torture can you stand before you tell the truth." The FBI also repeatedly asked the Israelis who sent them to the United States, whether they took any pictures of tall buildings and whether they had any Israeli intelligence connections or role. Each was also asked whether he or she was Muslim and whether they had visited a mosque in Toledo, Ohio. On the night of their arrests, the two women in the group were subjected to a humiliating "pat down" by a male INS officer as a prerequisite to their use of the restroom. The male INS officer claimed there were no longer any female officers present at INS Headquarters.

[2] A separate issue, and one that will be discussed more fully by other groups, is the extent to which these ethnically biased law enforcement tactics violate the Constitution and international laws, and tarnish our country's image. Singling out non-citizens for disparate treatment raises serious constitutional questions. *See Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886). As the Supreme Court recently reaffirmed, the Fifth Amendment protects all non-citizens, even those here unlawfully, from deprivation of life, liberty or property without due process of law. *Zadvydas* v. *Davis*, 121 S. Ct. 2491, 2500–2501 (2001). Policies which evade these protections not only erode minority and immigrant confidence in law enforcement, but undermine efforts to obtain adequate rights and protections for United States citizens traveling abroad.

The USA PATRIOT Act gave broad new powers to federal law enforcement in the areas of eavesdropping and electronic surveillance, search and seizure, money laundering, criminal and civil asset forfeiture, information sharing (e.g., erosion of wiretap and grand jury secrecy rules), and detention of non-citizens. To determine whether these powers are being exercised in a responsible manner or whether they are being abused, and therefore need to be curtailed, public disclosure and oversight is essential. This accountability is enhanced by defense lawyers, many of whom have already brought their cases of abuse to public light.

While my client has been completely absolved of any wrongdoing or connection to the acts of terrorism, I am still prohibited by court order from discussing certain aspects of the case. The extraordinary secrecy which has characterized the post-9/11 investigation has made it difficult for defense lawyers to discuss the facts surrounding their clients' detentions and impossible for the public to gain a complete picture of the government's tactics. Many of my colleagues who represent past or current detainees share my view that this veil of secrecy serves only to shield the government from criticism.

Before concluding, I would like to discuss one more issue, which is closely related to the denial of access to counsel. On October 31, the Federal Bureau of Prisons published notice in the Federal Register of a new rule giving the Federal government authority to monitor communications between people in Federal custody and their lawyers if the Attorney General deems it "reasonably necessary in order to deter future acts of violence of terrorism." Instead of obtaining a court order, the Attorney General need only certify that "reasonable suspicion exists to believe that an inmate may use communications with attorneys or their agents to facilitate acts of terrorism." Until now, communications between inmates and their attorneys have been exempt from the usual monitoring of other calls and visits at the 100 federal prisons around the country.

NACDL joins the American Bar Association and the vast majority of the legal profession in denouncing this new policy. The attorney-client privilege—"the oldest of the privileges for confidential communications known to the common law"—is the most sacred of all the legally recognized privileges. Its root purpose is "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981).

Based on my 32-years experience, defending persons from all walks of life, I can tell you that the crucial bond of trust between lawyer and client is hard-won and easily worn. This is particularly true when the attorney must bridge cultural, ethnic and language differences. Any interference from the government can permanently damage this relationship, threatening the defendant's representation and the public's interest in a just and fair outcome—not to mention the government's interest in obtaining cooperation in its investigations. In all likelihood, the mere specter of monitoring will complicate the already difficult endeavor of communicating effectively with incarcerated clients and will chill the delicate relationship between the accused and his advocate.

* * *

NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's 11,000 direct members—and 80 state and local affiliate organizations with another 28,000 members—include private criminal defense lawyers, public defenders, active-duty U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

ATTACHMENTS

LAW OFFICES
GOLDSTEIN, GOLDSTEIN AND HILLEY
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310 S. ST. MARY'S STREET
SAN ANTONIO, TEXAS 78205-3109

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(1915-2000)
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LICENSED IN TEXAS AND COLORADO
VAN G. HILLEY
PATRICK T. PERANTEAU
CYNTHIA HUJAR ORR

AREA CODE 210
TELEPHONE 226-1463

AREA CODE 210
TELEFAX 226-8367

September 13, 2001

Supervising Agent Haldeman
Immigration and Naturalization Service
8940 Four Winds Drive
San Antonio, Texas

Re: Al Bader Al Hazmi

Dear Agent Haldeman:

Please be advised that yesterday afternoon I was contacted by the above named individual who advised he was being detained by INS. When I spoke with INS Special Agent West, he advised me that he no information other than that the INS was attempting to determine Mr. Al Hazmi's visa status in this country. Further, Agent West, advised that all further questions or contact with my client should be referred through Supervising Agent Haldeman. Since that time I have attempted to contact your office on some five separate occasions yesterday afternoon, last evening and again this morning leaving both my office and after hour cell phone numbers. However, as of 10:30 AM this morning, I have not had the courtesy of a return phone call.

I am concerned with regard to the status of Mr. Hazmi's and am requesting that information regarding his status and provisions for my office to communicate with him be provided at your earliest convenience.

In light of your unavailability and my expressed concern regarding the need to communicate with Mr. Hazmi, I am copying this letter to the US Attorney's Office in the hopes that they may help facilitate same. I appreciate your assistance in this matter.

Sincerely,

Gerald H. Goldstein
for GOLDSTEIN, GOLDSTEIN & HILLEY

GHG/dd

FAXED TO 967-7070

xc: USA Robert Pitman
AUSA John Murphy
AUSA David Counts

NOTICE OF ENTRY OF APPEARANCE AS ATTORNEY OR REPRESENTATIVE

In re: Albadr Alhazmi

DATE 9-13-01

FILE No.

I hereby enter my appearance as attorney for (or representative of), and at the request of, the following named person(s):

NAME Albadr Alhazmi (Custody of INS) ☐ Petitioner ☐ Applicant ☐ Beneficiary ☐

ADDRESS (Apt. No.) (Number & Street) (City) (State) (ZIP Code)

NAME ☐ Petitioner ☐ Applicant ☐ Beneficiary ☐

ADDRESS (Apt. No.) (Number & Street) (City) (State) (ZIP Code)

Check Applicable Item(s) below:

[X] 1. I am an attorney and a member in good standing of the bar of the Supreme Court of the United States or of the highest court of the following State, territory, insular possession, or District of Columbia

Supreme Court of Texas, Supreme Court of US, Fifth Circuit, Western District of Texas (Name of Court) and am not under a court or administrative agency order suspending, enjoining, restraining, disbarring, or otherwise restricting me in practicing law.

☐ 2. I am an accredited representative of the following named religious, charitable, social service, or similar organization established in the United States and which is so recognized by the Board:

[X] 3. I am associated with Robert A. Shivers, the attorney of record who previously filed a notice of appearance in this case and my appearance is at his request. *(If you check this item, also check item 1 or 2 whichever is appropriate.)*

☐ 4. Others (Explain fully.)

SIGNATURE

COMPLETE ADDRESS
Gerald H. Goldstein
310 S. St. Mary's Street, Suite 2900
San Antonio, Texas 78205

NAME (Type or Print)
Gerald H. Goldstein

TELEPHONE NUMBER
210-226-1463

PURSUANT TO THE PRIVACY ACT OF 1974, I HEREBY CONSENT TO THE DISCLOSURE TO THE FOLLOWING NAMED ATTORNEY OR REPRESENTATIVE OF ANY RECORD PERTAINING TO ME WHICH APPEARS IN ANY IMMIGRATION AND NATURALIZATION SERVICE SYSTEM OF RECORDS:

(Name of Attorney or Representative)

THE ABOVE CONSENT TO DISCLOSE IS IN CONNECTION WITH THE FOLLOWING MATTER:

NAME OF PERSON CONSENTING | *SIGNATURE OF PERSON CONSENTING* | *DATE*

(NOTE: Execution of this box is required under the Privacy Act of 1974 where the person being represented is a citizen of the United States or an alien lawfully admitted for permanent residence.)

Form G-28 (Rev. 10-25-79)N (OVER) UNITED STATES DEPARTMENT OF JUSTICE Immigration and Naturalization Service

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402

NOTICE OF ENTRY OF APPEARANCE AS ATTORNEY OR REPRESENTATIVE

In re:	DATE
	FILE No.

I hereby enter my appearance as attorney for (or representative of), and at the request of, the following named person(s):

NAME: Albadr Alhazmi ☐ Petitioner ☐ Applicant ☐ Beneficiary ☐
ADDRESS (Apt. No.) (Number & Street) (City) (State) (ZIP Code)
INS Custody

NAME: ☐ Petitioner ☐ Applicant ☐ Beneficiary ☐
ADDRESS (Apt. No.) (Number & Street) (City) (State) (ZIP Code)

Check Applicable Item(s) below:

[X] 1. I am an attorney and a member in good standing of the bar of the Supreme Court of the United States or of the highest court of the following State, territory, insular possession, or District of Columbia

TEXAS SUPREME COURT (Name of Court) and am not under a court or administrative agency order suspending, enjoining, restraining, disbarring, or otherwise restricting me in practicing law. TEXAS BAR NO: 18283000

[ ] 2. I am an accredited representative of the following named religious, charitable, social service, or similar organization established in the United States and which is so recognized by the Board:

[X] 3. I am associated with Gerald Goldstein, the attorney of record who previously filed a notice of appearance in this case and my appearance is at his request. *(If you check this item, also check item 1 or 2 whichever is appropriate.)*

[ ] 4. Others (Explain fully.)

SIGNATURE	COMPLETE ADDRESS
	SHIVERS & SHIVERS 1146 S. ALAMO SAN ANTONIO, TEXAS 78210
NAME (Type or Print) ROBERT A. SHIVERS	TELEPHONE NUMBER (210) 226-9725

PURSUANT TO THE PRIVACY ACT OF 1974, I HEREBY CONSENT TO THE DISCLOSURE TO THE FOLLOWING NAMED ATTORNEY OR REPRESENTATIVE OF ANY RECORD PERTAINING TO ME WHICH APPEARS IN ANY IMMIGRATION AND NATURALIZATION SERVICE SYSTEM OF RECORDS: Shivers & Shivers (Name of Attorney or Representative)

THE ABOVE CONSENT TO DISCLOSE IS IN CONNECTION WITH THE FOLLOWING MATTER:

SOLELY IN CONNECTION WITH THE REFERENCED MATTER STATED ABOVE.

NAME OF PERSON CONSENTING	SIGNATURE OF PERSON CONSENTING	DATE
Albadr Alnazmi		

(NOTE: Execution of this box is required under the Privacy Act of 1974 where the person being represented is a citizen of the United States or an alien lawfully admitted for permanent residence.)

Form G-28
(Rev. 10-25-75)N

(OVER)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

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Shivers & Shivers

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Texas Board of Legal Specialization

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Nancy Taylor Shivers
Board Certified-Immigration & Nationality Law
Texas Board of Legal Specialization

September 14, 2001

Via Facs: 210-967-7102

Mr. Kenneth Pasquarell
District Director
U.S. Immigration Service
8940 Fourwinds Drive
San Antonio, Texas 78239

Re: Albadr Alnazmi
"A" unknown

Dear Mr. Pasquarell:

On September 13, 2001 I received a phone call from Mr. Gerald Goldstein, an attorney in San Antonio, Texas, concerning the above detained alien. According to Mr. Goldstein he spoke to a supervisory investigator who could give him no information. He was referred to Mr. Reid Tiltson in the Trial Litigation Unit who advised him to fax a G-28. He complied with this request as did I. Mr. Goldstein told me that neither the investigator nor Mr. Tiltson would tell him where his client was. Today around 8:30 a.m. or so I spoke to Mr. Tiltson and asked where our client was so that we could speak to him. Mr. Tiltson informed me that he did now know where our client was but to check with the ADD for deportation. He also told me that there was no "A" number. I immediately phoned her but was informed that she was not available. I left a message with my office phone and cell number. Not receiving a reply I again called from the Immigration Office but was again told she was not available. I then phoned you and left a message. I phoned Mr. Tiltson and after explaining to him that I could not get a hold of Ms. Winfrey, again requested the whereabouts of our client. He said he would check and let me know. He again stated that there was no "A" number. I gave him my cell number and hold him I was downstairs. You then returned my call and I explained that I had just spoken to Mr. Tiltson and he was taking care of it. After my interviews I again phoned Mr. Tiltson, who told me that our client had been flown out of San Antonio to an unknown destination.

We were informed that our client was in immigration custody. According to Fifth Circuit decisions a detained alien is entitled to be represented by counsel and that counsel has a right to speak with a detained client. Our client has the right to access to counsel. We are not challenging the Service's right to move our client to a different facility.

It is inconceivable to me that your legal representatives are unaware of what is going on in your office. It is also inconceivable that you would hold an alien for over 24 hours without creating a file. I understand that this is an unusual case with foreign policy and national security considerations. If someone would have simply expressed these reasons for being cautious then I could understand. If misrepresentation were knowingly made to prevent our consulting with our client without a legal basis then the code of federal regulations regarding conduct might have been violated.

Mr. Goldstein has communicated with the U.S. Attorney's Office concerning this matter.

I hope to hear from you soon.

Sincerely,

ROBERT A. SILVERS

RAS:ltk

cc: Gerald Goldstein

NOV-30-01 FRI 07:07 PM GOLDSTEIN HILLEY FAX NO. 210 226 8307

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September 14, 2001

Mr. Robert Pitman, US Attorney
Mr. John Murphy, Assistant US Attorney
Mr. David Counts, Assistant US Attorney
601 NW Loop 410, Suite 600
San Antonio, Texas 78216

Re: Dr. Badre Al Hazmi

Dear Robert, John and David.

As you can see from my enclosed letter of yesterday to Supervising INS Agent Haldeman, and immigration attorney Robert Shivers' letter to INS District Director Pasquarell of today, our offices currently represent the above named individual.

As is also evident, although my client called me on Thursday, September 12, 2001 to advise that he was being held by INS authorities, I have been unable to speak with or otherwise communicate with my client since that time.

What is of particular concern to me is that despite prior notice to your office (*See:* copy of my letter to INS Agent Haldeman) of my client's desire to communicate with counsel and my attempts to locate and speak with him, my numerous calls to your offices have gone unanswered.[1] A Mr. Tilson, trial counsel for INS did call me back only to advise me that he could not talk to me or even advise me where my client was being detained until I had filed an INS Form G-28. After both Mr. Shivers and I filed our respective representation forms, and after Mr. Shivers spent the better part of the day attempting to locate and visit our client, INS District Director Pasquarell, advised that our client had been placed on an airplane and removed from this "jurisdiction." Even an individual being deported under Title 8 U.S.C. §1531 is entitled to be represented by counsel,

[1] I was able to reach AUSA John Murphy who visited with me briefly by telephone on Wednesday, September 12, 2001 after I was first contacted regarding representing Mr. Al Hazmi. It was from AUSA Murphy that I was given AUSA Counts' name.

NOV-30-01 FRI 07:07 PM GOLDSTEIN HILLEY FAX NO. 210 226 8367 P. 10

and a reasonable opportunity to consult their counsel. Accordingly, I am hereby making another formal demand for same.

Sincerely,

Gerald H. Goldstein
For GOLDSTEIN, GOLDSTEIN & HILLEY

GHG/dd
Encl.

FAXED to 384-7118 and 384-7460

xc: Robert Shivers, Esq.

Senator FEINGOLD. Our next witness is Steven Emerson. Mr. Emerson is a researcher, journalist, and author focusing on terrorism and national security. He is also the Executive Director of The Investigative Project, which he started in 1995 following the broadcast of his controversial documentary film, "Jihad in America." Prior to his career in journalism, Mr. Emerson was a professional staff member of the United States Senate Foreign Relations Committee. Mr. Emerson, thank you for joining us today and you may proceed.

STATEMENT OF STEVEN EMERSON, EXECUTIVE DIRECTOR, THE INVESTIGATIVE PROJECT, WASHINGTON, D.C.

Mr. EMERSON. Thank you very much. First of all, unlike everybody else on this panel, I am not a lawyer and neither do I play one on TV and I am not an expert in constitutional procedures. I am here only to provide some expertise about the degree of the terrorist threat that exists in the United States and the magnitude of the deception used by terrorists in planting themselves on American soil.

Toward that end, I would like to be able to show an excerpt of the film, if it is okay with the chairman.

Senator FEINGOLD. You may use the allotted time as you wish, but I am not going to be able to extend it beyond the time I have allotted others.

Mr. EMERSON. Could I—

Senator FEINGOLD. You can show the video if you wish or testify.

Mr. EMERSON. Could I borrow the two minutes that Vicki Toensing did not use, so give me seven?

Senator FEINGOLD. You know, I am going to allow that and no more.

Mr. EMERSON. Can we show it, then, for three minutes, and then we will just cut it off.

Senator FEINGOLD. Sure.

[A videotape was shown.]

Senator FEINGOLD. I think we are going to turn the tape off. I have already accorded you Ms. Toensing's two additional minutes, which is unusual procedure, and you have already received more time than all the other witnesses, as well as the representative of the Attorney General's office, but I am going to give you one more minute to explain the relevance of this to the detention of innocent people.

Mr. EMERSON. Thank you very much, and in any future testimony, I will gladly surrender my five minutes.

The bottom line is that I want the American public and American policy makers to be aware of the nature of the unprecedented threat that exists on American soil and the extent to which our civil liberties have been exploited and used by militants who have carried out the worst attack on American soil in our history.

Senator FEINGOLD. Thank you.

[The prepared statement and attachments of Mr. Emerson follow:]

STATEMENT OF STEVEN EMERSON, EXECUTIVE DIRECTOR, THE INVESTIGATION PROJECT, WASHINGTON, D.C.

EXECUTIVE SUMMARY

On September 11, 2001, thousands of Americans were executed, most of them incinerated in the worst terrorist attack on American soil in the history of the United States. In the wake of this attack, the President of the United States has declared a war against the terrorists.

In the war on terrorism, the military component poses the greatest strategic challenge and incurs the greatest potential for American casualties. But from the widest political perspective, the greatest challenge to the United States is the ability to recognize terrorist groups operating under false cover and veneer. Clearly, the success of Osama Bin Laden and his Al-Qaeda network has demonstrated, with murderous consequences, the ability of terrorist groups to hide under the facade of "human rights," "charitable" and "humanitarian" cover. In addition, the ability of militant Islamic groups to hide under the protection of the larger non-violent and peaceful Islamic community has created a challenge for policymakers and officials, the likes of which has not been present before in American society. Sleeper cells that are believed to number in the tens, possibly hundreds, also constitute a dangerous threat to American society.

As someone who has tracked and investigated the activities of militant Islamic fundamentalist networks for the past eight years, I am presenting in the following testimony the results of my recent investigations into the operations of terrorist networks in the United States.

The basic findings of my investigative findings are summarized as follows:

Osama Bin Laden has systematically recruited American passport holders (like Wadih El Hage, now in prison for his role in the 1998 bombings of the United States embassies in Kenya and Tanzania) in order to exploit the ease in which these operatives can travel freely around the world as well as ship American communications technology to the Bin Laden network.

Bin Laden recruited a United States Special Forces sergeant who then became the secret head of security for Bin Laden, while serving as a triple agent, pretending to assist the FBI on counterterrorism matters, even though he was serving as a top aide to Bin Laden.

Bin Laden has created front organizations serving under false cover as groups with missions officially tethered to "human rights," "charitable" and "humanitarian" purposes. The most striking and hitherto secret organization serving under the false "human rights" facade was created by Bin Laden with offices in London (England), Kansas City (Missouri) and Denver (Colorado).

Hamas has created a network of cover groups, "humanitarian organizations" and commercial companies in the United States.

Militant Islamic groups based and headquartered in the United States have exhorted their followers, behind closed doors and out of the earshot of the

American public and media, to carry out and raise funds for Jihad (in this sense, referring to the concept of "holy war ").

Bin Laden has created, exploited and utilized a network of established charitable conduits throughout the world, including those headquartered in the United States.

The Islamic Jihad terrorist group secretly set up its headquarters in the United States to promote the Islamic Jihad terrorist organization under the false cover of an academic institute connected to the University of South Florida and a "humanitarian" front group.

The events of September 11th may well have been impossible without the support of individuals and organizations with ties to al-Qaeda, some of which are still operating in the United States today. Foreign terrorist organizations have utilized numerous modes of operation within the United States to facilitate their fundraising goals. Their infiltration into American society has occurred through the use of domestic universities, establishment of innocuous-sounding non-governmental organization entities, and through the utilization of "front" corporations whether they be domestic or foreign corporations with branches within the United States. The following are examples of these various modus operandi from actual situations within the United States.

A. BARAKAAT GROUP OF COMPANIES: FUNNELING MONEY FOR AL-QAEDA ON AMERICAN SOIL

The intricate networks of supporters for terrorists exist on the organizational level, and the Bush administration has responded in kind. With each passing order by the President and the Treasury Department, the United States gets one step closer in ridding the terrorist element from our society. One such success is the governmental shutdown of the Al-Barakaat Group of Companies, a hawala-type bank which allegedly funneled money for Osama bin Laden and his al-Qaeda. A large sum of funds used for terrorism was funneled directly from multiple branches of Barakaat in the U.S., right under our noses.

Though based in the United Arab Emirates, al-Barakaat has an abundance of subsidiaries, scattered across the world, with nine of them in the United States,[1] including branches in or near Seattle, Washington DC, Minneapolis, Columbus, and Boston. In particular, the Boston branch of Barakaat, Barakaat North America Inc., moved more than two million dollars through an American bank.[2] The head of Barakaat, Ahmed Nur Ali Jumale, is said to have befriended Osama bin Laden during the Afghani war against the Soviets. In 1988, bin Laden donated a substantial amount of capital to Jumale, initiating the money flow between al-Qaeda and Barakaat.[3] The London Daily Telegraph reported that the Barakaat bank was owned by Al-Ittihad al-Islamiya,[4] which is on the list of terrorist organizations whose assets were frozen by Bush's first Executive Order. The Barakaat Bank of Somalia was also believed to be sending funds to Al-Ittihad al-Islamiya.[5]

Barakaat clearly flourished on American soil, incorporating in at least five states and working clandestinely as a benign money-transfer business. This organization could be one of many supposedly legitimate businesses that reside within the United States. It is therefore imperative that suspicious organizations be scrutinized to the fullest extent within which the law will allow. Cutting off the money flow to terrorist organizations and their supporters is an integral part of the war against terrorism. The war is now on our soil, and our enemy comes in many forms, including American businesses.

While businesses must be examined thoroughly, we must not forget to look at the fundamental base of these organizations-people who actively support the terrorist agenda. Terrorists make up these organizations, and they have exploited the United States and its liberties in every way possible.

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[1] Ron Fournier. "U.S. moves on Islamic money exchanges in Minnesota, elsewhere." *The Associated Press*. November 7, 2001.

[2] Ibid.

[3] David E. Sanger and Kurt Eichenwald. "A NATION CHALLENGED: MONEY TRAIL; U.S. MOVES TO CUT 2 FINANCIAL LINKS FOR TERROR GROUP." *The New York Times*. ovember 8, 2001.

[4] "Banks-to-terror conglomerate faces US wrath Somalia" The Daily Telegraph (London). September 28, 2001.

[5] "European Authorities Arrest 3 Allegedly Linked to Al Qaida" Associated Press. October 10, 2001.

B. U.S. PASSPORT HOLDERS: TERRORIST CANDIDATES

American passport holders are recruited by terrorist groups enabling these operatives to move easier, risking less suspicion than their counterparts who hold foreign passports. There are documented cases of individuals traveling in and out of the United States on their American passports to deliver money, weapons and technical equipment such as satellite phones. This method of operation is used by various terrorist groups such as Hamas who used Muhammad Salah, an American naturalized citizen, to travel to Israel using his American passport to enter Palestinian territories carrying hundreds of thousands of dollars.

The Al-Qaeda network used various U.S. passport holders such as Wadih El Hage, a 40-year-old naturalized American citizen from Lebanon who was convicted earlier this year for the 1998 embassy bombings in Kenya and Tanzania.

FBI Special Agent Robert Miranda testified in 2001 at the trial of Wadih El Hage and others for their roles in the bombings of the United States embassies in Kenya and Tanzania regarding an interview he conducted with El-Hage on August 20, 1998:

> *Q:* Did he indicate to you why it was that he was asked to work for Usama Bin Laden?
> *Miranda:* Yes. He said that because he had an American passport, Usama Bin Laden wanted him to work for him because he could travel more freely and buy things for Bin Laden.[6]

One of Wadih El-Hage's attorneys, Sam Schmidt, emphasized this point even further at the same trial by stating:

> The evidence will show that Wadih El Hage was hired by Bin Laden to work in the Sudan, not only because he was well-educated, a hard worker, honest, responsible and a devout Muslim, but, yes, he was an American free to travel throughout the world on American passport.[7]

Wadih El-Hage served as Osama Bin Laden's personal secretary in the early 1990's. In 1994, Mr. El-Hage moved to Kenya to set up businesses for Bin Laden to be used as terrorist fronts. Mr. Hage's business card shows him as a director of Anhar Trading, a company with addresses in Hamburg, Germany, and Arlington, Texas.[8]

U.S. passport holders Tarik Hamdi and Ziyad Khaleel illustrate another example of Al-Qaeda's use of American citizens. Hamdi and Khaleel delivered a satellite telephone and battery pack to Osama Bin Laden in Afghanistan in May 1998. Using this phone, Bin Laden conferred with followers across the globe and, according to prosecutors, ordered the bombing of the two American embassies in East Africa. Hamdi, a resident of Herndon, Virginia, traveled to Afghanistan with an ABC News team in order to coordinate an interview with Bin Laden. The phone itself was purchased by Khaleel.[9]

In the same trial as mentioned above, an employee of O'Gara Satellite Networks testified on the sale of an INMARSAT phone to Ziyad Khaleel, a resident of Columbia, Missouri. This phone was allegedly for the exclusive use of Osama Bin Laden.[10] Khaleel purchased additional phone accessories and asked that the equipment be mailed to: Tarik Hamdi at 933 Park Avenue in Herndon, Virginia 20170.[11]

In the trial transcripts on March 27, Hamdi's name was mentioned time and again regarding the satellite phone issue and a letter from ABC World News Tonight requesting an interview with Bin Laden, dated May 13, 1998 and addressed to Bin Laden's senior military commander, Mohammed Atef. Apparently Hamdi was familiar with Atef, since contained in the letter was a line referring to previous communication through "Mr. Tarik Hamdi in Washington." Later in the trial it was revealed that when Hamdi traveled to Afghanistan with the ABC News team, he sent a fax from Pakistan to a Bin Laden aide named Khalid al-Fawwaz. The fax read:

> "Brother Khalid: Peace be upon you. We arrived safely and now we are in the Marriott Hotel."[12] Soon after, Bin Laden received the battery pack that was so instrumental in Bin Laden's communication with his worldwide network.

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[6] *United States* v. *Usama Bin Laden et al.* trial transcript, March 20, 2001.
[7] *United States* v. *Usama Bin Laden et al.*, trial transcrit, February 20, 2001.
[8] A copy of this business card is included as Appendix "A".
[9] See Appendix "B" for documentation of this fact.
[10] *United States* v. *Usama Bid Laden et al.*, trial transcript, March 20, 2001.
[11] *United States* v. *Usama Bid Laden et al.*, trial transcript, March 27, 2001.
[12] *United States* v. *Usama Bid Laden et al.*, trial transcript, May 1, 2001.

The use of individuals with American passports was a necessity for Bin Laden to achieve his goals. One of the privileges that an American passport brings is the ability to travel from place to place with little or no interference. This was obviously the case with Wadih El Hage who, with his American passport, was able to pass in and out of the United States and into regions in Africa, the Middle East and Asia on instructions from Bin Laden himself. This trend should definitely raise a warning flag for future cooperation between international terrorists and sympathetic counterparts within the United States.

C. ALI MOHAMMED: BIN LADEN'S SPECIAL OPERATIONS MAN WITHIN THE UNITED STATES

Perhaps one of the most frightening examples of the infiltration of terrorists into the infrastructure of the United States is that of Ali Mohammed, one of the individuals indicted for his role in the conspiracy plot to bomb the United States embassies in Kenya and Tanzania. Mohammed was an officer within the United States Army's Special Forces based out of Fort Bragg, North Carolina. At the same time, he was arranging for security for meetings between such individuals as Osama Bin Laden and Hizbollah military chief Imad Mughniyeh in Sudan and coordinating activities with other Bin Laden operatives within the United States.

On November 8, 1990, FBI agents raided the New Jersey home of El Sayyid Nosair, the Egyptian born Islamic militant, following his arrest in the shooting of Rabbi Meir Kahane in New York City. Among the many items found in Nosair's possession were sensitive military documents from Fort Bragg, North Carolina. The documents, some of which were classified Secret, contained the locations of U.S. military Special Operations Forces exercises and units in the Middle East, military training schedules, U.S. intelligence estimates of Soviet forces in Afghanistan, a topographical map of Fort Bragg, U.S. Central Command data and intelligence estimates of Soviet force projection in Afghanistan. Appended throughout the documents were Arabic markings and notations believed to be that of Ali Mohammed. Some documents were marked "Top Secret for Training otherwise unclassified". Other documents were marked "sensitive."

The military documents had been given to Nosair by Ali Mohammed, an Egyptian born Islamic fundamentalist who had come to live in the United States in 1985. He had been in the United States earlier that decade, having graduated as a captain from a Special Forces Officers School at Fort Bragg in 1981 in a program for visiting military officials from foreign countries. He joined the U.S. military in 1986 and received a security clearance for level "secret." He was assigned as a sergeant with the U.S. Army Special Operations at Fort Bragg, North Carolina. He also served unofficially as an assistant instructor at the JFK Special Operations Warfare School at Fort Bragg where he participated in teaching a class on the Middle East and Islamic fundamentalist perceptions of the United States.

Ali Mohammed became active in the war against the Soviets in Afghanistan and soon connected with Islamic militants in New Jersey who had been training and supporting the jihad. Mohammed was introduced to El Sayyid Nosair by Khalid Ibrahim, an Egyptian born Islamic fundamentalist in New Jersey. Ibrahim had become active in the Office of Services of the Mujihadeen, known Al Kifah, the group that recruited volunteers and funds for the jihad in Afghanistan. Al Kifah, headquartered in Peshawar, Pakistan, maintained scores of offices world-wide, including three dozen in the United States, with Al Kifah's primary American offices located in Brooklyn, Jersey City and Tucson, Arizona. According to the current indictment against Bin Laden and others for their role in the bombing of the United States embassies in Kenya and Tanzania in August 1998, the Office of Services was transformed into the terrorist organization of Osama Bin Laden, known as Al-Qaeda.

According to transcripts of the World Trade Center bombing trials, Ali Mohammed began giving training sessions in New Jersey in guerilla warfare in 1989 to Islamic militants that included, among others, El Sayyid Nosair, Mahmud Abuhalima (later convicted in the World Trade Center bombing conspiracy) and Khalid Ibrahim. Other training sessions took place in Connecticut where Islamic militants trained on weekends. A FBI report, based on Connecticut State Police intelligence, summarized the activities of the training sessions using semi-automatic weapons.[13]

According to military records, Ali Mohammed left the military in November 1989 and moved to Santa Clara, California. Law enforcement officials say he traveled to Afghanistan and Pakistan where he befriended Osama Bin Laden and other top militants in the Islamic fundamentalist movements who had sought sanctuary in

[13] The FBI reports were collected in connection with the investigation of El Sayyid Nosair for the assassination of Rabbi Meir Kahane in New York City on November 5, 1990.

Peshawar. From his base in Santa Clara, Mohammed soon emerged as a top aide to Osama Bin Laden. Federal officials say that Mohammed traveled regularly to and from Pakistan and Afghanistan, having helped oversee Bin Laden's terrorist bases in Khost and other terrorist camps in Afghanistan. In 1991, Mohammed was the person in charge of Bin Laden's move from Afghanistan to the Sudan. The move was considered perilous since Bin Laden had made so many enemies. Mohammed helped Bin Laden set up his new home and terrorist base in Khartoum, Sudan where 2000 "Arab Afghans"-the name given to the Arab veterans of the Afghanistan jihad-were headquartered in Bin Laden terrorist camps. Mohammed continued to travel between the terrorist camps in Afghanistan, Bin Laden's base in the Sudan and the United States. Mohammed continued to train new Islamic recruits in the expanded holy war, or jihad, against the United States, Israel, the Philippines, Bosnia, Egypt and Algeria.

Law enforcement records show that Mohammed's extended stays outside the United States would range from weeks to half a year. But he would always return to the United States, which provided him a safe base from which to travel around the world on behalf of Bin Laden. In California, Mohammed became involved in smuggling illegal aliens into the United States, including suspected terrorists. Law enforcement sources say that a favorite route for Mohammed was to smuggle illegal aliens through Vancouver, Canada.

In a seemingly bizarre twist, while in California, Mohammed volunteered to provide information to the FBI on smuggling operations involving Mexicans and other aliens not connected to terrorist groups. Within time, officials say, the relationship allowed Mohammed to divert the FBI's attention away from looking at his real role in terrorism into examining the information he gave them about other smuggling. This gave Mohammed a de facto shield in effectively insulating himself from FBI scrutiny for his ties to Bin Laden. And the relationship helped protect Mohammed from being scrutinized by other federal agencies. Mohammed had succeeded in creating an ingenious scheme all the while he worked for Osama Bin Laden. Mohammed had also tried to cultivate a relationship with the CIA, which did not succeed, although he had far better success in playing off the FBI against the CIA in his dealings with both agencies. Like a John Le Carre thriller, Mohammed played the role of a triple agent and nearly got away with it.

In late 1994, Mohammed was called by the FBI who wanted to speak with him about the trial in the World Trade Center conspiracy case. As Mohammed stated in his plea of guilty before Judge Leonard B. Sand of the United States District Court for the Southern District of New York on October 20, 2000, "I flew back to the United States, spoke to the FBI, but didn't disclose everything I knew."[14] In other words, Mohammed was continuing to manipulate the American authorities even when he was called to testify regarding the acts of terrorists about whom he possessed information.

Federal law enforcement officials say that Mohammed's role and association with the Islamic militants surfaced in connection with the World Trade Center bombing trials in 1994 and 1995. He was named on a list of some 118 potential unindicted co-conspirators in the World Trade Center bombing conspiracy released by federal prosecutors. Even so, Mohammed's connections with Bin Laden were so solid that, when he obtained a copy of this list, he sent it to Wadih El Hage, Bin Laden's personal assistant, in Kenya "expecting that it would be forwarded to bin Laden [sic] in Khartoum."[15]

In 1996, according to intelligence reports, Mohammed helped move Bin Laden back from the Sudan, which wanted to maintain an official arm's length relationship (yet keeping its close connections secret), to Afghanistan. Mohammed continued working for Bin Laden in 1997 and 1998, maintaining his role as one of Bin Laden's top lieutenants.

On October 20, 2000, Mohammed rendered a guilty plea to all charges filed against him with regard to his role in the conspiracy to bomb the United States embassies in Kenya and Tanzania in 1998. In his admission, Mohammed admitted his involvement with both the Al-Qaeda organization and the Egyptian Islamic Jihad organization. He admitted that he had been involved in conducting military and explosives training for Al-Qaeda in Afghanistan; that he had conducted surveillance of various American, British, French and Israeli targets in Nairobi; that trained Bin Laden's personal bodyguards to prevent any assassination attempts; and that he arranged security for a meeting between Bin Laden and Hizbollah military leader Imad Mughniyeh.[16] Ali Mohammed's role in terrorism and his ability to work within

[14] Excerpts of Mohammed's October 20, 2000 plea are attached as Appendix "C".
[15] See Appendix "C".
[16] See Appendix "C" for further excerpts of Mohammed's plea.

the United States outside the scope of investigation provides proof of the vulnerability of the United States to the work of terrorists within the United States.

D. IHAB ALI: FLIGHT SCHOOL

Another instance of an abuse of American citizenship is Ihab Mohammed Ali, currently incacerated for lying to a grand jury about his role in the Al-Qaeda network and the embassy bombings in Kenya and Tanzania. Ali and his family moved to the United States in the 1970s, immigrating from Egypt. There he obtained a job as a cab driver for City Cab Co in Orlando, Florida, before heading off for Pakistan in 1989.[17] While there, Ali worked for the Muslim World League, an organization reportedly backed by Osama bin Laden.[18] After being taken into custody in May 1999 due to his alleged connections to the embassy bombings in Africa, Ali refused to aid authorities and lied to the grand jury.

According to his indictment, Ali took flight lessons in Oklahoma in 1993 like some of the September 11 hijackers.[19] Ali's learned to fly at the Airman Flight School in Norman, Oklahoma. Two hijackers, Mohammed Atta and Marwan al-Shehhi, visited the Airman Flight School before deciding to learn to fly at a flight school in Florida. Ihab Ali's exact role in the Al-Qaeda network remains unclear, but his indictment intimates that Ali was believed to have knowledge of both Wadih El Hage and Ali Mohammed and their actions.[20]

E. RAMADAN ABDULLAH SHALLAH: THE CASE OF THE UNIVERSITY OF SOUTH FLORIDA

On March 11, 1992, the University of South Florida (USF) and the World & Islam Studies Enterprise (WISE) entered into a formal agreement regarding cooperation between the two entities in the fields of research and graduate student enrichment.[21] WISE was a seemingly benign organization which was a self-described think-tank on Middle Eastern and Islamic issues. The individual who signed the agreement on behalf of WISE was Ramadan Abdullah Shallah. In October 1995, following the assassination of then-leader Fathi Shikaki, Shallah became the Secretary-General of the Palestinian Islamic Jihad (PIJ), an international terrorist organization based in Damascus, Syria, that was engaged in a jihad against the State of Israel through a campaign of suicide bombings and other deadly attacks carried out against Israeli civilians and soldiers alike.

The role of WISE in nurturing the future leadership of PIJ was that of providing a legitimate front for PIJ activities within the United States through agreements such as the one between WISE and USF which leant WISE the legitimacy necessary to overcome scrutiny for its activities. WISE, founded in 1990, was a PIJ brain-child from its formulation. The founders of WISE all emanated from the Middle East with a definite agenda dictated by PIJ.

The Director of Administration of WISE was Ramadan Abdullah Shallah. As mentioned earlier, Shallah currently serves as the Secretary-General of PIJ in Damascus, Syria. The Director of Research of WISE was Bashir Musa Nafi. Nafi was deported from the United States in 1996 based on visa violations. On his INS Order to Show Cause, which constitutes the INS equivalent to an indictment against an alien within the United States, a pseudonym is listed for Nafi of Ahmed Sadiq. This alias is important to his connections to terrorism. To those in the Palestinian Islamic Jihad, he was better known by this name. Under this pseudonym, Nafi wrote scores of articles in journals referred to by Palestinian Islamic Jihad head Fathi Shikaki as publications of the movement. Included among these are Al-Mukhtar Al-Islami, which is published in Cairo, and Al-Taliah Al-Islamiah, which was published in London (Nafi being on the Editorial Boards of both publications during the time that he wrote for them).

A master's thesis presented by Abdul Aziz Zamel at USF on April 17, 1991 referred to Nafi as an ideological head of the Palestinian Islamic Jihad along with Fathi Shikaki. Based on interviews with an anonymous individual identified by Zamel as a "founder" of the Palestinian Islamic Jihad, Zamel wrote, on page 192 of his thesis, that Nafi had actually "published and edited a journal, *al-Taliah al-Islamiah (The Islamic Vanguard)* [sic] specifically for the [Palestinian Islamic Jihad], which was sent to the occupied territories for reproduction, in the same shape and form, and distribution." Thomas Mayer, a researcher who wrote an arti-

[17] Pedro Ruz Gutierrez. "Case Builds Against a Cabbie." *The Orlando Sentinel.* July 19, 1999.
[18] Ibid.
[19] United States District Court for the SOurthern District of NY, Indictment of Ihab Mohamed Ali., p.5.
[20] Ibid.
[21] A copy of the agreement is attached as Appendix "D".

cle in Emmanuel Sivan and Menachem Friedman's 1990 book entitled *Religious Radicalism and Politics in the Middle East*, stated that Fathi Shikaki regarded Bashir Nafi as "an ideological friend." Mayer also discussed the cooperation between Nafi and Fathi Shikaki in distributing Al-Taliah Al-Islamiah throughout the West Bank and Gaza Strip.[22] These references suggest that Nafi was not merely a member of the movement, but a spokesperson with close ties to Shikaki.

Another of the founding members of WISE was Khalil Shikaki, the brother of then-Secretary-General of PIJ, Fathi Shikaki. Documents seized by federal agents pursuant to a search warrant at the WISE office in November 1995 show that Shikaki, after his departure from WISE in 1992, contacted his brother by means of Ramadan Shallah who was working at WISE and teaching at USF at the time. Evidence released in the federal investigation against WISE and ICP included a letter and a fax between Abdullah and Khalil Shikaki showing that Abdullah served as a go-between for the brothers.[23]

By utilizing the agreement between WISE and USF[24] as a means of facilitating legitimacy for their activities, the individuals associated with WISE were able to coordinate PIJ activities within the United States free from government scrutiny. The government became actively involved only after one member of the inner circle of this organization, Ramadan Shallah, emerged as the Secretary-General of PIJ in Damascus, Syria.[25]

F. MUSA ABU MARZOOK AND UASR:

The United Association for Studies and Research (UASR), an Islamic think tank now based in Springfield, Virginia, was founded in 1989 in Chicago, Illinois by a number of prominent Islamic radials living in the US, primary among whom was Musa Abu Marzook.

Musa Abu Marzook, a.k.a. Abu Omar, was the head of the Hamas Political Bureau since 1988, while he was resident in the United States.[26] Hamas (*Harakat Al-Muqawama Al-Islamia fi Filastin—The Islamic Resistance Movement in Palestine*) is one of the most militant Islamic groups in the world and is included in the United States Department of State's list of Foreign Terrorist Organizations that are outlawed pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996. Hamas has claimed responsibility for numerous suicide bombing attacks within Israel resulting in the deaths of scores of innocent Israelis.

On July 27, 1995, Marzook was arrested at New York's John F. Kennedy Airport because "he played an important role in supervising the activities of the military wing to Hamas [the wing responsible for the terrorist attacks] and in appointing individuals to important leadership roles in the military wing."[27] In the United States, Abu Marzook was "responsible for the Muslim Brothers organization in the U.S. and resigned from this job in order to devote his time to activities dedicated to Palestine" following the foundation of the Hamas. Marzook, who was born in the Gaza Strip, was a close associate of Sheikh Ahmad Yassin, the Islamic cleric who founded Hamas as an organization distinct from its parent group Muslim Brotherhood.[28]

Marzook first came to the United States in the late 1970s, although immigration records show that he formally began residing in the United States starting in 1981.[29] Marzook and his family lived in a number of locations during their 14 years in the United States, including Colorado, Louisiana and Virginia. He and his family moved to Falls Church, Virginia in 1991.Between 1993 and 1995, Marzook resided

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[22] Emmanuel Sivan and Menachem Friedman, *Religious Radicalism and Politics in the Middle East,* SUNY Press, 1990.

[23] This evidence was released to subsequent to the first immigration bond determination hearings for Mazen Al-Najjar in Orlando, Florida in 1996 and 1997.

[24] See Appendix "D".

[25] Additional information on the Palestinian Islamic Jihad Network in the United States is attached as Appendix "E".

[26] United States District Court for the Southern District of NY, In the Matter of the Extradition of Mousa Mohammed Abu Marzook, Affidavit of Kevin Thomas Duffy, DJ, 95 Civ. 9799 (KTD) May 8, 1996. p. 1.

[27] United States District Court for the Southern District of NY, In the Matter of the Extradition of Mousa Mohammed Abu Marzook, Sealed Complaint by Shirah Neiman.

[28] The Muslim Brotherhood is the international Sunni Islamic extremist movement that was founded in Egypt in 1928. It is also the ideological ancestor of today's most violent Islamic extremist movements.

[29] At the time of his arrest, Abu Marzook was a permanent resident alien of the United States. In 1990, he and his family received their Green Cards in an INS lottery that offered "permanent legal residency" to potential immigrants. In affidavits filed by Deputy United States Attorney Shirah Neiman, the role of Abu Marzook in Hamas activities was discussed as follows:

principally in Jordan, which deported him in June 1995 for his involvement and senior position in Hamas. In July 1995, after making trips to Iran and Syria, Abu Marzook attempted to reenter the United States at which time he was arrested by customs and INS officials at the request of the Israeli Government which sought to prosecute Abu Marzook for numerous crimes in connection with his leadership role in Hamas. In October 1995, acting at the request of the Israeli Government, the United States initiated extradition proceedings against Abu Marzook, based on pending Israeli criminal charges that included murder, attempted murder and conspiracy stemming from Hamas-sponsored terrorist acts.

In his role as head of political bureau, Abu Marzook financed certain activities of Hamas, including terrorist activities against soldiers and civilians in the Territories and Israel. In addition, he played an important role in supervising the activities of the military wing to Hamas (the wing responsible for the terrorist attacks) and in appointing individuals to important leadership roles in the military wing. Throughout most of the relevant period, he resided in the United States.[30]

The arrest of Muhammad Salah, Mohamad Jarad and Nasser Hidmi by the Israeli authorities marked an important turning point into the investigation of Hamas. What was revealed as a result of interrogations and confessions of these individuals (Salah and Jarad were both residents of Chicago, Illinois, and Hidmi was a student at Kansas State University in Manhattan, Kansas) was the importance of the United States as an operational base for Hamas. Under the leadership of Musa Abu Marzook, the Hamas headquarters in the United States was able to operate virtually unimpeded from the intense scrutiny of authorities.

On January 25, 1993, Salah and Jarad, two high ranking Hamas operatives with United States citizenship, were arrested by the Israeli General Security Services (GSS) with the aid of the Israeli Defense Forces (IDF). The Israeli authorities obtained the most significant information against Musa Abu Marzook from Salah, a.k.a "Abu Ahmad." In these statements, Salah exposed the pivotal role of Musa Abu Marzook in the Hamas organization. Musa Abu Marzook directed the Hamas organization's activities, the allocation of its resources and the transfer of funds: "Abu Marzook specifically directed funds towards Hamas' 'military' (i.e. terror) activities, encouraged acts of terror, and played an important role in overseeing certain 'military' aspects of Hamas' operations and in making 'military.'"[31]

On October 10, 1994, Abu Marzook appeared in a television interview broadcast from the "Al Manar" television station in Lebanon. This was only one day after the October 9, 1994 shootings in which two Hamas terrorists killed two and wounded eighteen persons in a suicide attack in a pedestrian mall in downtown Jerusalem. In the interview, Marzook stated as follows:

Death is the goal to every Muslim and every fighter wants to die on Palestinian land. This is not the first time that the Izz Al-Din Al-Qassem heroes carry out suicide and terrorism actions. . .The peace process, as described by Arafat more than once, is a failure. By these actions, we do not strive to foil the talks and the negotiations. We are doing them for a much higher aim and they are steps on the way for a full restitution of the rights of the Palestinian people.

G. USE OF MONEY LAUNDERING: THE "CHARLOTTE HIZBOLLAH CELL"

On July 21, 2000, agents from the Federal Bureau of Investigation (FBI) in Charlotte, North Carolina, arrested eleven individuals on charges of smuggling contraband cigarettes to Michigan from North Carolina and money-laundering. In a superseding indictment filed in the United States District Court for the Eastern District of North Carolina on March 28, 2001, four individuals were charged with providing material support or resources to the Hizbollah terrorist organization. The individuals were charged with providing "currency, financial services, training, false documentation and identification, communications equipment, explosives, and other physical assets to Hizbollah, in order to facilitate its violent attacks."[32]

Another similar case was filed in Michigan against Fawzi Mustapha Assi on August 4, 1998. The charges against Assi, stated in both the Indictment and the Criminal Complaint, included allegations that he did "(k)nowingly provide and attempt to provide material support or resources, to wit, night vision goggles, global positioning satellite modules and a thermal imaging camera to a designated foreign terrorist organization." The foreign terrorist organization to whom Assi was charged

[30] United States District Court for the Southern District of NY, In the Matter of the Extradition of Mousa Mohammed Abu Marzook, Sealed Complaint by Shirah Neiman to the US Magistrate Judge, p.2.

[31] Ibid. p. 5

[32] *United States* v. *Mohamad Youssef Hammoud et al.*, No. 00 CR 147 (W.D. N.C. filed July 20, 2000, amended March 28, 2001) Superseding Bill of Indictment, ¶3.

with providing these materials was the Hizbollah terrorist organization. Unfortunately, prior to the filing of the indictment, Assi disappeared,[33] and allegedly reappeared in Lebanon.[34]

These two examples show how foreign terrorist organizations may develop relationships with individuals who are already resident within the United States in order to provide them support. In these cases, however, the support was not merely financial but also tactical. Both in Charlotte and in Detroit, the items involved were highly sophisticated items to be used directly in terrorist operations.

In each of the above examples, different approaches by the United States government and its many agencies would have served the purpose of shutting down the potential for providing funds, recruitment or a base of operations for terrorists on American soil.

CONCLUSION:

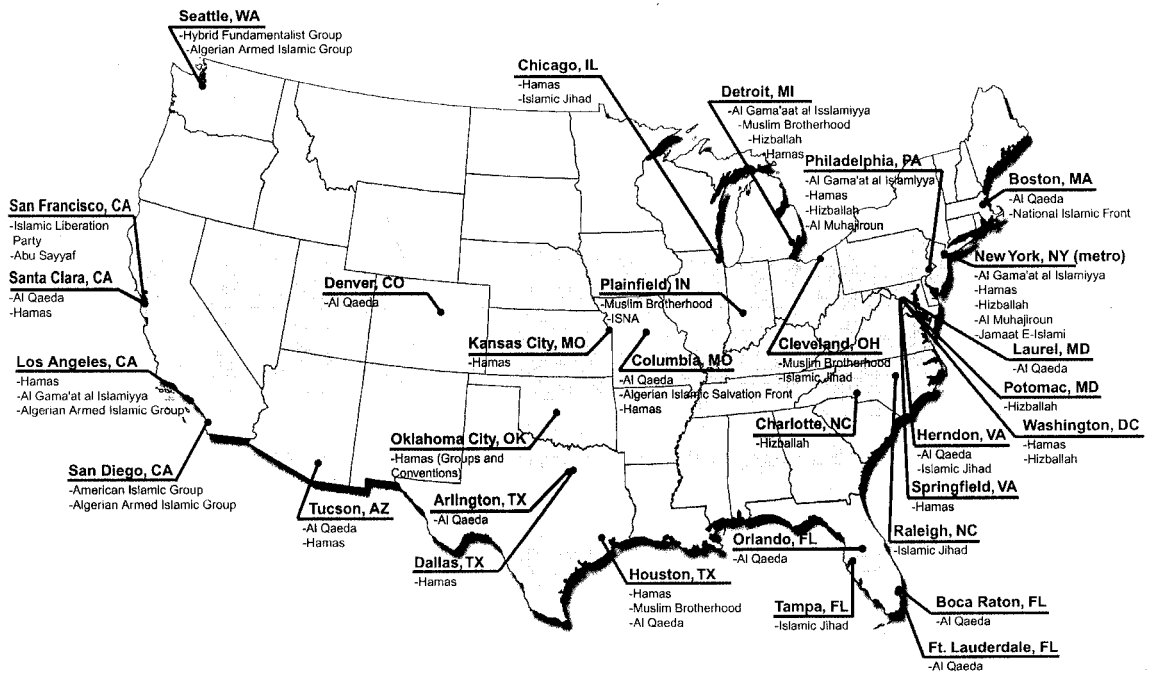
On September 11, Osama Bin Laden proved that terrorists were able to hide under our radar screen for years without being detected by the relevant agencies or even by what is known as the fourth branch of government, the media. The horror of September 11 was achieved through a variety of means, not all tethered to the specific operational details of the actual plot. Our nation's defenses and our awareness of the threats surrounding us were numbed through false conduits, fake companies, religious charities, exploitation of our free speech and religious freedoms and abetted by problems in the visa system and loopholes in the terrorist watch list. The bottom line is that if this is not to be repeated, we need to institute new safeguards, methods of detecting false cover companies, academic institutes, and religious charities, monitor those who are here illegally and who are connected to known terrorist groups and demand that our government do a much better of job of scrutinizing those who violate American law by exploiting the very freedoms that make our country great.

[33] Kay M. Siblani, "Man charged with exporting weapons to Hizbollah disappears," *Arab American. News*, August 7, 1998: David Josar, "Suspect in Hezbollah case skips hearings," *Detroit News*, July 29, 1998.

[34] Kevin Lynch, "Ford engineer seen in Lebanon: Newsletter publisher says people have seen man suspected of supporting terrorists," *Detroit News, September 4, 1998.*

Appendix A

THE TERRORIST NETWORK IN AMERICA



APPENDIX B

Documents provided by Ali Mohammed to Al-Qaeda listing the positions of United States Special Operations Forces residing in the Middle East and the United States. The documents are accompanied by Mohammed's translation into Arabic directly on the pages.

CHAPTER 2

LOCATION OF SELECTED UNITS ON 05 DEC 1988

Section I.

Special Operations Forces (SOF)

1. SOCCENT — MACDILL AFB, FL

2. ARSOF

Unit Forward	Location	Lat/Long	Mission
B-120, B-1-21	Muscat, Oman	Vic 23N/58E	DFT MAROPS
A-122, B-1-21	"	"	"
A-216, A-2-21	"	"	"
A-125, B-1-21	Al Khari, Saudi Arabia	Vic 24N/48E	MTT HALO
A-126, B-1-21	Al Hufuf, Saudi Arabia	Vic 25N/50E	MTT REDEYE
A-235, C-2-21	Iscia Baidoa, Somalia	Vic 03N/48E	DFT MEDCAP
A-236, C-2-21	Rocca Litterio, Somalia	Vic 07N/47E	DFT MEDCAP
B-230, C-2-21	Al Mukhha, North Yemen	Vic 13N/43E	DFT LT INF TACTICS
A-231, C-2-21	"	"	"
A-232, C-2-21	Sanaa, North Yemen	Vic 15N/44E	"
A-313, A-3-21	Dongola, Sudan	Vic 19N/30E	MTT NCO LDRS
B-210, A-1-21	Cairo West		JTX/Isol.
A-211, A-1-21	"		"
A-212, A-1-21	"		"

3. NAVSOF

CDR, NAVSPECOPSCOM — Coronado, CA

NSWG-4 — Little Creek NAB, VA

SEAL-7, SEAL-9, SPEC BOAT SON 5, SBU 31, SBU 33 — Little Creek NAB, VA

FOR TRAINING PURPOSES ONLY

أمريكية
قواعد جوية متقدمة

[redacted]	الإحداثيات UTM LOCATION	القوات الجوية المخصصة ASSIGNED AIRCRAFT
[redacted]	BN420040	18 RF-4C 24 F-16 18 F-111
[redacted]	VK630060	24 F-15 1 EL-135
[redacted]	VK130050	32 C-130H
[redacted]	WH570940	24 F-4E 18 A-10
[redacted]	CN340930	24 F-4E 8 F-4G 24 F-15
[redacted]	CP930320	36 A-10 18 OV-10 24 F-16
[redacted]	Egypt	18 B-52 5 AC-130 5 EC-130
[redacted]	Saudi Arabia	4 E-3A 4 EF-111 30 KC-135
[redacted]	FM300100	32 C-130E

١٨ طائرة رف ٤ س
٢٤ ف ١٦
١٨ ف ١١١
وهكذا

معدات القوات الجوية

[redacted]	اسم الصنف NAME	الكمية في كل قاعدة QUANTITY PER BASE
20-mm		unlimited
20-mm		unlimited
AIM-7E/4		500
AIM-9J/L		1,000
AGM-45	Shrike	170

CTG 70.9	In USS LASALLE (vic. Strait of Hormuz) In USS AMERICA (vic. 22oN/64oE)
TF 72	At Diego Garcia
TG 73.2	With/Supporting TG 70.9
TG 73.3	Vicinity [redacted]
TF 74	Forces with CVBGs
4. [redacted] USARCENT	FT MCPHERSON, [redacted]
21st ABN CORPS	Ft Bragg, [redacted]
1st BDE, 102d ABN DIV	JTX "HUMBLE PATRIOT", [redacted]
2d BDE, 55th MECH DIV	JTX "HUMBLE PATRIOT" [redacted]
5. [redacted] USMARCENT (CG, FMFPAC)	With I MEF
I MEF	w/CTG 70.1 (USS [redacted])
5th MEB	Designated TF 500 (3 SEAL PLTS accompany this TF) Currently in [redacted]
6th MEB	Camp Lejeune, [redacted]
7th MEB	CONUS

*Control of conventional forces will be a controller responsibilty. Though there is no conventional force intervention planned, there are Navy and Marine elements in the Arabian Sea and Persian Gulf in accordance with the NCA's SHOW-OF-FORCE directive. Accordingly, there will be some conventional play executed by controllers, but only as directed by USCINCCENT as the exercise progresses. Controllers representing USARCENT, USNAVCENT, USAFCENT, and USMARCENT must be prepared to fulfill liason requirements as required. USE OF CONVENTIONAL FORCES DURING THE CPX WILL NOT BE RULED OUT, BUT WILL ISTEAD BE REGULATED BY CONTROLLERS UNDER THE DIRECTION OF USCINCCENT.

مجموعة دعم ب

093529 0

ORT GROUP B

MA (AEM 93)	
JR (AR-PM 52)	
N (AS 530)	MOGOMED GADZI
BNA (AO 612)	IRKUT
ZBEK (AO 613)	DESNA
MA (AGI 1059)	YUPITER
RYN (ATA 16)	BOLSHEVETSK
EOV (AGOR 09)	NIKOLAYZUBOV

مجموعة الغواصات

BMARINE GROUP

XIROT
HO II
HO II
ARLIE
TOR I
TOR III

القوات الجوية البحرية

AL AVIATION GROUP

GER G/H	12	TASHKENT
TER J	8	ADEN
KFIRE	40	TASHKENT
R D	4	ADEN

IOTIONAL STRUCTURE, 18 BDE BPRA

092730

(2) Sortie rates: Daily sortie rates per O/H aircraft are:

Type Aircraft	Sortie Rate	Surge Rate	Normal Turn	Combat Quick Turn
A-10A	2.0	3.0	1.5 Hrs*	0.5 Hrs
AC-130	2.0	2.5	2.5 Hrs	1.5 Hrs
B-52 H	0.8	1.0	---	---
C-130E/H	2.5	4.0	2.0 Hrs	1.0 Hrs
E-3A	1.0	1.0	4.0 Hrs	2.0 Hrs
EC-130	1.5	2.5	2.5 Hrs	1.5 Hrs
EF-111	1.0	1.8	4.0 Hrs	2.0 Hrs
F-4E	1.0	2.0	2.0 Hrs	1.0 Hrs
F-4G	1.0	2.0	2.0 Hrs	1.0 Hrs
F-15A	1.5	2.0	1.5 Hrs	0.5 Hrs
F-16	1.0	2.0	1.5 Hrs	0.5 Hrs
F-111A/D	1.0	2.0	3.0 Hrs	1.0 Hrs
KC-135	1.5	1.5	3.5 Hrs	2.0 Hrs
OV-10	1.5	3.0	1.0 Hrs	0.5 Hrs
RF-4C	1.5	2.0	2.5 Hrs*	0.5 Hrs*

*Tactical electronic reconnaissance (TEREC)—Minimum turn time = 4.0 Hrs.

The following data is a list of USAF major operating units extracted from the USCENTCOM TPFDL generated by OPLAN 1956-09 and their proposed location during execution of the plan:

Force Description	Aircraft	Source	Redeployment Location
3 AWACS	7 E-3A*	FORSCOM	Riyadh
35 AREFS	6 KC-135	SAC	Riyadh
151 TFS	24 F-15*	FORSCOM	Dhahran
131 TAS	16 C-130H	MAC	Dhahran
132 TAS	16 C-130H	MAC	Dhahran
133 TAS	16 C-130E	MAC	Seeb
134 TAS	16 C-130E	MAC	Seeb
152 TFS	24 F-15	FORSCOM	Bahrain
409TFS	18 RF-4C	FORSCOM	Abu Dhabi
35 AREFS	9 KC-135	SAC	Riyadh
161 TFS	24 F-16	FORSCOM	Abu Dhabi
994 WWS	8 F-4G	FORSCOM	Dubai
52 BMW	12 B-52	SAC	Ras Banas
102 TFS	24 F-4E	FORSCOM	Doha
101 TFS	18 A-10	FORSCOM	Doha
15 SOS	5 AC-130	MAC	Ras Banas
0 TASS	18 OV-10	FORSCOM	Ras al Khaymah
19 TEWS	4 EF-111	FORSCOM	Riyadh
11 TFS	9 F-111	FORSCOM	Abu Dhabi
6 AREFS	15 KC-130	SAC	Riyadh
62 TFS	24 F-16	FORSCOM	Ras al Khaymah
02 TFS	18 A-10	FORSCOM	Ras al Khaymah
03 TFS	18 A-10	FORSCOM	Ras al Khaymah
0 SOS	5 EC-130	MAC	Ras Banas
7 AREFW	1 EC-135	SAC	Dhahran

These units are already in-country on 05 Dec 88 (refer to General/Special Scenario)

16TH TACTICAL AIR ARMY ELEMENTS		HQ [redacted]
4TH FTR DIV		[redacted] 380042N 581142E
40TH FTR RGT		[redacted]
FTR SQ 401	15 FLO G/K	
FTR SQ 402	15 FLO G/K	
FTR SQ 403	15 FLO F/K	
	5 FLO C	
41ST FTR RGT		[redacted] 404337N 721733E
FTR SQ 420	15 FUL A	
FTR SQ 421	15 FUL A	
FTR SQ 422	15 FUL A	
	6 FUL C	
5TH F/B DIV		[redacted] 373724N 673103E
50TH F/B RGT		[redacted]
F/B SQ 501	15 FIT H	
F/B SQ 502	15 FIT H	
F/B SQ 503	15 FIT H	
	6 FIT G	
51ST F/B RGT		[redacted]
F/B SQ 510	15 FIT H	
F/B SQ 511	15 FIT H	
F/B SQ 512	15 FIT H	
	6 FIT G	
52D F/B RGT		[redacted] 375847N 582140E
F/B SQ 520	15 FEN A	
F/B SQ 521	15 FEN A	
F/B SQ 522	20 FEN B	

002732

97TH AD RGT — MARYANE

SPT SQ 971 — 15 FLO B
SPT SQ 972 — 15 FLO B

98TH AD RGT — CHIRCHIK
413050N
693434E

AD SQ 981 — 15 FOX E
AD SQ 982 — 15 FOX E
4 FOX C

175TH TRANS SQ — TASHKENT
411844N
692325E
5 CUB
5 CURL

القوات الجوية المخصصة لعمليات ضد افغانستان

AIR FORCES ASSIGNED IN AFGHANISTAN

60TH FTR RGT — KANDAHAR
313013N
655041E

FTR SQ 601 — 15 FLO B
FTR SQ 602 — 15 FLO B
FTR SQ 603 — 15 FLO B

693D IND GND ATK SQ — 15 FROG A — KANDAHAR

70TH AIR COMPOSITE RGT — BAGRAM
345640N
691545E

[redacted] (899TH IND RECON SQ) 332325N 0621520E
FOXBAT B/D — 12
FENCER E — 6

[redacted] (70TH AIR COMPOSITE RGT) — 345640N 0691545E
FLOGGER K — 15 (701ST FTR SQ)
FITTER H (RECON) — 12 (702D RECON SQ)
FROGFOOT A — 26 (703D, 704TH IND GND ATK SQ)

[redacted] (80TH F/B RGT) — 342730N 0621020E
FROGGER J — 45 (801ST, 802D and 803D F/B SQ)

[redacted] (33D ATK HELO RGT) — 342357N 0702940E
HIND D/E — 30 (331ST ATK SQ)
HIP E — 30 (332D ATK SQ)

KUNDUZ (34TH ATK HELO RGT) 363948N 0685430E
HIND D/E 35 (341ST ATK SQ)
HIP C 35 (342D ATK SQ)

GHAZNI (35TH ATK HELO RGT) 333142N 0682435E
HIND D/E 30 (351ST ATK SQ)
HIP E 20 (352D ATK SQ)

KHOST (36TH ATK HELO RGT) 313344N 0642143E
HIND D/E 20 (361ST ATK SQ)
HIP E 20 (362D ATK SQ)

KABUL INTL (165TH TRANS SQ) 343354N 0691223E
CUB 10
DUBL 15

Naval Order of Battle

BATTLE GROUP A

KRESTA II (CG 225)	ADMIRAL OKTYABRSKIY
KYNDA (CG 120)	ADMIRAL GOLDUKO
SLAVA (CG 341)	ADMIRAL VUNYETZO
KOTLIN (DDG 476)	SPESHNYY
MOD KOTLIN (DD 477)	BUSLIVYY
KRIVAK I (FFG 209)	ZODORNYY
KRIVAK II (FFG 165)	RAZITELNYY
NATYA	

SUPPORT GROUP A

LAMA (AEM 44)	
BEREZINA (AOR 155)	
AMUR (AR-PM 20)	
DON (AS 528)	
ALTAY (AO 610)	ILIM
SOVIA (AO 611)	AKHTUBA
VYTEGRALES (AG 211)	YAMAL
PAMIR (AGI 1058)	GIDROGRAF
MAYAK (AF 41)	NEMAN

BATTLE GROUP B

KIROV (CB 451)	FRUNZE
KRESTA I (CG 299)	VITSE ADMIRAL DROZD
KASHIN (DDG 150)	STEREGUSHCHITY
KRIVAK I (FFG250)	ZHARKYY

VI-16 V
9

	1ST PLT, SEAL-7; 1ST PLT, 2D PLT, SEAL-9	With TF 70.1
	NSWU-5	Machrinhanish, [redacted]
	NSWU-7	Roosevelt Roads, [redacted]
	SBU 32	New Orleans, [redacted]
4.	2D SOW, 9TH SOS, 15TH SOS, 21ST SOS, 24TH AF	Hurlburt Field, [redacted]
	38TH ARRW, 56TH ARRS	Eglin AFB, FL
	2D SOS, 32D ARRS	Clark AB, RP
	42D RWRW	McClellan AFB, [redacted]
	34TH ARRS	Kadena AB, [redacted]
	39TH ARRS	Osan AB, [redacted]
	68TH ARRS	RAF Woodbridge, [redacted]
	6TH SOS	Rhein Main AB, [redacted]
5.	SOF AVIATION ASSETS	
	3/161ST, Med Hel Co, AVIM/AVUM Co	Ft Campbell, [redacted]
	Assault Hel Co	[redacted]

Section II.

Conventional Forces

1.	HQ, USCENTCOM	MACDILL AFB, [redacted]
2.	HQ, USCENTAF	SHAW AFB, [redacted]
3.	HQ, USNAVCENT	HONOLULU, [redacted]
4.	USCINCPAC/CINCPACFLT	[redacted]
	COMSEVENTHFLT/COMSUPNAVFOR	In USS [redacted] (Vic. Socotra, 12oN/54oE)
	CTG 70.1	In USS [redacted] (vic. 22oN/61oE)
	CTG 70.3	In USS [redacted] (vic. 02oN/54oE)

Senator FEINGOLD. I noticed in the tape, one of the gentlemen was a Mr. Revell, who was one of your experts. I want to place in the record, without objection, an article by Jim McGee of the Washington Post entitled, "Ex–FBI Officials Criticize Tactics on Terrorism," in which Mr. Revell is quoted as follows. With regard to the detention, or the proposal to interview 5,000 people by the Justice Department, he said that while that practice may have a short-term deterrent effect, that the tactic is problematic. His actual quote is, "One, it is not effective, and two, it really guts the values of our society, which you cannot allow the terrorists to do."

So this is one of the individuals that was quoted on this tape making that statement about one of the things that the Justice Department is doing. Without objection, that will go in the record.

At this point, I will turn to our last witness, Nadine Strossen. She is the President of the American Civil Liberties Union. She is also a professor of constitutional law at New York Law School. The ACLU has been at the forefront of protecting civil liberties for decades and their work has taken on even greater importance since September 11. I believe the ACLU has done our country a great service by reminding us that we must defend our cherished freedoms even as we face enormous national security challenges at home and abroad. I thank you for your leadership and for joining us today. You may proceed.

STATEMENT OF NADINE STROSSEN, PRESIDENT, AMERICAN CIVIL LIBERTIES UNION, NEW YORK, NEW YORK

Ms. STROSSEN. Thank you so much, Chairman Feingold, Senator Sessions, other members of the Committee. The ACLU is, indeed, concerned with our freedom, but we are, of course, also concerned with safety, and the logo on our website since September 11 has been "Safe and Free."

Along with Oliver Buck Revell, whom I too noticed—I had read his critical comments and I was surprised to see him on the film—these law enforcement officials are saying the same thing, or perhaps it is the obverse, that the measures that we are criticizing, including the massive secretive detentions and the round-up of 5,000 people, mostly on the basis of national origin, are the worst of both worlds. They are not going to be effective, as Mr. Revell himself said, and they certainly are going to make us less free.

As you pointed out, Senator Feingold, the critiques have been coming from local law enforcement officials around the country, interestingly enough, not only from California and Oregon, but also from Texas, from the Middle West, and they have been coming from present and former FBI officials.

Now, in my limited time, I am going to try to focus on a few points that really have not been covered so thoroughly and many others are covered in my written testimony.

First of all, we have heard assertions from the government, including this morning, that these massive so-called interviews of 5,000 young men from certain countries are supposedly voluntary. How voluntary is it, though? I have the letter that is being sent to these individuals and here is the exact pertinent language. It reads, "While this interview is voluntary, it is crucial that the investigation be broad-based and thorough and the interview is im-

portant to achieve that goal. We need to hear from you as soon as possible, by December 4," interestingly enough, today.

I think it is fair to say that most people who receive that letter would not see this as a voluntary request for an interview. It is particularly true when we are talking about these individuals who are foreigners, new to this country, and in particular, as we keep hearing reports and government acknowledgement that hundreds of people are already in jail for minor immigration violations, no doubt these interviews are going to feel much more coercive than voluntary.

In addition, the fact is that all of these people come from countries—many of them come from countries—with repressive regimes. They are not told that they have a right to refuse to answer certain questions. The Justice Department's guidelines expressly say that they should not be told of their *Miranda* right. They are not affirmatively told of their right to be represented by counsel. So, in fact, for all practical purposes, there is going to be a very coercive atmosphere.

Also on the point of coercion, we heard this morning again from the Justice Department that there is further encouragement to come forward voluntarily through the new Responsible Cooperators' Program. The problem with that program, though, is that it is very vague in terms of the assurances that are supposedly going to be made to these interviewees, and it is completely inconsistent with the actual written guidelines that the Justice Department has issued governing the immigration consequences of the interviews.

The written, formal Justice Department guidelines actually expressly instruct those law enforcement officials who are conducting the interviews—I think interrogations is a more accurate term—to inquire into immigration status and if there is any reason to suspect that the person is not in compliance, to immediately contact local INS officials with the express purpose of determining whether detention would be appropriate.

So if, in fact, the Attorney General is going to reverse that policy and offer some kind of waiver of detention or deportation, then it certainly should be done through official, formal guidelines that are legally enforceable. Otherwise, this becomes much more like a sting operation, making it even more coercive and less voluntary than it was in the first place.

I would like to make one other point, and that is with respect to the various assertions we heard this morning from the Justice Department, the Assistant Attorney General, about the various constitutional rights that are being respected: we are just getting assertions to that effect. The major reason why we have been asking for information repeatedly, together with other citizens' organizations, together with members of Congress, is precisely so that we can verify that the detainees' legal rights have been complied with. Unfortunately, along with other people who have testified on this panel, we are getting information from detainees which is inconsistent with the assertions that the Justice Department has made.

Specifically, on the Department's point that people are being charged within 48 hours, we are aware of three contrary cases in New Jersey, because we had been considering representing these individuals. They have all been detained for far more than 48

hours—in one case, up to 3 weeks. So we would welcome information from the Justice Department that would confirm their assertions.

And my final point, as my time is expiring, is on the point of secrecy. We heard a new rationale this morning from the Assistant Attorney General that we had never heard before; that is, that the reason for not giving the names of the Immigration detainees is because they are under seal.

One week ago today, Chairman Feingold, you asked, and I think other members of the Committee also asked Michael Chertoff of the Justice Department specifically whether there is any legal reason for not releasing those names, and he answered that there was no legal reason.

[The prepared statement of Ms. Strossen follows:]

STATEMENT OF NADINE STROSSEN, PRESIDENT, AMERICAN CIVIL LIBERTIES UNION

Chairman Feingold and other members of the Committee, I am pleased to testify before you today at this oversight hearing on the conduct of the Department of Justice in response to the September 11 attacks on the World Trade Center and the Pentagon. My name is Nadine Strossen and I am the President of the American Civil Liberties Union, a non-partisan, non-profit organization, consisting of nearly 300,000 members, dedicated to protecting the principles of freedom and equality reflected in our Constitution and civil rights laws. I am also a Professor of Law at New York Law School, teaching and writing about Constitutional Law.

Before I discuss the ACLU's concerns about the infringements on constitutional rights and civil liberties in connection with the Department of Justice's detention and questioning of thousands of individuals in the wake of the horrifying September 11 attacks, I want to note how close to home those attacks were, and how I continue to be directly affected by their ongoing impact. Both the ACLU's national headquarters and New York Law School are located within blocks of "Ground Zero." By some stroke of relative good fortune, everyone who worked at either location was spared direct physical injury or death. Nonetheless, the psychic and health traumas are deep and enduring, and both workplaces were severely damaged.

The ACLU office was closed for a week and it took several weeks before we had full use of telephone service and computers. New York Law School, which suffered more physical damage, was closed for several weeks, and in fact did not have long distance telephone service restored until just a couple weeks ago. Many students—including many who had just arrived in New York from other parts of the country, for the beginning of their law school careers—are still suffering severely from the psychic aftershocks. A number dropped out and moved away altogether, and others are taking some time off before returning to law school. One who never came back after witnessing the horrifying attacks and ensuing chaos, choosing to move to another part of the country, was one of my two full-time staff members. The air quality is still so bad that it is often physically unpleasant, if not adverse to health; colleagues with asthma or other respiratory conditions can't remain at the school for more than short periods.

Moreover, like most New Yorkers, I lost a friend and colleague in the attack. John Perry, who was both a police officer and a lawyer, had long been active in the ACLU's New York affiliate. He and I worked together on a number of projects, including a series of public television programs about constitutional law/civil liberties issues. So I come before the Committee today with personal losses and grief resulting from the tragedy (fully realizing how much greater and more direct were the losses suffered by so many others), and a strong desire to see that those who helped perpetrate this atrocious crime are brought to justice.

The ACLU recognizes that this investigation is an enormous undertaking and we are grateful to the thousands of people at the Department of Justice who are working hard, with the best intentions, to solve this atrocious crime and protect us from future attacks. However, the Department of Justice has assumed broad new police powers and used investigative tactics that unnecessarily violate rights with no showing that these measures increase the likelihood of capturing or deterring terrorists. Indeed, former FBI agents have publicly criticized the government's detention and questioning of thousands of individuals based on their immigration status and their national origin specifically from a law enforcement perspective. They

maintain that these dragnet tactics are ineffective at best, counterproductive at worst, in terms of the all-important goals of punishing and preventing terrorism.[1]

My written testimony will focus on three aspects of the sweeping detentions and questioning, which raise particular concerns about infringements of constitutional rights and civil liberties: (1) the DOJ regulation authorizing it to record confidential, privileged attorney-client communications between individuals who are being detained and their attorneys; (2) the government's refusal to disclose basic information about the people who have been detained, and (3) the questioning of 5,000 young men who lawfully entered the U.S. on non-immigrant visas, based on their country of national origin. We believe that these measures unnecessarily violate civil liberties and rights without sufficient justification in terms of advancing national security. These measures will not make us more safe, but they will make us less free.

EAVESDROPPING ON PROTECTED ATTORNEY CLIENT CONVERSATIONS

Without observing the normal notice and comment period required under the Administrative Procedures Act, Attorney General Ashcroft announced, under "emergency authority," a regulation that permits the Department of Justice to eavesdrop on confidential attorney client conversations in any case in which the Attorney General finds that there is "reasonable suspicion" to believe that a particular federal prisoner "may" use communications with attorneys or their agents "to further or facilitate acts of terrorism." The regulation requires that the Director of the Bureau of Prisons (BOP) "shall. . .provide appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys' agents who are traditionally covered by the attorney-client privilege.[2]

In short, the Justice Department, unilaterally, without judicial oversight, and with no meaningful standards, is to decide when to eavesdrop on the confidential attorney-client conversations of a person whom the Justice Department itself may be seeking to prosecute. This regulation applies not only to convicted prisoners in the custody of the BOP, but to all persons in the custody of the Department of Justice, including pretrial detainees who have not yet been convicted of any crime and are presumed innocent, as well as material witnesses and individuals who are being held on suspected immigration violations and who are not accused of any crime.

This regulation is particularly disturbing because it is unnecessary. The Department of Justice already has legal authority to record attorney-client conversations by going before a judge and obtaining a warrant based on probable cause that the attorney is facilitating a crime[3]. Indeed, the Supreme Court has even approved searches of an attorney's law office, provided a warrant has first been obtained from a neutral and detached magistrate.[4] Similarly, if prison officials have reason to believe that a particular prisoner is using the mail to violate the law or threaten security, they may obtain a search warrant to read and open the mail.[5]

A second source of longstanding legal authority to record conversations between attorney and client, when justified by crime control concerns, is the "crime-fraud exception" to the attorney-client privilege. Attorney-client communications lose their privileged status if the government can establish that the communications were used for the purpose of facilitating a crime or perpetrating a fraud. However, it is the judge, not the Justice Department, who determines which communications fall under the crime-fraud exemption. The Supreme Court has made clear that the determination whether an attorney-client communication falls within the crime-fraud exception is to be made by courts in an *in camera* hearing after the government provides the court with evidence substantiating a good faith basis to believe that the exception applies.[6]

The Justice Department has not articulated a single reason why these two provisions in current law are insufficient to ensure that attorneys are not assisting their clients in committing crime. Indeed, during questioning before the Senate Judiciary Committee on November 27, 2001, Assistant Attorney General Michael Chertoff could not answer Senator Kennedy's question as to why the new regulation was necessary. Yet in spite of any justification for doing so, the Department of Justice has made itself the arbiter of when conversations should be monitored, taking away the authority from a neutral judge. This regulation is an unprecedented frontal assault

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[1] *Washington Post*, October 27, 2001.

[2] 66 Fed. Reg. 55062 (October 31, 2001); 28 C.F.R. sec. 501.3(d)

[3] *United States* v. *Harrelson*, 754 F.2d 1153, 1168–69 (5th Cir. 1985).

[4] *Andresen* v. *Maryland*, 427 U.S. 463, 480 n. 4, 96 S. Ct. 2737, 2748 n. 4, 49 L.Ed.2d 627 (1976). (approving search of law office pursuant to a warrant based on probable cause)

[5] *Guajardo* v. *Estelle*, 580 F.2d 748, 759 (5th Cir. 1978).

[6] *United States* v. *Zolin* 491 U.S. 554, 109 S. Ct. 2619, 2631, 105 L.Ed.2d 469 (1989).

on the attorney-client privilege and on the right to counsel and the right of access to the courts guaranteed by the Constitution.

The Supreme Court has recognized the attorney-client privilege as the oldest of the privileges for confidential communications known to the common law.[7] Its purpose is to encourage full and frank communication between attorneys and their clients, recognizing that sound legal advice or advocacy depends upon the lawyer being fully informed by the client. The Court stated that the attorney client privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."[8] Indeed, the privilege is so well established and considered such a compelling societal interest, that the Supreme Court has held that the privilege survives even after the client's death.[9]

Besides violating the long established attorney-client privilege, the regulation violates the Sixth Amendment right to the assistance of counsel. In the famous case of *Gideon* v. *Wainwright*, the Supreme Court ruled that the Sixth Amendment guarantees a person facing criminal charges the right to the assistance of counsel for his defense.[10] This right is not limited to the trial itself, but includes the assistance of counsel in the investigation and preparation of a defense. Indeed, the Supreme Court has recognized that denying a person access to counsel in the period prior to trial, the period most likely to be impacted by this regulation may be more damaging than denial of counsel during the trial itself.[11]

The essential bedrock of the Sixth Amendment right to the assistance of counsel is the ability to communicate privately with counsel.[12] Even the Justice Department recognizes the need for private attorney-client communications. In a friend of the court brief, the Justice Department wrote, "the Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding."[13] Under the regulation, the defendant and his counsel are confronted not just by the possibility that the government is monitoring their communications, but by the certain knowledge that it is doing so.

Separate and distinct from the Sixth Amendment rights of persons facing criminal charges, prisoners have a constitutional right of access to the courts.[14] This right is not limited to pretrial detainees facing criminal charges, or those appealing criminal convictions, but extends even to convicted prisoners who may wish to seek a writ of habeas corpus or file an action challenging the conditions of their confinement. Indeed, because a prisoner ordinarily does not have the right to vote, the Supreme Court has held that the right to file a court action might be a prisoner's remaining most fundamental right.[15] Regulations and practices that unjustifiably obstruct the availability of legal representation are invalid.[16] Courts have expressly held that the right of access is the guarantee of an opportunity to communicate with counsel privately.[17] Moreover, courts have specifically held that, when the individual seeking to confer with counsel is incarcerated, a prison must provide a facility for confidential attorney-client conversations.[18] Likewise, judicial rulings have held that the Sixth Amendment right of access to the courts includes the right to privacy in attorney-client mail.[19]

The new DOJ regulation provides that the government will not retain "properly privileged materials" that it obtains through its monitoring. During his appearance before the Senate Judiciary Committee, Assistant Attorney General Chertoff suggested that the regulation violates no rights and causes no harm because "innocent" conversations will not be retained or used against the client and "guilty" conversations are not protected anyway. However, an individual's right to counsel will still

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[7] *Upjohn Co.* v. *United States*, 449 U.S. 3838, 389, 101 S. Ct. 677, 682 L.Ed.2d 584 (1981).

[8] *Id*. (quoting *Hunt* v. *States* 128 U.S. 464, 9 S. Ct. 125, 127, L.Ed. 488 (1888).

[9] *Seidler & Berlin* v. *United States*, 524 U.S. 379, 118 S. Ct. 2081, 2088, 141 L.Ed. 2d 379 (1998).

[10] *Gideon*v. *Wainwright*, 372 U.S. 335, 339–40, 83 S. Ct. 792, 794 (1963).

[11] *Maine* v. *Moulton*, 474 U.S. 159 170, 106 S. Ct. 477, 484, 88 L.Ed. 481 (1985).

[12] *United States* v. *Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973).

[13] *Weatheford* v. *Bursey* 429 U.S. 545, 554 n.4, 97 S. Ct. 837, 843 n. 4, 51 L.Ed.2d 30 (1977) (quoting Brief for United States as Amicus Curiae).

[14] *Bounds* v. *Smith*, 430 U.S. 817, 821, 97 S. Ct. 1491, 1494, 52 L.Ed.2d 72 (1977).

[15] *McCarthy* v. *Madigan*, 503 U.S. 140, 153, 112 S. Ct. 1081, 1091, 117 L.Ed.2d 291 (1992).

[16] *Procunier* v. *Martinez*, 416 U.S. 396, 419, 94 S. Ct. 1800, 1814, 40 L.Ed.2d 224 (1974).

[17] *Bach* v. *People of the State of Illinois*, 504 F.2d 1100, 1102 (7th Cir. 1974)

[18] *Dawson* v. *Kendrick*, 527 f. Supp. 1252, 1314 (S.D.W.Va. 1981).

[19] *Muhammad* v. *Pitcher* 35 F.3d 1081, 1083 (6th Cir.1994).

be violated by the government's announced monitoring program, even if the government does not retain his privileged communications with counsel or use these communications against him in a criminal prosecution. Indeed, an individual's Sixth Amendment right to counsel will still be violated in the wake of the announced monitoring program even if the government does not actually intercept any of that individual's privileged communications with his lawyer. As the courts have recognized, the violation occurs as soon as the individual and his lawyer are informed that their confidential attorney-client communications are henceforth subject to monitoring by government agents. From that point on, all attorney-client communications are chilled, thus thwarting the privilege's key purpose—to encourage the full and frank disclosure and discussion between attorney and client that is an essential prerequisite for the lawyer's effective representation of the client.

In a recent opinion, Richard A Posner, Chief Judge of the United States Court of Appeals for the Seventh Circuit, powerfully explained why "merely" announcing a policy of government monitoring of attorney-client communications would have a devastating impact on the attorney-client privilege and the associated Sixth Amendment rights to representation by counsel and access to the courts. Chief Judge Posner's opinion described a colloquy during the oral argument in which he had asked the government lawyer if the attorney-client privilege would be violated in the following hypothetical situation: all conversations between criminal defendants and their lawyers were taped, but the tapes were never turned over to the prosecutors, and instead were stored in the National Archives. The government lawyer took the position that none of the defendants could complain in this situation because none could be harmed by it, since the prosecutors would not have access to the tapes. Judge Posner rejected that conclusion, explaining:

The hypothetical practice that we have described would, because of its pervasiveness and publicity, greatly undermine the freedom of communication between defendants and their lawyers and with it the efficacy of the right to counsel, because knowledge that a permanent record was being made of the conversations between the defendants and their lawyers would make the defendants reluctant to make candid disclosures. (Totalitarian style continuous surveillance must surely be a great inhibitor of communication.)[20]

FAILURE OF THE GOVERNMENT TO DISCLOSE FULLY INFORMATION ABOUT THE PERSONS IT HAS HELD AND INCARCERATED SINCE SEPTEMBER 11

The Department of Justice has launched what appears to be an extensive program of preventive detention. Although certainly not on the same scale or scope as the internment of Japanese-Americans during World War II,[21] this is the first large-scale detention of a group of people based on country of origin or ancestry since that shameful episode, for which our government formally apologized and paid reparations.

The Department admits that over 1,200 people have been detained in connection with the September 11 attacks. Some have been incarcerated for long periods of time, others held for only hours. Because of the secrecy surrounding the detentions, we do not know whether most of these people are still incarcerated or have been released.

A major safeguard against government abuses of power is being thwarted by the Justice Department's policies: access to information. The Department is defying the public's right to know, refusing to give important information about the detainees. This wall of silence undermines public confidence in the investigation and raises questions about the fairness of the process, as well as the rights and even the welfare and safety, of the incarcerated individuals.

According to media accounts of the detentions, only a very small number of persons that have been arrested have any involvement or knowledge of the attacks. Approximately 10 people, what the Washington Post called the "hot center"[22] are believed to have close ties to the al Qaeda network or some knowledge of the hijackers. An additional 17 men and 1 woman have more distant connections to the hijackers or connections to the people in the "hot center." The rest have been charged with unrelated technical immigration violations, minor criminal charges (usually under state law), and as material witnesses under 18 U.S.C. sec. 3144. It appears that the vast majority of the people being detained in connection with this investigation are

[20] *United States* v. *DiDomenico*, 78 F.3d 294, 299 (7th Cir. 1996).

[21] One significant difference is that the Japanese-Americans were not charged with any criminal or immigration violation, but were held solely based on their ancestry or country or origin.

[22] Post Staff writters, "A Deliberate Strategy of Disruption", *The Washington Post*, November 4, 2001, p. A1.

being detained on pretexts: they have committed a minor offense that gives law enforcement or immigration authorities the power to detain them even though they would not under normal circumstances be detained for such conduct. By all accounts, the overwhelmingly majority of detainees are Muslims or Arabs, come from Middle Eastern countries, and are non-citizens.

We have the most urgent concern for the detainees who are being held on immigration charges because their access to legal counsel is limited. Unlike defendants in criminal cases or persons held as material witnesses, those who face immigration charges are not entitled to counsel at government expense if they cannot afford an attorney. Therefore, immigration detainees will have legal representation if they are able to retain counsel (or someone retains counsel for them) or are able to get free legal representation. Restrictions on telephone access, contact with family members and visits by pro bono lawyers and organizations that offer free legal representation impose practical impediments that deny detainees the opportunity to find or retain counsel.

The public has virtually no information about the whereabouts of persons held on immigration violations. Are they being held in custody or have they been released? Where are they being held? How long have they been held? Do they have an attorney? The fact that immigration detainees can be held in so many facilities, coupled with the secrecy surrounding the detention, makes it extremely difficult to determine whether the detainees have access to counsel, are allowed contact with their families, and are being properly treated. We know that at least one detainee—55-year-old Mohammed Rafiq Butt—died in custody.[23] On October 23, Mr. Butt was found dead in his cell at the Hudson County jail in Kearny, New Jersey, the cause of death ruled heart failure. We know of others who have been held for weeks without any immigration charges being lodged against them. This contradicts the Attorney General's assurances that all those who are being detained are being promptly charged within 48 hours. It also violates the recently enacted Patriot Act, which requires that, even for those individuals certified by the Attorney General as suspected terrorists, charges must be filed within 7 days or the individuals must be released.

Until very recently, the Department of Justice had not released any information about the detainees other than some numbers about how many there were. However, perhaps responding to mounting political pressure, Attorney General Ashcroft recently released some information. While this is a positive development, the released information is woefully incomplete. The basic information that the ACLU and other citizens' groups have been requesting is not classified or privileged, nor could its release raise any legitimate national security concerns. To the contrary, the information we seek should be a matter of public record: the names of the detainees; their citizenship status; where they are being held; the dates they were arrested or released (if applicable); the nature of the criminal or immigration charge; the disposition of the material witness warrant; the identity and names of addresses of the attorneys representing the detainees; the courts where the charges were heard and whether the proceedings were sealed, including the legal authority to close the proceedings; and any policy directives or guidance issued to officials about making public statements or disclosures about the detainees. Members of Congress have asked for similar information.

The information that has been provided by the Department of Justice is better than the total wall of silence that previously existed, but still inadequate. The government has now released the names of 93 people who have been charged with federal crimes but has not said where they are being held, nor provided any information about any of the people arrested on state or local charges who were also included in the DOJ's tally of 1200 arrests. It is unacceptable that the government continues to refuse to provide the names of the immigration detainees, the locations where they are being held, or the identities of their lawyers. Without the names of the detainees it is impossible to verify if they are being properly treated. The DOJ should immediately allow pro bono attorneys and legal organizations to have in-person access to every immigration detainee wherever held.

It is not for lack of trying that we have been unable to get information about the detainees. On October 17, the ACLU wrote to the Attorney General asking him for information about the detainees. He did not respond to that letter. We posed similar questions to the Director of the FBI, Robert Meuller, at two meetings on September 25 and October 25. When those requests for information failed, we filed, along with other organizations, a request under the Freedom of Information Act on October 29. Subsequent to filing the FOIA request, on October 30, we met with Commissioner

[23] Somini Sengupta, "Pakistani Man Dies in I.N.S. Custody," *The New York Times*, October 25, 2001.

Ziglar of the Immigration and Naturalization Service who also did not provide the information. Although some information has been provided since the time of our FOIA request, the disclosures have been utterly inadequate, particularly because the information requested should be publicly available.

Further legal action may well be necessary to secure the Justice Department's compliance with our FOIA request, especially in light of the Attorney General's new directive discouraging the release of information pursuant to FOIA requests. The memorandum also informs agencies that the Department of Justice will back up their decisions not to release information. On October 12, 2001, Attorney General Ashcroft issued a "Memorandum for Heads of all Federal Departments and Agencies" instructing them on how to respond to FOIA requests. "When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records." Ashcroft established a "sound legal basis" standard for complying with FOIA requests. This memorandum superseded a 1993 memorandum from Attorney General Janet Reno, which encouraged agencies to release information under the FOIA unless it was "reasonably foreseeable that disclosure would be harmful." Reno's standard encouraged disclosure unless there was a reason not to, whereas Aschroft's discourages disclosure unless there is a sound legal basis to do so. The fact that the Attorney General has pledged DOJ resources to defend any FOIA challenges is a further indication of the degree to which this administration is discouraging an open government.

The Attorney General's ongoing refusal to provide requested, important information about the detainees appears to reflect his general philosophy of withholding as much government information as possible, as set out in his October 12, 2001 memorandum, rather than any specific legal justification for withholding this particular government information. When questioned by members of the Senate Judiciary Committee at an oversight hearing on November 27, 2001, Assistant Attorney General Michael Chertoff said there was no legal reason why the names of all the detainees could not be released. Even though it could legally do so, the DOJ has not released the names of the detainees who have been charged with immigration violations. Assistant Attorney General Chertoff explained that the Attorney General wishes to protect the privacy of the detainees and does not wish to compile and release a list of detainees for fear that the list will get back to Osama bin Laden and he will learn what has happened to some of his "sleepers." It is highly unlikely that bin Laden would not know if one of his soldiers was taken into custody. However, the slight possibility that such a list might provide bin Laden with some information is overridden by the much greater public interest in making sure that 1,200 people are not being held incommunicado.

Significantly, the Attorney General's October 12, 2001 memorandum discouraging disclosure in response to the FOIA requests stresses the special importance of maintaining the confidentiality of any communications with attorneys. "Congress and the courts have long recognized that certain legal privileges ensure candid and complete agency deliberations without fear that they will be made public. Other privileges ensure that lawyers' deliberations and communications are kept private. No leader can operate effectively without confidential advice and counsel." Ironically, the Attorney General appears to appreciate the need for private conversations with counsel on the part of the government itself, but not on the part of the individuals who are being detained and facing prosecution by the government.

New Authority for Attorney General to Hold People in Detention

Adding to the concern about unfair detention is a new regulation that makes it easier for the government to detain non-citizens. This regulation was issued by the Attorney General on October 26 and went into effect on October 29. Like many post-September 11 regulations, it was put into effect under the administration's "emergency rule-making authority" that exempts the Attorney General from complying with the normal notice and comment period. The new rule allows the Immigration and Naturalization Service to set aside any release order issued by an immigration judge,[24] simply because it disagrees with the immigration judge's determination, in cases where the agency says it believes that the non-citizen poses a danger to the community or is a flight risk. Previously, the immigration service needed to request a stay from the board of immigration appeals if it disagreed with an immigration

[24] An immigration judge is an administrative law judge employed by the Department of Justice to render independent decisions in immigration proceedings. IJ's cannot consider constitutional matters. Their decisions are subject to review by the Board of Immigration Appeals (BIA) decisions can be reversed by the Attorney General.

judge's determination, except in limited circumstances where the individual had been convicted of certain crimes or accused of terrorism. Now, even for individuals who are merely accused of overstaying their visas, the hearing before the immigration judge is has been rendered meaningless because the decision whether to detain or release rests exclusively with the INS.

In some cases, immigration detainees who have been ordered released on bond by an immigration judge (before the regulation changed) or who have been authorized to leave the country under an order of "voluntary departure" nonetheless remain in detention because they have not been "cleared" by the FBI. Under these circumstances, the detention is solely the result of an FBI hold and not based on any immigration authority. We do not know the total number of cases in which such holds constitute the basis for ongoing detention.

This new regulation expanding the government's power to detain non-citizens raises some of the same constitutional concerns as the other new regulation discussed above, authorizing government monitoring of confidential attorney-client communications. Both reduce the traditional, essential role of judges to review executive action that limits individual rights and freedom—the Fifth Amendment right not to be deprived of liberty without due process of law, and the Sixth Amendment rights to counsel and access to the courts respectively. Judicial review is a critical lynchpin in our constitutional scheme of checks and balances, providing an important curb against executive abuses of power. In both cases, the government essentially takes a "trust-us" stance, urging Congress and the public to trust the Justice Department not to abuse its newly claimed unilateral powers to override the attorney-client privilege and to hold non-citizens in custody. But one of the touchstones of democracy is a healthy distrust of government.

THE QUESTIONING OF 5,000 MEN BASED ON THEIR COUNTRY OF ORIGIN

Another area of concern, which has come to light in recent weeks, is the Attorney General's November 9, 2001 directive, directing the FBI and other law enforcement officials to conduct interviews of at least 5,000 men, 18 to 33 years old, who have entered the U.S. on non-immigrant visas in the past two years and come from countries where terrorist activities are known or believed to occur. The DOJ's list of the young men targeted for government questioning thus was compiled solely on the basis of national origin. The DOJ acknowledges that it has no basis for believing that any of the thousands of men on this list even has any knowledge relevant to the investigation, and it stresses that it has no basis for suspecting any of them of any involvement in any terrorist activities, or of any other criminal activity, or any violation of immigration laws. The DOJ apparently assumes that people fitting this profile would have information about terrorism.

The ACLU recognizes the right—indeed the responsibility—of federal law enforcement to gather relevant information in the course of its investigation into the September 11 terrorist attacks. But discriminatory, dragnet profiling is neither an effective investigative technique nor a permissible substitute for the constitutional requirement of individualized suspicion of wrongdoing.

To conduct the interviews, the Justice Department is relying on the assistance of "Terrorism Task Forces" set up in United States Attorney districts across the country. All the targeted persons received letters from their local United States attorney asking them to "voluntarily" cooperate with the investigation. However, the wording of the letter implies that declining is not really an acceptable option. "While this interview is voluntary, it is crucial that the investigation be broad based and thorough, and the interview is important to achieve that goal. We need to hear from you as soon as possible—by December 4." Most foreigners who receive this letter will feel that if they do not take part in the "voluntary" investigation, it will be detrimental to them.

With hundreds of people already in jail for minor immigration violations, these interviews will understandably be seen as inherently coercive. This is especially true since the DOJ guidelines for conducting the interviews specifically instruct the interviewer not to inform the person of his Miranda rights, should that be a relevant consideration.

In addition, all of the men targeted for interviews are non-citizens who have entered the U.S. legally within the past two years, many of whom come from countries with repressive regimes. These men are unlikely to know or to believe that they may have a right to refuse to answer questions when the FBI or local law enforcement officials come knocking on their doors. They are likely to believe that any refusal to answer will make them suspects. In short, while the DOJ says that is seeking "interviews," to the targets, they will likely feel more like interrogations.

The DOJ guidelines for these question sessions go far beyond any legitimate quest for factual information, and instead are intrusive and intimidating. Officials who conduct the questioning are instructed to inquire into the political beliefs of the targeted young men, and to ask them to report on the political beliefs of their family and friends. These men will be asked, for example, whether they "support" any cause that terrorists espouse. That presumably includes Palestinian statehood, which the Bush Administration itself supports. A true response might trigger suspicion and further investigation. A false response would be a felony.

Other categories of information to be sought under the DOJ guidelines are equally intrusive and intimidating and go far beyond information relevant to the September 11 investigation. For example, the law enforcement officials are instructed to "obtain the telephone numbers used by the individual and his family and close associates." This heavy-handed tactic is an unwarranted invasion of privacy for people who are not even suspected of any wrongdoing. Compounding the intrusion is the fact that all the information collected is going to be stored in a searchable database maintained by the federal government.

In ordering questioning into the political beliefs and associations of persons not known to have any connection whatsoever with the events of September 11, the DOJ directives go far beyond existing Justice Department antiterrorism guidelines. Those guidelines appropriately recognize government's obligation to carefully tailor its investigations so as to minimize inquiry into individuals' constitutionally protected beliefs and associations.

Moreover, the guidelines call for questioning about and the review of documents concerning the target's immigration status, and the guidelines require the questioning officials to report any suspected immigration violations they uncover to the INS. These features compound the coercive context of the "voluntary interviews." The questions to be posed suggest that the interviews are of people who may be suspected of wrongdoing, and are not as the DOJ asserts, merely designed to elicit information about other people.

Because of the foregoing considerations, a growing number of local police departments around the country have raised objections to these dragnet interrogations as an exercise in ethnic profiling and an impermissible intrusion into matters concerning personal beliefs and associations. These local police departments, accordingly, are refusing to participate in the interviewing program. These departments include: San Francisco and San Jose in California; Detroit, Michigan; Hillsboro, Corvallis and Portland, Oregon; and Austin and Richardson in Texas.

At the same time that the Justice Department is conducting the "voluntary interviews," last week Attorney General Ashcroft announced a "Responsible Cooperators Program," asserting that the government would help non-citizens with their visas in exchange for providing information the government determines to be useful to its investigation. But this latest move is more suggestive of a sting operation than a serious, good-faith effort to collect important information in the ongoing terrorism investigation. The Attorney General's vague promises are completely inconsistent with the specific threat of arrest and detention for any minor visa violation expressly set forth in the existing INS memo governing this investigation. The Attorney General's vague promises are also completely inconsistent with the DOJ's actual actions since September 11, of arresting and detaining hundreds of people on minor immigration violations.

The Attorney General's public statements suggest that those immigrants who come forward will not be arrested. However, the Attorney General's memorandum governing the conduct of the questioning specifically instructs the law enforcement officials who are doing the questioning to contact the nearest INS official if they have suspicions about someone's immigration status, and the memorandum also expressly contemplates the detention of individuals who are suspected of immigration violations. The memorandum states: "[I]f you suspect that a particular individual may be in violation of the federal immigration laws, you should call the INS representative on your Anti-Terrorism Task Force or the INS officials at the closest Law Enforcement Support Center. Those officials will advise you whether the individual is in violation of the immigration laws and whether he should be detained."

The guidelines, if followed, are bound to produce resentment against law enforcement rather than cooperation, just as racial profiling has done in the past. This undermines the hard work done by many local law enforcement agencies to establish positive and cooperative relationships with targeted communities, including Muslim and Arab communities. This resentment is already surfacing. The American-Arab Anti-Discrimination Committee (ADC) issued a statement on November 28 objecting the Responsible Cooperators Program. A portion of their statement reads:

> ADC believes that this approach will be ineffective and ripe for abuse. First and foremost, programs that offer an easy pathway to citizenship are inher-

ently prone to fraud and abuse for personal gain. Second, had Mr. Ashcroft consulted with anyone familiar with the Arabic language, he would have known that the word "cooperator" has an extremely negative connotation that may deter many from participating in a program such as this. The use of this term is apt to solicit the same Arab reaction as that generated by the unfortunate use of the term "crusade" by President Bush after the September 11 attacks.[25]

The statement ends with a quote by ADC Vice President Khalil E. Jahshan predicting that the program will be unsuccessful because the trust has eroded between the government and the Arab community. "The trust between the U.S. government, including law enforcement agencies, and the Arab community has been eroded over the past few weeks by denial of due process, by revoking of attorney client privileges, by arbitrary and extended detention, and by casting the investigative net so broadly as to implicate thousands of innocent people."

The Attorney General holds all the cards; it is completely in his discretion to detain and deport or to grant a reprieve. Who would voluntarily come forward under these conditions, especially since the Justice Department already has detained hundreds of people based on minor visa violations? If the Justice Department is serious about encouraging immigrants to come forward voluntarily, the Attorney General should withdraw the part of the memorandum calling on law enforcement officers conducting terrorism-related interviews to report minor visa violations to the INS, and make a specific, written enforceable promise not deport those who offer information.

CONCLUSION

The Justice Department's recent actions, violating cherished rights and freedoms, have antecedents stretch back to the earliest days of the Republic. The Alien and Sedition Act of 1798, criminal restrictions on speech during World War I, the internment of Japanese-Ameicans following the attack on Pearl Harbor, and the blacklists and domestic spying of the Cold War are all instances in which the government was granted (or assumed) summary powers in a moment of crisis, to the inevitable regret of later generations. The diminution of liberty that accompanied these episodes was later understood as an overreaction to frightening circumstances; each is now viewed as a shameful passage in the nation's history. After the immediate danger passed, it was recognized that the government had already possessed ample powers to address the threats at hand, making the new tools unnecessary at best and dangerous at worst.

We welcome the many statements that Attorney General Ashcroft and other U.S. officials have made since September 11, promising to uphold the Constitution and to protect civil liberties, while pursuing the anti-terrorism campaign. Unfortunately, the Attorney General's actions belie his rhetoric. Our democracy is in real danger if any one branch of the government becomes too powerful. From establishing military tribunals without Congressional approval, to expanding wiretapping authority while limiting judicial oversight, this Administration is demonstrating its disregard for the other two branches of government. The Constitution's delicate balance of powers is becoming dangerously title toward an excess of Executive Branch power.

We are heartened that the Senate is taking the lead in reclaiming the Congressional role of overseeing the U.S. government's expansive, intrusive new police powers and tactics, and we hope this will be an ongoing practice. While the Administration and the public are understandably focused on waging war against terrorism, we ask Congress to ensure that the war on terrorism does not become a war on democracy.

Senator FEINGOLD. Thank you very much for your testimony. I thought the testimony was excellent from the entire panel, and now we will begin the first of 5-minute question rounds.

I will start with Mr. Al–Maqtari. As you know, and as Ms. Strossen was just illustrating, Chairman Leahy, and Senator Kennedy and I have been pressing the administration to provide us with basic information about who was being detained and why. The administration has turned over some information, but it still has not provided us with anything near a full picture of who is being

[25] ADC Press Release: "ADC Extremely Concerned by Ashcroft's Latest Plan", November 28, 2001.

detained and why. In response, Attorney General Ashcroft and others in the administration have said that they need not provide us with a complete picture because individuals who have been detained can self-identify. In other words, he is saying the detainees are free to call up this Committee or their member of Congress and tell them that they have been detained.

Could you tell this Committee about the conditions in which you were held, including the conditions for communicating with the outside world. How many calls a day were you allowed to make to your lawyer and how many calls were you allowed to make each day to your wife and to your family members?

Mr. AL-MAQTARI. Thank you. I have been held because my visa has been expired, and my marriage application did not finish yet. I could not talk with the outside world. I did not have any contact with the outside world. Sometimes I did not know what time it is, 3:30 or 2 o'clock. So sometimes I pray at what I suppose to pray, 3:30, I pray at 5:30 because I do not know what time is it.

For the calls, I have, first of all, the first 2 weeks I was in general population with other inmates, so I could use a collect call many times, but after that, they changed my place to the segregation unit, where I was held for 23 hours a day. I have 1 hour, if I want to go out to break. I had 15-minute call every week.

Senator FEINGOLD. A 15-minute call every week; is that what you said?

Mr. AL-MAQTARI. This call, you use for one person, which was your wife, your family, your lawyer. Once you complete this call, you have to wait another—to the next week. This call you have to apply, you have to request this call. If you do not request, you do not have this chance to make call. So every day or every week you have to request phone request sheet and you write the request, "I would like to make a call," and you have to identify or specify which one you want to call. If you say, "I want to call my wife," you cannot call your lawyer because this call has been approved for your wife.

So it was a little bit complicated. I could not reach my wife. I did not see her since September 15th, when I was arrested. One time I saw her in court, my first hearing. Because of that I asked my lawyer to call me because I could not reach him every day because sometimes he wanted me to answer some questions or to tell him about some documents he wants me to bring them from Yemen or from my family or from my wife. So call was very difficult.

Even visitation, you have 1-day visitation, Friday, for 1 hour or 2 hours, and this visitation is no contact. That means there is a glass between you and the person who visits you, and you talk to her by phone.

Senator FEINGOLD. Mr. Al–Maqtari, it seems to me that your coming forward and making your identity known has had a beneficial effect on your case. The public can now see the unjust way in which you were treated and know you were moved from your family and your home without cause. Would you agree that lifting the veil of secrecy helps allay the fears and suspicions of neighbors or friends or coworkers who wondered why you were being held by Federal law-enforcement officials for almost 2 months. And the reason we are asking this, I believe the Attorney General has sug-

gested it is sort of to your benefit and the benefit of people being detained to not have that information out there.

Mr. AL-MAQTARI. I am sorry. My English is not that good. So, if there is another way to facilitate this question or—

Senator FEINGOLD. Mr. Boyle, would you like to respond? Your representative can respond.

Mr. BOYLE. Sure. I mean, there is no question in our case it made a tremendous difference. We were hung up for weeks. The Government had all of the documents that proved his full life history, that there were no gaps, that he had been at school in France, that he had been teaching. We could not get anyone to release them. Once press people started making inquiries, all of a sudden the analysis of his computer hard drive that had been unable to be done in 2 months got done, and a week later the INS came into court and said that the FBI had cleared him.

So I think having, and we were very frustrated up to that point, with the secret hearings, the no names. The first couple of weeks we had no access to him. So I think there is no question that an open process, where the names are out there, where you have the normal access to find out where people are held and where the hearings are and what they are charged with, I think that would be very positive for the people who are held.

Senator FEINGOLD. Thank you, Mr. Boyle.

We will turn now to Senator Sessions for his first round.

Senator SESSIONS. Thank you, Mr. Chairman.

Our Nation has gone through a most devastating attack. It has shaken the country in many ways and cost the lives of thousands of innocent American citizens, and I believe it is appropriate that the country act vigorously to defend its freedoms, but at the same time, I think it is appropriate that we adhere to our established rules wherever we possibly can and certainly not violate our constitutional protections that are significant.

Mr. Boyle, I missed your earlier testimony. When we talk about secrecy, were you, you were free to tell anyone about your client's incarceration, were you not?

Mr. BOYLE. That is right, Senator.

Senator SESSIONS. Nobody told you to keep it secret or anything of that nature.

Mr. BOYLE. Absolutely not.

Senator SESSIONS. And his family, whom he was able to contact, was not told such.

Mr. BOYLE. Well, he was not able to contact his wife, but, yes, there was no limitation, and ultimately she was able to speak about his case.

Senator SESSIONS. And with regard to any hearings that were held, were those closed hearings or was it handled—

Mr. BOYLE. Yes, they were closed. We were not allowed—

Senator SESSIONS. That was different than you would normally have in an Immigration hearing?

Mr. BOYLE. Yes.

Senator SESSIONS. So the hearings, could family members attend the hearing, if you know?

Mr. BOYLE. The regulation, it is not a regulation, it is a letter from the chief Immigration judge, it does bar family members. In

our case, his wife was brought in briefly because she testified for an hour. But under this new, it is not a regulation, it is simply some kind of policy letter at the Attorney General's direction, family members are not allowed into court.

Senator SESSIONS. Part of the Immigration law procedure?

Mr. BOYLE. The normal regulation has certain limitations.

Senator SESSIONS. A new reg?

Mr. BOYLE. Right, this is not a reg. It is a policy memo. It was not public until about a week ago, but it has been made public now, one way or another, and it does bar family members.

Senator SESSIONS. To your knowledge, anybody that is under arrest now could write a letter to the New York Times or Ms. Strossen or anyone they wanted to, to express concern about their incarceration?

Mr. BOYLE. Sure. If you knew about it, absolutely.

Senator SESSIONS. I think, when we talk about secrecy, we need to get straight here what we are talking about. The freedom to communicate has not been totally lifted, although those in jail have historically had their freedoms restricted in any number of different ways.

Mr. GOLDSTEIN. Yes, Senator?

Senator SESSIONS. —with regard to your client, he was held for 4 days, you say, before he was released? How many days?

Mr. GOLDSTEIN. He was actually picked up on September 12th. He was released on September 24th. So it was almost 2 weeks.

Senator SESSIONS. And you said 4 days occurred before you were called or you used a figure of 4 days, I wrote—

Mr. GOLDSTEIN. No, we were actually called on the 12th. For 4 days, we attempted to locate our client through letters and telephone calls to INS agents, to the supervisor, to attorneys with the Litigation Section, to the Department of Justice, to the assistant assigned to the case to no avail.

We did not learn that our client had been moved to Manhattan until the 17th, which was, I believe, 5 days after he had been arrested, and at that point we were denied access to him until 2 days thereafter, on the 19th of September.

Senator SESSIONS. So he was arrested a day or two after the attack.

Mr. GOLDSTEIN. He was arrested at 5 a.m. the morning after the attack, and no doubt every American, including myself, was shocked and outraged at what had happened.

Senator SESSIONS. I guess, were you given any reason that you could say or maybe not say as to why they thought this doctor, out of all of the other people in America, would be one to be detained?

Mr. GOLDSTEIN. Not until September 18th, some 6 days after he was apprehended. Those reasons are part of an affidavit, which is sealed and made a part of the secret proceedings.

Senator SESSIONS. But they apparently had some basis, they thought, to make the arrest.

Mr. GOLDSTEIN. I can tell you that there were published accounts of one of the reasons was that he had made a $21-purchase at a location known as the White House in Washington, D.C. It turned out to be a food cluster, and he was buying food for his family at

a time when he was at Georgetown University Medical Center studying, on leave from the University of Texas.

One of the concerns I had was we had documentation that could have allayed any of those fears, and yet what happened was the investigating agents were deprived of the very information that would have relieved them from this course and allowed us to use those precious resources to go after the real bad guys at a time when we could ill afford to waste them.

Senator SESSIONS. Well, I assume there are other reasons which are under seal—

Mr. GOLDSTEIN. There are.

Senator SESSIONS. —part of the Grand Jury and that sort of thing, but I guess—

Mr. GOLDSTEIN. But not only would I have been able to explain them quicker and did we have documentation to explain them, the FBI satisfied themselves once it got to that point and there was a lawyer, but it was 2 weeks later, and I think we could have had a better use of our resources and time. It is an example of why having a lawyer is not only good for the client, but good for the system as well.

Senator SESSIONS. Well, I think lawyers are good for the client and the system, and I agree with you on that, and I do not think it is justified to deny that long you being able to see your client, and I think that was a violation, Mr. Chairman. But I guess the only explanation we can say is that sometimes errors occur, and in the stress of this moment, probably more errors probably would occur than normal, and I do not think that is an unjustified procedure.

But for the most part, Ms. Toensing, the people that are held, as you understand it, those people are held on criminal charges; is that right? You have been in the Department of Justice.

Ms. TOENSING. I believe 55 of them are on criminal charges.

Senator SESSIONS. Criminal or immigration charges.

Ms. TOENSING. About 500 are on immigration charges.

Senator SESSIONS. And there are procedures for detention under those laws, if you are an illegal immigrant, is it not?

Ms. TOENSING. There are. I agree—this whole panel agrees. We are all lawyers, I guess, except for poor Steve there—that lawyers are important to the system. And if there are problems there, the Justice Department should correct them, as far as seeing to it. I do think the system is better if the lawyer is there and is able to make it more efficient to get evidence and documents that clear people.

In the case of the criminal detainees that are charged with a criminal offense, taxpayers pay for the lawyer to be appointed, and that is a good system.

Senator SESSIONS. Well, it is troubling that the system does not work perfectly. It ought to work perfectly, and every person is entitled to certain rights, and I am troubled that that is not occurring. It did not occur, at least, Mr. Goldstein in yours, and perhaps, Mr. Boyle, in yours.

Ms. TOENSING. Do you think, perhaps, in those 2 weeks that maybe the system is working better now, rather than just in those—

Senator FEINGOLD. I am going to have to—

Senator SESSIONS. That is what I was going to say, Mr. Chairman, that I hope that that is improving itself, number one, and I hope that we are also not ignoring potential dangers. The law-enforcement officers have great, great, difficult choices. They have got people that could be potentially be very dangerous, and they have to sometimes make decisions very quickly.

Thank you.

Senator FEINGOLD. I want to thank Senator Sessions for the tone of his remarks and his candor with regard to this incident. I would simply say that it is simply not a question of 2 weeks. Mr. Al–Maqtari's story involves 2 months, and I think we need to keep that in mind.

I will start another round.

Senator SESSIONS. With regard to that, was that detention as a result of being illegal, not having a legal status here or as a result of some charge?

Senator FEINGOLD. If you would like to answer, Mr. Boyle.

Mr. BOYLE. If I may. Yes, the only charge against him was that his tourist visa had run out, and his marriage application was pending. That is a technical violation. We withdrew it in the interest of honesty because he no longer had the intention to be a tourist. He had validly filed an extension, but you are supposed to withdraw it when you no longer have the intention.

Normally—

Senator SESSIONS. He was technically in violation.

Mr. BOYLE. Oh, that is right. There is no question he was in violation. What is different—

Senator SESSIONS. He was, therefore, detainable; is that correct?

Mr. BOYLE. He was detainable. You would never be detained normally or maybe you would get a $1,500 bond. You would never get a $50,000 bond. You would never be held for 2 months without bond.

Senator FEINGOLD. Thank you, Mr. Boyle.

Yes, in light of the comment of Ms. Toensing that, for the first couple of weeks, it was tough and confusing, this kind of thing seems very hard to justify over the course of 2 months, given the fact, as Mr. Boyle points out, that this certainly never would have been done prior to September 11th.

Let us start another round, if we could.

Mr. Boyle, you said something in your testimony that I would like to have you and Mr. Goldstein amplify a bit. You said having a right to counsel is meaningless unless those in prison in our Immigration system are made aware of their rights and given the opportunity to actually exercise the right in a timely fashion.

When Mr. Chertoff was here last week, he was emphatic that—and I am quoting him here—that "Every one of these individuals has a right to counsel. Every person detained has the right to make phone calls to families and attorneys."

Would you comment on what your experience with representing detainees has told you about the truth of these statements and whether, in practice, you think the Department of Justice is living up to Mr. Chertoff's description of the situation, and if, as I suspect, you believe the Department might have fallen short in this

area, what can we do to rectify the situation? Recognizing that people in deportation proceedings do not have a right to appointed counsel at the Government's expense, what should the Department do to make sure that the right to counsel is not rendered meaningless?

Mr. BOYLE. In our case, there were problems. He was held completely without the ability to make calls for about 4 days, and interrogated extensively. He was arrested with a warrant that was prepared improperly and signed by a low-level deportation officer instead of the correct officer. He was given a Notice to Appear, the charging document, which was also unlawfully signed by a low-level officer instead of the appropriate officer.

I have gotten many calls from other immigration attorneys that people are not getting the appropriate warnings that were talked about before, to be able to talk to your lawyer, to be able to have the consulate of your country called. I think, when you set a climate where you say do not worry about the information requests, where every regulation is in the other direction of holding people without any rights, you create a climate where it is better to cut the corners than to treat people correctly.

And while I absolutely understand the importance of this investigation, I think we have to be careful about, especially when we are netting in hundreds of people, this is not finely targeted for, you know, heavy-duty suspects, we have got to be very careful about the climate we create.

I do think the Justice Department knows about civil rights and could do it, and I think it is important to place a premium on people's rights, as well as on bringing people into custody.

Senator FEINGOLD. Thank you, Mr. Boyle. What do you think of the statements by Mr. Chertoff and the Attorney General that the people in detention on immigration charges are free to self-identify, that nothing prevents them from making their detention public, even though the Department will not release that information because they say it would help the terrorists?

Mr. BOYLE. Again, I think it is a real problem. If people cannot get in contact with their lawyers and their families, how are they going to know who to call and where to call at the newspaper or at this Committee? I just think it is not a real alternative. I think it would be better to have a normal, real, functioning court system, where not only can those people self-identify, but where the country can satisfy itself, as we do every day, with how well our judicial system works. I do not think, except in the most critical cases, and then, yes, there are procedures for closing hearings, and if both parties want to close a hearing, I think that is perfectly legitimate. In cases like asylum cases, battered spouse cases, cases of people who are informing for the Government, I think there are cases where it is perfectly appropriate, but there needs to be input from both sides, as there was normally.

I think, except in the strictest national security questions, and teenagers from Israel or someone like Mr. Al–Maqtari, this is being invoked left and right. It is being invoked for hundreds of cases. There is a huge disconnect from the 10 or 15 who have any al Qaeda connection. I think we have got to bring things more back into focus and preserve our heavy weapons for the heavy cases and

not completely alienate the communities where we need the leads and we need the information by coming down like a ton of bricks on people who really are innocent people who just got in the way.

Senator FEINGOLD. I would like to follow that by just making a couple of remarks about the difficulty I am having with trying to understand the Attorney General's arguments in this area. I would like to just say that I find the idea that detainees can self-identify almost laughable, given the testimony that we have heard today about the conditions of detention and the restrictions that are at least sometimes put on the communications of the detainees with the outside world.

Mr. Chertoff stated emphatically, "Let me emphasize there is nothing to prevent any of these individuals from identifying themselves publicly or communicating with the public." But this statement, and here is where I cannot follow the logic, entirely undercuts the argument that releasing the names publicly might actually help Osama bin Laden by letting him know that some of his sleepers are in custody.

If you just think about it, if the Department were really concerned about that, it would be taking steps to prevent these individuals from communicating with the outside world. It would not say, well, the sleepers can identify themselves and nothing prevents that, but we are just not going to do their work for them maybe because they are too dumb or embarrassed to inform their handlers that they have been taken into custody.

A week ago the administration argued that it was prohibited by law from releasing that information, as Ms. Strossen was pointing out, that it did not want to help Mr. bin Laden by doing so and that it wanted to protect the privacy of the detainees.

As we have already found out again, today, Mr. Chertoff admitted that the first reason was simply invalid last week; the second reason is simply fanciful, given the administration's willingness to allow these detainees to self-identify. I think we have heard today both the protection of privacy rationale is extremely weak and that there is ample justification for concern about the conditions under which people are being held to justify overriding those concerns, to the extent that they exist.

I still believe, even more strongly than when I first tried to get this information, the public and the Congress has a right to this information. And so once again I call on the administration to answer the questions we asked in our October 31st letter about people who have been detained on immigration charges.

Senator Sessions, it is your turn.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Well, Mr. Chairman, with all due respect, I do not think it is laughable to say that self-identification is not meaningful. All of these people, to my knowledge, have lawyers, and most of them promptly, unlike Mr. Goldstein's circumstance, and they can make public. Their family knows they are there. Maybe they do not want bin Laden's group to know they are there. Maybe they are cooperating with the Government. This is a serious matter.

We do not know, with absolute certainty, who is a terrorist and who is not. Lawyers, investigators, Immigration officials, FBI agents, they are struggling with some very serious matters. If they miss the person who is on the way to carry out a major bombing attack, what kind of feeling are they going to have then, that they had the person and they let them go or they did not pursue the matter effectively.

So I believe that we need to adhere to the rule of law. I believe that we need to do what is required by the Constitution, but I am not aware that the Constitution or the statute of the United States requires the Attorney General to tell the names in one time of everybody he has arrested on immigration charges.

Ms. Toensing, have you ever heard of the Attorney General listing in bulk hundreds of names of people that are arrested for individual, separate criminal or immigration charges?

Ms. TOENSING. No.

Senator SESSIONS. I just do not know—it seems like to me that is what is being called for here, and it would have some possible adverse consequences to the security of the United States and to ongoing investigations.

What I think, Mr. Chairman, you are correct on is the holding the Department of Justice and our Immigration systems' feet to the fire on properly disposing of cases, promptly finding out with whom we have legitimate evidentiary problems or facts exist that raise serious questions, and releasing those for whom there is no basis to hold them.

Mr. Emerson, I know it was a bit unusual to have your film shown here, but I think it does provide context for the circumstances we are under, and I would just note that back in November, all of the Senators received a letter from their colleagues, Ron Wyden and Sam Brownback, who had studied your documentary. They said, among other things, "The documentary makes clear, and we would reiterate, that the majority of Muslims in the United States do not support terrorist activities and that Islam, as a faith, condemns acts of terrorism. It made clear that Islamic extremists who promote and carry out their form of Jihad are as great a threat to moderate Muslims as they are to Christians, Jews and all American citizens."

So I think that is a good compliment to the objectivity of your film.

Mr. EMERSON. Senator, if I might just add something.

Senator SESSIONS. Yes, go ahead.

Mr. EMERSON. That I just want to reemphasize what you just stated, that the film itself emphasized that the issue was not of Islam, but rather of Islamic militants. I think, as somebody who has investigated the 9/11 attack, if you will permit me just to provide a little context for understanding the degree of unprecedented danger and the degree to which U.S. law enforcement was unprepared to deal with 9/11. Because sleeper cells and those who are arrested after 9/11 were not arbitrarily selected because of the alphabet.

There was a belief somehow they were connected, either they were on credit card applications, they were the recipients of telephone calls, there was some reason why they were picked up. It

was not just an arbitrary decision because of somebody's fanciful whims. The problem was that most of the hijackers from 9/11 maintained an operational security that was unprecedented; in other words, they did not call each other. The phone calls that were made, in fact—

Senator SESSIONS. They had only minimal contact between each other.

Mr. EMERSON. —between each other, so it was impossible to prove—

Senator SESSIONS. To make it more difficult to investigate.

Mr. EMERSON. In fact, one of the reasons why we now know today who the hijackers were on the plane was because of a stewardess's call on one of the planes identifying the hijackers and the seats that they had, and that then led the investigators to unravel the network. And a lot of people were picked up because of the fact that there was some connection, even though it may be later proved that it was not as solid, but most of these—Hani Hanjour came here in 1991. These people buried themselves into the American society. They never did anything illegal. Mohamed Atta, the ringleader, he was caught for speeding. He was given a summons for speeding. But, you know, if he had been arrested, what good? He could not have been held, and he was the ringleader of the whole plot that killed 4,000 people.

So I believe that this is the setting that we are now facing. It is a new ballgame. I am not here to justify abuses of the system at all, but I am here to tell you that having investigated 9/11, working with investigators in law enforcement and understanding the pressures, and understanding the dilemma they faced, it was absolutely a magnitude that they had never faced before, precisely because these people learned from previous terrorist attacks not to have any connection with one another, to keep a low profile, not to stand out.

Therefore, even if you look at the 21st hijacker, Moussaoui from Minnesota, the odds are people know or believe, in law enforcement, that he most likely was going to be on a fifth plane. Nobody can prove this. The hijackers were not 4 for 4 on 9/11. They were more like 4 for 6, 4 for 7. Now can anyone prove this? Absolutely not, at this point. Do they believe it? Absolutely. That means there may be 30, 40, 50 other hijackers out there in American society that have not been apprehended or that were picked up in this group and that are being forcibly held. And one good byproduct, even though there are bad byproducts, is that they cannot carry out a terrorist attack now.

Senator FEINGOLD. We will start another round.

Senator SESSIONS. Mr. Chairman, I would just offer this letter from Senators Wyden and Brownback on film.

Senator FEINGOLD. Without objection.

Senator SESSIONS. And would note that three of the hijackers were, in fact, student overstays—people who came legitimately as a student, but had overstayed their stay.

Senator FEINGOLD. Thank you, Senator Sessions. We will start another round.

I certainly understand the argument that this is a new ball game, and I understand sort of the basis for this raft of rather un-

usual proposals from the administration. But the problem I have is first we have to determine whether the arguments that are being made about the system prior to September 11th and the current law are even valid. There is a sort of mixing and matching going on here. As Ms. Strossen pointed out, the Attorney General simply asserted that he was required by law not to give out the information. That is simply not true. And I don't really understand why that was asserted.

The same goes for this obvious contradiction with the Attorney General saying on one day that he couldn't release any names because it would help Mr. bin Laden, but that everybody was free to release their own identities. It doesn't add up.

And so these aren't statements that are insensitive to the new world we live in because the arguments are based on what the current law was and the practice has been as a foundation for justifying these new changes. So that concerns me.

In that spirit, I would like to follow up with regard to what Senator Sessions said with Mr. Goldstein and Mr. Boyle. Aren't immigration charges generally public, Mr. Boyle?

Mr. BOYLE. Yes. They are read in open court. They are available. All the names and the alien numbers are posted on the wall of the immigration court ever morning, and you can dial into an 800-number system.

Senator FEINGOLD. And so the hearings are listed in the courthouse?

Mr. BOYLE. That is right.

Senator FEINGOLD. And, Mr. Goldstein, would you agree with that?

Mr. GOLDSTEIN. I would.

Senator FEINGOLD. And let me ask each of you, so what we are asking for here is not unusual at all, is it? What we have asked for in our letters—

Mr. BOYLE. Normally it is open. Normally the hearings are open.

Senator FEINGOLD. Is that correct?

Mr. GOLDSTEIN. Not only are the hearings open, but the idea that someone who has retained counsel, who is constantly communicating with both agents and Department of Justice officials, seeking the whereabouts of their counsel and an opportunity to consult with them, that goes beyond whether something is secret or nonsecret. It simply defies logic or common sense that this simply slipped through the cracks, that these were terrible—no question they were terrible times, and I understand that they often require extraordinary remedies. But the point is all of us understand that providing counsel would have been a benefit to everyone, and yet we were stonewalled from the get-go for a considerable period of time, which to me in my experience in this one case looked like an orchestrated effort that was a—there was a commonality to it. Each of the agents, each of the agencies and the U.S. Attorneys all told us that they would be unable to tell us where our client was or why he was being held, even though everyone now knows they had that knowledge at their fingertips.

Ms. STROSSEN. Could I add something, Senator Feingold?

Senator FEINGOLD. Yes, Ms. Strossen.

Ms. STROSSEN. Because our Immigration Rights Project lawyers and those that they work with around the country are reporting similar problems. And in the earlier round of questions, you asked what steps could be suggested to facilitate access to counsel, to which Senator Sessions agreed. I guess we are all lawyers. We all support the rule of law and the positive value of having access to lawyers. And in the ACLU's written testimony, we do affirmatively suggest that the Justice Department can and should take steps to make sure that pro bono attorneys and legal organizations such as the ACLU which are willing to counsel these individuals free of charge be given access, and that it be the responsibility of the Justice Department to make sure that at all these scattered facilities where these individuals are being held that these obstacles are removed.

Senator FEINGOLD. Thank you, Ms. Strossen.

Mr. Boyle, we do not yet know the identities of the people who are being detained on immigration charges, although from the information that has been released, we can be pretty sure that the vast majority are being held on minor immigration violations, such as overstaying their visas, and that there is no evidence that more than a small number of these detainees have any connection with any terrorist organization or any knowledge about terrorist activities or the September 11th attack.

Now, the Attorney General has often defended these detentions by pointing out that these people violated the immigration laws of the United States. Your client, Mr. Al–Maqtari, was charged with overstaying a tourist visa, as we have discussed.

Can you tell me—and, again, getting at the practice at least prior to September 11th—what happened when someone was discovered to have overstayed their visa or committed some other minor immigration violation? Were they always deported? Can you explain the gravity of these violations, how they can be corrected, and whether you agree with the administration's position that someone who violates the law should not remain in the United States?

Mr. BOYLE. Before September 11th and in non–Arab cases now, there is still a lot more discretion, and particularly in terms of detention. Non-criminals were almost never and are almost never, outside of these communities, detained. They are almost always released on their own recognizance or with a very low bond. And the administration did—and I hope will in the future—exercise more discretion about whether people would actually be charged based on a variety of factors about their circumstances, whether relief might be available in the future if they are married to a permanent resident and that application is on a waiting list and will ripen.

There certainly was a lot of discretion, and it was exercised far more freely and is exercised far more freely outside of the communities that seem to be being targeted now.

Senator FEINGOLD. Senator Sessions?

Senator SESSIONS. With regard to the 5,000 people that have supposedly been requested—or are being requested for interviews, I don't consider that a round-up. I don't consider that a detention. I don't consider that a violation of their rights. They are simply asked by letter or in person, presumably, would they be willing to talk about information that might be pertinent to their cir-

cumstances. According to the New York Times article, I guess today, reporting from Detroit on interviews that occurred, "Two people who attended a half-dozen interviews today said the conversations were professional, non-threatening and surprisingly short." They were asked a number of questions, such as: Are you aware of people who were celebrating? They were asked if they were aware of a terrorist group or if they knew of anybody who was planning anything. They were asked if they had ever been part of the armed conflict in their country, and questions of that sort.

So it seems to me that if you have got an attack coming at this country from Liechtenstein, you would want to interview people who had come from Liechtenstein. If we have got people who are coming from a series of countries, as we do in this circumstance, for the most part, then those are good people to interview. And maybe their very families have been victims of oppression. Maybe their very families fled to the United States because of some fundamentalist oppression that they served in their country. Maybe they left because women were mistreated in their country and they know some things. And somebody calls and asks them about it, and maybe they say, I can tell you this guy down the street here has been into this stuff big-time heavy, I would look at him if I were you.

Now, what is wrong with asking somebody if they have any such information as that? And there is no allegation or contention that they could not refuse to answer.

And, Nadine, with all due respect, they are not entitled to *Miranda* warnings and should not be given them. They are not being brought into custody—

Ms. STROSSEN. I didn't say that they were—

Senator SESSIONS. Well, you said they were instructed not to give *Miranda* warnings, and well they should not have been given *Miranda* because *Miranda* is not required to interview somebody in a voluntary interview.

So I think this big deal has been exaggerated beyond the level of importance given to it, and we might hope in these interviews that we might come up with a bit of information here or there that could save somebody's liberty or life in this country in a way that would be consistent with all our laws. And certainly I would think it would be.

So you agree that they don't have to give *Miranda* warnings? Well, why did you make such a big deal about it?

Ms. STROSSEN. I think what is noteworthy, if I may answer, Senator Sessions, is that there was an affirmative effort to instruct in the guidelines that the *Miranda* warning need not be given. There was also an absence of an affirmative instruction to inform these individuals that they had a right not to answer particular questions and that they had a right to seek counsel.

So we think that there was an effort to take maximum advantage of people's ignorance of their legal rights, and, you know, if I may say so, the Michigan interviews were different from those that are taking place consistent with the Justice Department's guidelines. According to the New York Times article I read recently, the local police there decided not to follow the Justice Department's form letter precisely because they thought the tone was

too coercive, and, therefore, not only was negative in terms of individual freedom but also was counter to the effort to get voluntary cooperation.

Senator SESSIONS. Well, I don't think they are required to give that warning. I think the advisers who asked them to conduct the interview should have told them up front whether *Miranda* was required or not. I think that was the right thing.

I yield back.

Senator FEINGOLD. Senator Sessions, thank you.

Let me start another round. It seems to me—and certainly others on the panel have suggested this today—that the instructions that have gone out to Federal investigators who will conduct interviews of the 5,000 Arab and Muslim men and the new Responsible Cooperators Program sort of creates an extraordinarily high-risk choice for some immigrants. On the one hand, the Government is saying we will help you with becoming a citizen and maybe overlook your visa violation if you come forward and have reliable and useful information. On the other hand, the people conducting the interviews are told to call the INS if they suspect that a particular individual is in violation of the immigration laws. So if you are a person with an immigration problem but you think you have some information that might be helpful to our Government, you have got a choice. You can keep the information to yourself and try not to make yourself known to the Government, or you can sort of spin the roulette wheel and go in and talk to the FBI. If you are lucky, you might get citizenship, but if you are not, not only don't you get citizenship but you will probably be detained for extra weeks or months and then deported.

If the Justice Department were really serious about trying to get people from these communities to cooperate with the investigations, wouldn't it take steps to assure people that if they come forward and answer questions that they will not be picked up on immigration violations? I guess I would be interested in Ms. Strossen's comments on that.

Ms. STROSSEN. I think that is a very good idea, and this is why I think the Michigan kind of approach of voluntarism is a good idea, although it is inconsistent to some extent with the Justice Department guidelines which right now do expressly instruct that there should be investigation about possible INS violations and that it is up to the INS to determine whether somebody should be detained. And as we have seen, there certainly seems to be a presumption in favor of detention.

I have also seen the instructions that the Attorney General sent out amplifying on this voluntary cooperation program, and they are much vaguer than the prior instructions, simply saying that it is a discretionary decision to be made ultimately in the Attorney General's sole discretion whether somebody has given sufficiently reliable and crucial information. I think this is very strong language, making it hard to be entitled to these waivers of deportation and other benefits. And it is only something that the Attorney General has to consider. So if we really want to follow along the kind of community policing, cooperative relations—building with these communities—which could well be good sources of information—this is why law enforcement officials are saying this is the wrong

way to do it. Let's really, really be voluntary, and as Senator Feingold suggested and our written testimony suggests, let the Attorney General issue guidelines with the full force of law that would give a legally enforceable assurance that if you come forward, you are not going to be pursued on your technical immigration violations.

Senator SESSIONS. Ms. Toensing, I would be interested in your reaction to this as a former law enforcement official. How can you get people to cooperate and tell what they know to you if you are sort of holding the hammer of detention over their heads?

Ms. TOENSING. Well, let me just tell you, Senator Feingold, my experience back in the mid–1980s when terrorism really first started focusing on Americans, but it was mostly abroad, and so we were looking at it differently. I thought that the way we controlled our borders and the way we controlled our passports, the State Department, an issue somebody ought to look into at some point, because they were so easily copied and fraudulent passports were so easily made, and there were ways, there were methods, technical methods—I am sure there are even better ones today—that would have prevented that. That was one of the issues, by the way, in some of the 19 that made it to our country, different passports and stolen passports and so forth. So my criticism comes more from that we did not carry out our immigration laws in the past and left many people here who were illegal and passed the violations.

Now, when we are talking about today and how do we bring people forward, one of the first things I want to say is to commend the Arab newspapers in Dearborn, a former hometown of mine, who are now saying to the community it is time to come forward and it is time to cooperate. I thought it was very sad, as I have heard past stories about the Muslim community and some kind of an excuse for them to feel alienated from our Government. I think, Nadine, it is a culture we can't accept, that we have to say you are here in the United States, and in our country we have a culture that says you work with the Government if a crime this heinous took place.

I mean, there are a lot of Muslim countries that don't want women to go to school. We would certainly never accept that part of the culture here in the United States. I think there are other aspects, very positive, from our country that our Government is not to be hated. It is always to be challenged, but certainly not to be hated.

Senator FEINGOLD. I appreciate that statement, but what about my question, which is: How do you get people to cooperate if you are holding the hammer of detention over their heads?

Ms. TOENSING. Well, I don't think that it is only the hammer of detention. In fact, the carrot came out, and the carrot was if you come in and you talk with us and tell us everything that you know, we can see to it—we can ignore your violations. It is real easy for us to sit here in theory and talk about this stuff, but when you are sitting there and you are the prosecutor or the Government official that has to make the call about whether someone really came forward or just came in and said, hey, I got some information about my neighbor, but I don't know much, okay, I came forward, now ignore my immigration problem, that is a real difficult call. So com-

ing forward and giving information is just not—you know, that is an art, not a science.

Senator FEINGOLD. Thanks for that answer.

Mr. Boyle, as someone who represents immigrants, what do you think of this investigative technique? How would you advise a client who came to you and said I know something that might be helpful but I am in violation of my visa?

Mr. BOYLE. Oh, boy, I would feel real bad. But I think you have to tell people to cooperate, but I think obviously if you want to encourage cooperation, you have an environment where people don't feel like they will then be turned around and thrown away. Historically, the S program has had a lot of problems, and in the current context, I think it has even more problems.

Obviously I have tried to work with clients in the past. I have had some clients who have, in fact, after much struggle, actually achieved permanent residence after they cooperated in immigration investigations. But, boy, it was really a fight. And I think if you make it an atmosphere where people don't think it is a fight, where they don't think they are putting themselves at risk of deportation, but where they know they will be left alone if they are cooperative, but do no harm, and where they will be rewarded if they provide really good information, I think that is better. But I think it is hard to come out with that today when the last 2 months have people calling every day scared to death, perfectly innocent people, honestly, even of the ethnic groups who aren't targeted, thinking that, you know, they are really in trouble. So I think it is more effective if it is in the context of making people really feel part of the system and part of the United States, not just economically but also in this bigger sense.

Senator FEINGOLD. Thank you.

Senator Sessions?

Senator SESSIONS. Well, I don't think any nation in the world—maybe you could name one or two that have any more lenient immigration laws than we do. We are very generous to people who come here, but they do come here, don't they, Mr. Boyle, by permission under certain limitations that people are required to adhere to?

Mr. BOYLE. Absolutely, Senator. I am just saying—I am sorry. Absolutely. I don't want to—

Senator SESSIONS. I guess I am saying that to state the obvious, but what I don't understand is the complaint about the Attorney General's offer that if people come in and cooperate, we are not going to prosecute them. We are going to give them a break. Now, what is wrong with that? Why would somebody come forward with information on a terrorist if he thought he was going to be deported? What the Attorney General is saying is, as I understand it—or am I missing this, Ms. Toensing?—that if you come forward and you have got valuable information, we will work with you to try to protect you. And isn't it also a fact based on your prosecutorial experience that if somebody gave information on a terrorist person in America, that their very lives could be at stake, their families' lives could be at stake, and they would want to know the Government was going to do something to help them?

Ms. TOENSING. Well, yes, we have been through that a lot, bringing people in and giving them—putting them on the witness protection program, which is certainly a whole other issue.

I am trying to understand. I think it is that there is not certainty, that they say—

Senator SESSIONS. They think they are going to double-cross them? Is that it?

Ms. TOENSING. Yes, if you come forward and that is automatic, and that is why I gave my answer that, who knows, if you just come in and say my neighbor I think is a bad person and that is all you say, that is not really coming forward. And so, you know, our days of Queen for a Day where you came in and you had to give your proffer of what you were going to tell to see if it was really valid information perhaps applies here. I think it is very difficult for someone to just come forward to measure before you know what it is. We never did that with guilty pleas or with cooperation in law enforcement. We had to have some measure of what the information was.

Senator SESSIONS. And if the person came in and said I have got information that is of value, let me stay here, and it is not valuable and/or it is false, then they shouldn't get the benefit of that bargain.

Ms. TOENSING. And I think that is what the problem is here because the people don't know when the carrot or the stick is going to apply. But I say you can't do that with any certainty.

Senator SESSIONS. Well, in my experience of over 15 years of prosecuting, there is very little incentive for a person who is involved in a criminal activity or knows about that criminal activity to come forward and tell about it. He is going to make whoever his buddy was very mad. He is going to be hauled into court. He might get charged or she might get charged with something also.

So the question, I guess, is the threat of prosecution is the best way and the most common way, is it not—at least in my experience it is, and I will ask you, Ms. Toensing. In your experience, the threat of prosecution and the possibility of some leniency is what overcomes a person's self-interest not to talk.

Ms. TOENSING. We have got both a carrot and a stick out there, and some people respond better to the carrot and some to the stick. We all know that who have raised children. Sometimes it just depends on the day.

Senator SESSIONS. Criminals respond best to the stick. Some really in this circumstance I think should very well be troubled by what they know and would like to get that information to the authorities, but might be afraid, Mr. Emerson, that if they do, it will get out and their family could be at risk. Is that a realistic statement I just made in your experience?

Mr. EMERSON. Absolutely. I mean, if you look at the people that have either offered information or have been prevailed upon to offer information, you know, there are some examples, like Ahmed Ressam, who came in from Vancouver into Seattle, and for a good year and a half, he did not reveal the intended target of his plot, and the ongoing operatives in his cell were still out in the United States, and he had plotted to bomb LAX. And it was only because of the severity of the punishment that he was facing and the likeli-

hood that it could be reduced that he decided to say I am going to cooperate right now. And he has requested protection as well for his family.

Senator SESSIONS. I think that is a common thing. Maybe I misunderstood your concerns on that, but I really think the Attorney General needed to send a signal to a community, many of which may not be that familiar with Federal procedures, that if they do come forward and help the United States, we will try to help you. That is the way I interpreted it. It may not get many people to come forward, but maybe one or two could be of some value. So I think it was a good statement.

Senator FEINGOLD. Well, I think you are correct in part. There is no certainty that you will be treated well if you cooperate, as has been pointed out. What the Attorney General has done is given himself discretion to help people out if they give, quote, reliable and useful information. But the problem is that at the same time he has given instructions to the FBI to refer people to interrogate to the INS if they have visa violations. So the conversation here has been sometimes a stick works, sometimes a carrot works. Here really what happens is you have the carrot being undermined by the stick. It is sort of simultaneous, and that is the problem with it, in my mind, at least the nature of the concern. But I am certainly interested in the discussion.

I just have a couple more questions. You have been very patient, so we will try to come to a conclusion, depending on what Senator Sessions would like to do.

Let me ask you, Ms. Strossen, all of the 5,000 men that the Justice Department wants to question are men between the ages of 18 and 33. Is there any conclusion to be drawn from this fact other than the Department must be seeking to capture terrorists in this dragnet as opposed to actually seeking information? Wouldn't women from these countries and older people from those countries be as likely or at least somewhat likely to have useful information for an investigation as these men if that is really what it is for?

Ms. STROSSEN. You are absolutely right, Senator Feingold, and, in fact, if you look at the questions themselves, that inference is reinforced because many of the questions are the kinds of questions that would not be asked of witnesses but that would be asked of potential suspects. And I think that is why this half-carrot and half-stick is so flawed and why we said it is more like a sting operation, because you are offering the carrot and then when somebody comes forward to bite the carrot, you hit them with the stick.

Also, the trust has so far been eroded already in the Arab American community and the Muslim community. If I might, I would like to point out a statement that was released by the American Arab Anti–Discrimination Committee which pointed out such a basic problem—and I am quoting now from a press released dated November 29th—that if Mr. Ashcroft had consulted with anyone familiar with the Arabic language, he would have known that the word "cooperator" has an extremely negative connotation that may deter many from participating in a program such as this. And then there are other spokespeople that go on to say that the trust has already been so undermined by the programs that we have been criticizing here this afternoon that it is a little bit too late to get

people to trust, especially with these vague standards that simply give the Attorney General discretion, and even the standards themselves on their face are discretionary: reliable information, important information, crucial information.

So I think the Government is sending such mixed signals in so many different ways, you know, saying—the letter itself says you are not a suspect, but then, on the other hand, if they really are seeking the full community information and support, why are they limiting it to people who only happen to share certain societal group characteristics that are shared by the hijackers that have been identified? And that is why one of the other critiques is that this is a form of profiling, which is doubly flawed. Justice is violating the rights of completely innocent people. It is also a completely ineffective method of law enforcement, since you are using the dragnet instead of honing in on people's behavioral characteristics that give rise to individualized suspicion.

Senator FEINGOLD. I think that is a very valuable answer, and I am very glad that issue came out in the hearing.

Let me ask you again, Ms. Strossen, another question. Two separate public opinion polls released last week appear to show that a majority of Americans support the steps taken by President Bush to combat terrorism, but have little concern with how these steps may infringe the rights of U.S. citizens or non-citizens. In a letter to the editor in yesterday's Washington Post, Ali Ayub made the astute observation that American citizens are willing to sacrifice civil liberties in the fight against terrorism, but which Americans are doing the sacrificing? It turns out that Mr. Ayub, who is an American citizen, has a name that is similar to—not any of the hijackers, but an individual arrested with suspected links to terrorism. Mr. Ayub has had to endure interviews at home and work by the FBI, the FBI's investigation of him through contact of his neighbors, friends, and a broker, and numerous freezing of his bank accounts without any prior notice.

He concludes by poignantly noting that what scares him even more is that he is an American citizen and that, while he is not in jail, joining the hundreds of detainees we have talked about today, the only crime he is guilty of is that his name is Ali Ayub, not Joe Smith. So I would like to submit, without objection, Mr. Ayub's letter to the editor for the record.

Unfortunately, we know that his case is not an isolated case. There have been other similar missteps by the FBI or other Federal officials and investigating people, including United States citizens, who have no ties to terrorism whatsoever.

I would like you to respond to this problem, that at least according to these polls—and I know very well, as Senator Sessions does, that polls can depend so much on how the question is asked. But the polls appear to suggest that many people are quick to support this abridgment of rights as long as they are not the ones who are actually bearing the burden. How do you react to that?

Ms. STROSSEN. Well, I think perhaps a common human reaction is if you think the measure is going to benefit you and not hurt you, then you will support it. The pain goes to somebody else. And that is why I think it is critically important that we explain to the American people, including through members of the law enforce-

ment community themselves, that maybe these measures are not likely in fact to benefit you, that they are as flawed, from a national security point of view, as they are flawed from a civil liberties point of view.

And as for the second part of the equation, that these measures are not going to burden Americans, I think that is unfortunately an illusion, as the example that you have given, Senator Feingold, has already shown. So many of the rationales that the Justice Department is putting forth for measures now that are targeted only at noncitizens, but also the same rationale could equally well apply to an American citizen.

To use the military tribunal example, President Bush has relied to justify that tribunal on a Supreme Court decision that expressly said that the authority to constitute these tribunals did not depend on whether the person being tried was or was not a citizen. You know, it is the reason why the ACLU has always insisted on defending all fundamental freedoms for everyone, because we know that once the government gets the power to violate somebody's right, it inevitably is going to use that very same power against the right of somebody else.

Senator FEINGOLD. Thank you.

Senator Sessions?

Senator SESSIONS. Well, I think you make an interesting comment, that President Bush's Executive Order was more limited than the Supreme Court gave him the power to issue it, but it did nevertheless say that before anyone could be tried, even a noncitizen, and that is the only ones it applied to, before they could be tried in a military tribunal, they have to be associated with a terrorist, international terrorist organization or al Qaeda. In fact the Supreme Court does seem to indicate that even citizens who are involved in a warlike attack on the United States can be tried in a military tribunal, which President Bush chose not to do that.

No one here—and the polls are not asking the American people to affirm an improper and erroneous arrest of Mr. Goldstein's client perhaps or Ali Ayoub improperly. The American people do not support erroneous carrying out of law enforcement. They do not support that.

But what I think is missing here, and the error that we are about, is we are characterizing things that are perfectly legitimate established laws of the United States is somehow in violation of civil liberties. To interview a potential witness, how many witnesses did we interview in the Oklahoma City bombing case? Thousands, I am sure. So interviewing witnesses is not a violation of civil rights, particularly when you are not compelled to give an answer. And many of the other matters that have been asserted as somehow undermining American law, I think are great exaggerations.

So the extent to which our government is not adhering to the law, I think they need to be held to account, and it does appear that in the rush after these events, some events occurred that were not justified, and I would apologize to you if you were wrongly held and your client, but it do not believe that the government should provide, in the case of a terrorist attack against America, more rights to defendants than we give to routine criminal defendants in

America today. And they are entitled to get their lawyer, they are entitled to the day in court. They can call their mama or they can call their lawyer, and they can tell whoever they want to they are arrested, but the Attorney General is not required to announce to the world they have been arrested. I do not think that violates their rights.

So I think we are in pretty good shape all things considered. The Attorney General and the FBI are challenged tremendously. We expect them to protect us as well as we expect the special forces in the Marines to be protecting us. And we want to hold them to account, make sure they follow the law, but at the same time, we need to understand the seriousness of their task and the challenge they face and the great protections that law gives them.

Mr. Chairman, let me just say, you and I may disagree on this, but I know you deeply believe in liberty in America. I know you care about that. I believe it is healthy, so let us put it all put on the table right here. Ms. Strossen and Boyle and all, you have made some—Mr. Goldstein—your points effectively. We ought to listen to what you say, and try to make the law work correctly. So I think it is healthy to do this. I just do not think the Attorney General is going nearly as awry as you might think.

Senator FEINGOLD. Well, I appreciate that very much and your participation. I would say it is a little more than healthy. It is not like just a good walk in the morning. It is essential that we have these sorts of hearings and that they be as extensive as this, and I really do admire your willingness to participate throughout the entire hearing.

Let me just say that the purpose here is not to characterize the activities of the Attorney General or the President as somehow inappropriate or something that could never be done. The problem is though, is that in each of these areas, an example is taken of something that is done in very limited circumstances, and then used to justify a very substantial change in the scope or the way in which it is done. For example, the military tribunals. Somebody just says, well, we have had military tribunals before; what is the big deal? That is not the whole story. The whole story is exactly what is the basis for it? What is the nature of the Executive Order?

Maybe it is the case, as Ms. Toensing suggests, that on occasion in certain circumstances, rare I hope, it is okay to listen to somebody's attorney-client conversation. My suspicion is that that is incredibly narrow, and that basically the American people are being told, why are you getting upset about that? It is perfectly appropriate to do that, and it gets broadened in that way.

And the same thing goes for the detainees. I mean I am not against the idea of military tribunals in all circumstances. I am not against the idea of detaining people including in this case. But when we are not given the information that simply should be given in a situation like this so we can analyze what is going on, how do we know whether or not what is being done now is in the traditional way in which these matters are handled, or whether something entirely different is being done? And the same goes for the interviewing of 5,000 people, who happen to be all men between the ages of 18 and 33, even though the justification is that we are

trying to just get information, we are not trying to specifically identify the terrorists.

So I would just say to the Senator, the problem here is that these are potentially enormous changes of scope and in the way these procedures are used, even though they may have been permitted in certain circumstances in the past, and that to me, is where we are at in the discussion of this at this time. And with that—

Senator SESSIONS. Could I—

Senator FEINGOLD. Senator Sessions?

Senator SESSIONS. Senator Hatch had wanted me to ask a question. I would, just based on—well, I will not get into that. Let me just ask the questions to Mr. Ali Al–Maqtari that Senator Hatch would like to ask.

You came here under a non-immigrant visa; is that correct, to the United States?

Mr. AL-MAQTARI. Tourist visa.

Senator SESSIONS. And there was a limit on the time that you were allowed to stay in the United States?

Mr. AL-MAQTARI. Yes.

Senator SESSIONS. And you knew that you were here illegally?

Mr. AL-MAQTARI. Yes.

Senator SESSIONS. You knew that your time had expired?

Mr. AL-MAQTARI. I applied for extension before my visa expired.

Senator SESSIONS. But your time had expired and you had not been approved additional time?

Mr. AL-MAQTARI. But they did not say that they refuse my application. They just give me a letter from INS saying we are discussing your file, and between 60 and 120 days you will hear from us an answer. After 120 days they give me another letter. They say, we discussed your file, and we want you to send us this and this and this, bank statement, whether you will leave, your situation. And they give me time until August 15 to send them these papers. Before August 15 I was married to my wife, so I think I was waiting for the answer. So I think I am—

Senator SESSIONS. I can understand your feeling, but I think technically you were not approved for continuance staying in. But let me ask you this: is it not a fact that the day after the attack and the day you were arrested, you were found with box cutters?

Mr. AL-MAQTARI. Yes.

Senator SESSIONS. I think that may explain some of the concern on behalf of law enforcement. It may not justify improper legal activity, but perhaps that showed some reason for the intensity of interest that there may have been here.

Senator FEINGOLD. Mr. Al–Maqtari, why did you have box cutters?

Mr. AL-MAQTARI. Okay. I had one box cutter, not two. One of mine—the other one is my wife. My uncle here has a grocery store, and sometimes I was helping them there, so we use these box cutters to—you know, it is a grocery store. And when we decided to move to Kentucky, we was preparing our stuff, so we used these box cutter to prepare our stuff. And then we finished preparing our stuff, and I put the box cutter in the car. So I did not know until the day before my hearing, I did not know that carrying box cutter, it is small, dangerous carrying RBG or—

Senator FEINGOLD. Good. I wanted to get that on the record.

I want to thank all of our witnesses and Senator Sessions very much. We have a vote on again. I had hoped to stop and chat with each of you and thank you personally, but I have to run, but thanks so much.

At this point we will include the statements of Senators Thurmond and Kennedy in the record.

[The prepared statements of Senators Thurmond and Kennedy follow:]

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Mr. Chairman:

Thank you for holding this important hearing on the detention of individuals suspected of links to terrorist organizations. I take seriously this committee's responsibility for overseeing the Justice Department, and we should ensure that the government's actions are in accordance with the Constitution. We must seek to formulate law enforcement initiatives that will be rigorous, giving DOJ the best possible opportunity of bringing to justice those associated with the terrorist attacks. At the same time, we must not compromise our Nation's historical commitment to due process and civil liberties.

I believe that the Bush Administration's detention policy is not only necessary for our national security, but it is also a legitimate use of powers under the Constitution. Two aspects of the detention policy have been highly criticized: the detentions themselves and the lack of public information released on detainees. Today, we will hear detainees' have access to lawyers and are treated properly. However, we must not allow isolated incidents to lead us to the conclusion that the government is shamelessly violating the civil rights of detainees.

Congress and the Administration have worked together to fashion a sensible policy on the detention of those charged with immigration violations or criminal laws. Once a person is taken into custody, the USA PATRIOT Act provides that the Attorney General may certify that he has reasonable grounds to believe that someone is a terrorist or security threat. The Attorney General then has seven days to charge the alien with an immigration or criminal violation. Upon the expiration of seven days, he must release the alien or charge him with a violation of law. The safeguard to this procedure is review in Federal court.

The Attorney General is using material witness warrants to hold all other detainees. Some critics question the practice of holding people as material witnesses, but the government must balance its need for crucial information with the liberty interests of detainees. Furthermore, current law allows for the detention of material witnesses for a "reasonable period of time" under 18 U.S.C. § 3144. It is important to remember that the government's power of detention is not unchecked. Detainees have recourse to review by Federal courts.

Congress should also give deference to the President's powers as Commander-in-Chief. The detention of suspects and witnesses serves not only law enforcement objectives by national security objectives as well. We are involved in a war against terrorism, and we should be sensitive to the national security concerns regarding the detentions. In fact, the Supreme Court has acknowledged that there may be circumstances where national security concerns call for deference to the executive branch's use of detentions. *Zadvydas* v. *Davis*, 121 S. Ct. 2492 (2001).

Some critics have also raised concerns about the Department of Justice's failure to release extensive details regarding detainees. As former Attorney General Barr indicated in his testimony before this committee last week, the Supreme Court has never interpreted the Constitution to require that all details of a law enforcement investigation be disclosed. For example, grand jury proceedings are kept secret so that the integrity of a criminal investigation is not tarnished. And even more relevant, affidavits in support of arrest, material witness warrants, and indictments are commonly filed with the court under seal if their disclosure would compromise an investigation.

Under current circumstances, detailed information about the detainees could provide crucial information to the cells of the al Qaida terrorist network. If terrorist cells operating in this Country were able to determine how their movements were being detected, they would adjust their operations in order to avoid detection. We must remember that we are at war, and the United States is still vulnerable to ter-

rorist attacks. The United States government has a legitimate need for secrecy in its effort to disrupt the functioning of al Qaida.

There is a misconception that the identities of all charged persons is secret. This is not so. According to Assistant Attorney General Michael Chertoff's testimony before this committee last week, the identity of every person arrested on a criminal charge is public information. Additionally, the government is not preventing a detained individual from identifying himself. There is nothing to indicate that detainees are being held in secret.

By not providing a list of detainees to the public, DOJ is actually protecting the privacy of the detainees. Because the detention itself is not secret, an individual detainee would not benefit from the publication of his name. In fact, a list could only serve to invade the privacy interests of the detainees by making their detention available to anyone. If such a list were published, there would surely be criticism that this list served no purpose but to smear the reputations of people caught up in the investigation.

Mr. Chairman, I appreciate your commitment to ensuring that our Nation protect the civil liberties of those under investigation. Even though we are at war, we must not allow our Constitution to be trampled in the name of justice. We must pay close attention to the assertions of our witnesses today. However, we must keep in mind that Assistant Attorney General Chertoff testified that all detainees are being provided with access to counsel and the right to make phone calls to families and attorneys. With these safeguards, I believe that the detention policies of the Administration are beneficial tools in our war against terrorism.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

As we seek to deal with those responsible for the terrorist attacks of September 11th, we must also uphold the fundamental civil liberties that our country stands for.

Several of the Administration's recent policies and actions raise serious questions about their impact on basic freedoms protected by the Constitution. The Department of Justice policy would allow the monitoring of privileged attorney-client communications—without judicial supervision, and without even a showing of misconduct by the attorney involved. Since September 11th, hundreds of people have been detained for a variety of reasons. Few appear to be linked to terrorist activities, but the Department has refused to disclose basic information about these detainees' identity and the grounds for detention. The Department's current questioning of 5,000 legal immigrants—almost all of whom are Middle Eastern—has raised concerns by local police departments about racial profiling.

I commend Chairman Feingold for holding today's hearing on these important issues. As we pursue our goal of bringing the terrorists to justice, enhancing our security, and protecting fundamental civil liberties, it is imperative for the Administration and Congress to share information and work together—as we did in the weeks immediately following the attacks.

Senator FEINGOLD. Senator Sessions has asked that a newspaper article be placed in the record and we will include it at this point.

The hearing is concluded.

[Whereupon, at 4:43 p.m., the Committee was adjourned.]

DEPARTMENT OF JUSTICE OVERSIGHT: PRESERVING OUR FREEDOMS WHILE DEFENDING AGAINST TERRORISM

THURSDAY, DECEMBER 6, 2001

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 10:02 a.m., in Room SD–106, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kennedy, Kohl, Feinstein, Feingold, Schumer, Durbin, Cantwell, Edwards, Hatch, Thurmond, Grassley, Specter, Kyl, DeWine, Sessions, and McConnell.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. I don't want to cut off the press in any way here, but I would ask you to step back now, if we could.

Just a couple of housekeeping things before we start. I am advised there will be roll call votes this morning. Attorney General Ashcroft is familiar with that, and first off, I thank the Attorney General for being, as he told me earlier, unsenatorial and arriving early, and I do appreciate that.

What I think we would do, with Senator Hatch's agreement, if we might, if a roll call starts, we will continue on with the questioning. And at some point, as the time goes down that first roll call, as one Senator finishes we will break and the Senators will go over so we can do that roll call, plus the next one, come back, and begin again with whoever is next in line. So hopefully we will be gone for only about 10 minutes, 12 minutes or so, and then just see what happens with the third roll call. I am trying to accommodate as many of you as I might.

To the Attorney General, I would say I welcome you here. When you and I chatted on the phone yesterday, as you know, I called to thank you for coming and I appreciate it. And, of course, you served with almost everybody on this Committee, so you should feel at home. I appreciate the comments you made yesterday, as you were telling me just earlier, when asked about whether there should be some kind of a bipartisan panel to look at all these things, and you said, well, there is at least one, the one right here, on which you served with distinction for years.

In the 12 weeks since the September 11th attacks, Americans in law enforcement have been working tirelessly to protect the public,

to capture and thwart terrorists, and to bring them to justice. And for its part, Congress too has moved promptly on several fronts, including our expedited consideration and enactment of the anti-terrorism bill 2 months ago.

Now, in the 2 months since your last appearance before this Committee, General, terrorism has also reached Congress' doorstep. That is why we are meeting in this room today and not in the Hart Building, which remains closed. One of the two anthrax letters that came to the Hill went to, as you know, the Hart Building, and it was of such a powerful nature, that building is still closed.

Last week, the Justice Department witness appearing before this Committee described Congress as a "full partner" in our Nation's anti-terrorism efforts. That is the way the Founders and the Constitution intended it, and I appreciate Mr. Chertoff in saying that. The partnership of our two branches of Government working together produced an anti-terrorism bill that was actually better than either the executive branch or the legislative branch would have produced had they acted on their own. Also, because we acted together, we had greater confidence of the public in the result. America works best when all parts of our Government work together.

As we continue our discussion of important and difficult questions about the means to be used in the fight against terrorism, let no one, friend or foe, make any mistake about what this discussion is. It is a principled discussion of policy approaches. It is a constructive assessment of the effectiveness of those approaches. It is undertaken by partners in our country's effort against a common and terrible enemy.

Tomorrow is the 60th anniversary of the attack on Pearl Harbor. Many have compared the galvanizing effect of that attack to that of the atrocities committed on September 11th. Well, today, just as 60 years ago, Government at every level is under great pressure to act. Our system is intended to help make sure that what we do keeps us on a heading that achieves our goals while holding true to our constitutional principles. The Constitution does not need protection when its guarantees are popular, but it very much needs our protection when events tempt us to just this once go beyond the Constitution.

The need for congressional oversight and vigilance is not, as some mistakenly describe it, "to protect terrorists." It is to protect ourselves as Americans and protect our American freedoms that you and I and everybody in this room cherish so much. And every single American has a stake in protecting our freedoms. It is to make sure that we keep in sight at all times the line that separates tremendous Government power on the one hand and the rights and liberties of all Americans on the other hand. It is to make sure that our Government has good reason before snooping into our bank records, our tax returns, our e-mails, or before the Government listens in as we talk with our attorneys. It is to make sure that no one official, however well intentioned, decides when that line is to be crossed without good reason for that decision.

Now, whether the administration's recent actions are popular or unpopular at the moment, that is not the issue. As the oversight

Committee for the Department of Justice, we accept our responsibility to examine them. That is our role under the Constitution. That is our duty. We are sworn to do that. We will not shrink from that duty.

But so, too, is congressional oversight important in helping to maintain public confidence in our system of laws. In our society, unlike in so many other nations, when a judge issues an order, it is respected and carried out because the public has faith in our system and its laws. The division of power and the checks and balances built into our system help sustain and earn the public's confidence in the actions taken by the Government. The consent of the governed that is at the heart of our democracy makes our laws effective and sustains our society.

I commend Senator Schumer, the Chair of the Administrative Oversight and Courts Subcommittee, and Senator Feingold, the Chair of our Constitution Subcommittee, for holding their hearings earlier this week, for the very constructive contributions to those hearings by Senator Hatch and Senator Sessions and Senator Durbin and Senator Feinstein and others. That is in the finest tradition of our Senate and our country.

During the past week of hearings and public debate, this oversight process already has contributed to clarifying the President's Order to establish military tribunals. It now seems following these hearings that the President's language that ostensibly suspends the writ of habeas corpus and the language providing for secret trials and the expansive sweep of the President's November 13 Order were not intended; instead the administration's intention is to use procedural rules more like those in our courts and our courts martial.

Over the last week it has become clear that, as written, the President's Order outlines a process that is far different than our military system of justice. American military justice is the best in the world. It includes open trials and right to counsel and judicial review. The public can see what is happening. It also appears that the risks of pursuing "victor's justice" are beginning to be understood more fully as the initial conception of that Order is clarified. And I commend the members of this Committee for their contribution to that process.

Last week, Senator Specter wrote an article expressing his concern that the administration had not demonstrated the need for the President's extraordinarily broad Order on military commissions. Others, Democrats, Republicans, moderates, conservatives, liberals, have expressed concern about the broad powers asserted by the administration and about the manner in which it asserted them—bypassing Congress and the court. But last Wednesday's hearing allowed the Committee to hear firsthand from legal experts across the spectrum on these questions.

Now, let me be very clear. There are circumstances where military tribunals are appropriate, and I agree with the constitutional experts and others who have testified before the Committee that military tribunals can have a role in the prosecution of the campaign against terrorism. But many issues remain how to proceed with such tribunals in the best interest of our national security, and ultimately the question is not only whether our Government

has the right or the power to take certain actions and in certain ways, but whether the means we choose really protect our security.

Defining those circumstances where military tribunals serve our national security interest is no easy task. Congress has contributions to make to this discussion, as we already have. To many, the constitutional requirement that military tribunals be authorized by Congress is clear. To others, it is not. To everyone, it should be beyond argument that such an authorization, carefully drawn by both branches of Government, would be helpful in resolving this doubt. It would give credibility to the use of military tribunals. Several members of the Committee of both parties have been crafting ideas for such an authorizing resolution to clarify these issues.

Mr. Attorney General, when I have called you in the past on issues to work with us, you have. And so I invite you to work with members of the Committee in creating a consensus charter for tribunals. And I suspect the Armed Services Committee, several members of which are on this Committee, would want the same.

It is never easy to raise questions about the conduct of the executive branch when our military forces are engaged in combat, even when those questions do not concern our military operations. The matters we are examining concern homeland security and our constitutional rights and preserving the limits on governmental authority that form the foundation of our constitutional democracy.

These are questions that go to the heart of what America stands for, to its people and to the world, especially to show them what we are and what we do when we are put to the test, a test that we have been put to far more than most of us can remember.

These are questions that we need to debate openly and thoughtfully. This Committee hopes to cast a light of reasoned public inquiry on the administration's actions, especially on sweeping unilateral actions that might affect fundamental rights. Ultimately, taking a close look at the assertions of Government power is one of the best ways to preserve our freedom and our security.

None of us in elective or appointive positions in Government has a monopoly of wisdom or of patriotism, and under our system, none of us has a monopoly on authority.

The Framers of our Constitution had great confidence in George Washington. They didn't expect him to abuse his power. But they did not entrust their liberty to his or to any Government's good intentions. Instead they provided a system of checks and balances, including congressional oversight and judicial review and public scrutiny. This Committee will be vigilant in seeking to preserve those fundamentals of our American constitutional system. We can be both tough on terrorists and true to the Constitution. It is not an either/or choice.

So I look forward to hearing from the Attorney General. He is a friend of each and every one of us on this Committee. I thank him for making this appearance.

[The prepared statement of Chairman Leahy follows:]

STATEMENT OF PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Attorney General Ashcroft, welcome.

In the 12 weeks since the September 11 attacks, Americans in law enforcement have been working tirelessly to protect the public, to capture and thwart terrorists, and to bring them to justice. For its part, Congress too has moved promptly on sev-

eral fronts, including our expedited consideration and enactment of the anti-terrorism bill two months ago.

In the two months since your last appearance before this committee, terrorism also has reached Congress's doorstep. That is why we are meeting in this room today, and not in the Hart Building, which remains closed.

Last week the Justice Department witness appearing before this committee described Congress as a "full partner" in our nation's anti-terrorism efforts. That is how the Founders and our Constitution intended it. The partnership of our two branches of government working together produced an anti-terrorism bill that was better than either branch acting alone would have produced, and with greater public confidence in the result. America works best when all parts of our government govern together.

As we continue our discussion of important and difficult questions about the means to be used in the fight against terrorism, let no one, friend or foe, mistake this for anything other than what it is: a principled discussion of policy approaches, and a constructive assessment of the effectiveness of those approaches, undertaken by partners in our country's efforts against a common enemy.

Tomorrow is the 60th anniversary of the attack on Pearl Harbor. Many have compared the galvanizing effect of that attack to that of the atrocities committed on September 11. Today, as 60 years ago, government at every level is under great pressure to act. Our system is intended to help make sure that what we do keeps us on a heading that achieves our goals while holding true to our constitutional principles. The Constitution does not need protection when its guarantees are popular, but it very much needs our protection when events tempt us to, "just this once," abridge its guarantees of our freedom.

The need for congressional oversight and vigilance is not, as some mistakenly describe it, "to protect terrorists;" it is to protect ourselves and our freedoms, something in which each and every American has a stake. It is to make sure that we keep in sight at all times the line that separates tremendous government power on the one hand and the rights and liberties of all Americans on the other. It is to make sure that our government has good reason before snooping into our bank records, our tax returns or our e-mail, or before the government listens in as we talk with our attorneys. It is to make sure that no one official, however well intentioned, decides when that line is to be crossed, without good reason for that decision. Whether the Administration's recent unilateral actions are popular or unpopular at the moment, as the oversight committee for the Department of Justice, we accept our responsibility to examine them. This is our role under the Constitution, this is our duty, and we will not shrink from it.

So, too, is congressional oversight important in helping to maintain public confidence in our system of laws. In our society, unlike in so many other nations, when a judge issues an order, it is respected and carried out because the public has faith in our system and its laws. The division of power and the checks and balances built into our system help sustain and earn the public's confidence in the actions taken by their government. The consent of the governed that is at the heart of our democracy makes our laws effective and sustains our society.

I commend Senator Schumer, the chair of the Administrative Oversight and the Courts Subcommittee, and Senator Feingold, the chair of our Constitution Subcommittee, for holding their hearings earlier this week, and for the constructive contributions to those hearings by Senator Hatch, Senator Sessions, Senator Durbin, Senator Feinstein and others. They were acting in the finest tradition of the Senate and this country.

During the past week of hearings and public debate, this oversight process already has contributed to clarifying the President's order to establish military tribunals. It now seems that the President's language that ostensibly suspends the writ of habeas corpus, the language providing for secret trials, and the expansive sweep of the President's November 13 order were not intended; instead the Administration's intention is to use procedural rules more like those used in our courts and our courts martial. Over the last week it has become clearer that, as written, the President's order outlines a process that is far different than our military system of justice. American military justice is the best in the world and includes open trials, right to counsel and judicial review. It also appears that the risks of pursuing "victor's justice" are beginning to be understood more fully as the initial conception of the order is being reformed and clarified. I commend the members of this committee for their contributions to that process.

Last week, Senator Specter wrote an article expressing his concern that the Administration had not demonstrated the need for the President's extraordinarily broad order on military commissions. Others, Democrats and Republicans, moderates and conservatives, have expressed concern about the broad powers asserted

by the Administration and about the manner in which it has asserted them—bypassing both Congress and the courts. Last Wednesday's hearing allowed the Committee to hear firsthand from legal experts across the spectrum on these questions and to assist in clarifying the Administration's intentions and actions.

There are circumstances where military tribunals are appropriate. I agree with the constitutional experts and others who have testified before the Committee that military tribunals can have a role in our prosecution of the campaign against terrorism. However, many issues remain about how to proceed with such tribunals in the best interests of our national security. Ultimately, the question is not only whether our government has the right or the power to take certain actions and in certain ways, but whether the means we choose truly protect our security.

Defining those circumstances where military tribunals serve our national security interests is no easy task, and Congress has contributions to make to this discussion, as we already have. To many, the constitutional requirement that military tribunals be authorized by Congress is clear. To others, it is not. To everyone, it should be beyond argument that such an authorization, carefully drawn by both branches of government, would be helpful in resolving this doubt and in lending credibility to their use. Several members of the Committee of both parties have been crafting ideas for such an authorizing resolution to clarify these issues, and I invite you to work with members of the Committee in exploring a consensus charter for tribunals.

It is never easy to raise questions about the conduct of the Executive Branch when our military forces are engaged in combat, even when those questions do not concern our military operations. The matters we are examining concern homeland security, our constitutional rights, and preserving the limits on governmental authority that form the foundation of our constitutional democracy. These are questions that go to the heart of what America stands for, to its people and to the world, when we are put to the test. These are questions that we need to debate openly and thoughtfully. This committee hopes to cast the light of reasoned public inquiry on the Administration's actions, especially on sweeping unilateral actions that might affect fundamental rights. Ultimately, taking a close look at assertions of government power is one of the best ways to preserve our freedoms and ensure our security.

None of us in elective or appointive positions in government has a monopoly of wisdom or of patriotism, and under our system, neither do any of us have a monopoly of authority.

The Framers of our Constitution had great confidence in George Washington and certainly did not expect him to abuse his power. But they did not entrust their liberty to his, or to any government's, good intentions. Instead they provided for a system of checks and balances, including congressional oversight, judicial review and openness to public scrutiny. This committee will be vigilant in seeking to preserve those fundamentals of our American constitutional system. We can be both tough on terrorists and true to the Constitution.

I look forward to hearing from the Attorney General. I want to thank him again for appearing today and hope that he will be able to stay to answer the questions of all senators.

Chairman LEAHY. I turn to Senator Hatch, a man I have served with for decades now, back when his hair was black and mine was there.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. That is right. Well, thank you, Mr. Chairman. I am honored to be with you today, and as you know, I was pleased to co-author with you the letter we sent to our good friend and former colleague, the Attorney General of the United States, asking him to come before this Committee to describe for us and for the American people some of the recent initiatives undertaken by the administration to protect Americans from terrorist attacks. And I am gratified that Attorney General Ashcroft readily accepted our invitation and has taken time from his critical duties to be here with us today.

Mr. Chairman, a week ago, the airwaves were filled with alarmist rhetoric charging that the administration's actions had tram-

pled the Constitution. During the course of these oversight hearings, as expert after expert has affirmed the constitutionality of these measures, I have noticed a change in the tone of the criticisms being leveled at the administration. The principal complaints we now hear are not that the measures are unconstitutional but, rather, that the Justice Department has engaged in insufficient consultation with Congress or with this Committee before announcing them.

Now, I have a couple of observations on this particular topic. First, let's put this issue in perspective. We are at war. We are battling an enemy committed to an absolute, unconditional destruction of our society. The principal means that the enemy employs toward this goal is the killing of our civilians in their homes and in their places of business. To the extent that this war is being waged on American soil, the Attorney General is one of the leaders in this war. I would hope that in this time of crisis we would all check our egos and for the good of this country look at the merits of these proposals rather than the manner in which they are packaged.

I am not saying that we don't have a solemn obligation to assess the Department's actions to ensure that they are both effective and sufficiently protective of our civil liberties. But do any members of this Committee really believe that in this time of crisis the American people, those who live outside the Capital Beltway, really care whether the President, the Secretary of Defense, or the Attorney General took the time to pick up the telephone and call us prior to implementing these emergency measures? I implore my colleagues, let's keep our focus where it matters: on protecting our citizens.

Certainly the American people are not interested in watching us quibble about whether we should provide more rights than the Constitution requires to the criminals and terrorists who are devoted to killing our people. They are interested in making sure that we protect our country against terrorist attacks.

To those of you who say that our input is necessary to make sure that these measures are done right, I say look around, look at the actions of the President. What do you think is happening? President Bush could have proceeded as President Franklin D. Roosevelt did in 1942. He could have privately called the Secretary of Defense and had him start working confidentially on procedures for military tribunals.

Months from now, President Bush could have announced we have captured some terrorists in Afghanistan, we will try them by military tribunal and here are the procedures for the tribunals that have been established by the Secretary of Defense.

President Bush did not proceed that way. Instead, he responsibly, in my opinion, announced that he wanted military tribunals to be one option for trying unlawful combatants against this country. He publicly tasked the Secretary of Defense with drafting the procedures to be employed. Since then, this Committee, the Armed Services Committee, numerous law professors, and just about every pundit with a microphone or typewriter have each expressed their opinion as to how those procedures should be written. That is consultation.

And to show how serious the President is about this process, he reserved to himself the ultimate designation as to who will be tried in military tribunals, unlike FDR, who delegated the decision to members of our armed forces—and, I might add, had the approval of both the New York Times and the then-predecessor of the Washington Post in the process.

Mr. Chairman, what the hearings over the last 2 weeks have shown is this: The vast weight of legal authority confirms the constitutionality of military tribunals. And if the issue to be analyzed is not the constitutionality of the tribunals but, rather, the fairness of the procedures to be used, then any criticism is entirely premature because the administration has not yet promulgated the procedures that will be employed.

Any questions to Attorney General Ashcroft on this topic would be particularly pointless because it is Secretary of Defense Rumsfeld, not General Ashcroft, who is charged with drafting the procedures, although we all hope that they will consult with General Ashcroft in the process. And I personally believe they will.

On the issue of detainees, what we have learned is that every person being detained has either been charged with a violation of U.S. law or being held pursuant to a decision of a Federal judge to issue a material witness warrant. Each of the detainees has had access to legal counsel or the right to access to legal counsel and has the right to challenge the grounds for his detention. Every detainee may, if he wishes, publicize his plight through legal counsel, friends, family, and/or the media. And while there has been some anecdotal evidence that the system has not worked flawlessly in the wake of the September 11th problems, there is absolutely no basis for believing that the Department of Justice has initiated any systematic policy to deprive detainees of their constitutional rights.

Mr. Chairman, let me also take a moment to correct the record on one score. At the time we sent our letter to General Ashcroft, it was widely misreported in the press that I was displeased with the Attorney General and had "demanded" his appearance before the Committee. Nothing could be further from the truth. I for one have been extremely pleased with the degree to which he and the Department as a whole have been responsive to this Committee's oversight responsibilities and requests. Not only did the Attorney General promptly respond to our invitation to testify, he and the Department have diligently and thoroughly responded to all of the many questions and document requests that have been sent to them by the Committee throughout this year.

And the Department has not just been responsive to our oversight efforts. They have been proactive as well. Last week, when the first in a series of DOJ—Department of Justice—oversight hearings was convened, the Department of Justice was not initially invited to testify. Commendably, the Department of Justice reached out saying that they believed it was appropriate, given the fact that they were the subject of the hearing, that they also be participants at the hearing. Assistant Attorney General Michael Chertoff made himself available and provided testimony last week that I think we can all agree was very helpful to the Committee, and erudite testimony at that.

The same thing happened this week, when the Department was again not invited to testify at Tuesday afternoon's oversight hearing. Again, the Department reached out to us and offered us more testimony which greatly contributed to the work of this Committee. I must say the candor and responsiveness exhibited by this Department of Justice in its dealing with this Committee is a refreshing departure from the responsiveness of the previous administration to our oversight responsibilities.

As you all know, I was chairman of this Committee for 6 of those previous administration years, and I can tell you that getting responsive answers from the Department of Justice during that period was like pulling teeth, whether we were examining the previous administration's pardoning and release of 11 convicted terrorists affiliated with the FALN or the campaign finance irregularities probe and the famous conflicting views within the Justice Department on whether to appoint a special counsel to the Elian Gonzalez matter, to the last-minute pardons and so on.

Given this previous experience, Attorney General Ashcroft's candor and responsiveness to this Committee are, in my opinion, pretty commendable and all the more commendable. I would like to thank you, General Ashcroft, for your honorable service to the country as Attorney General. I know that this Nation is a safer place due in large measure to what you and this administration is doing and basically to your tireless, honest efforts to rid us of crime.

Mr. Chairman, I am pleased to see, and supportive of, this Committee exercising its oversight authority over the Department of Justice, and I trust that the Department of Justice will always be cooperative.

I trust that we all agree as to the reason why it is important that we exercise this oversight function. It is, or at least it should be, to help the Department of Justice more effectively carry out its duties and to ensure that it does so consistently with congressional directives.

Now, I hope that we can also agree, however, that there is a point at which aggressive oversight by this Committee becomes counterproductive. Certainly we do not want to reach a point where the senior leadership of the Department spends all of its time responding to inquiries from our Committee regarding the terrorism investigation and none of its time actually tracking down terrorists.

And I know some might try to argue that this is a partisan criticism. Well, it is not. It is a bipartisan concern. I should note that one of our Senate Democratic colleagues yesterday properly observed in a press release that, "They need to get off his back and let Attorney General Ashcroft do his job. Military tribunals have been used throughout history. The Supreme Court has twice upheld them as constitutional. Now we are at war, and we are talking about using military tribunals only for non-citizens. Why in the world would we try our own soldiers with this system of justice but not some foreigner who is trying to kill us? It is crazy. These nit-pickers need to find another nit to pick."

I like that.

[Laughter.]

Senator HATCH. Let me continue. "They need to stop protecting the rights of terrorists. This is about national security. This is about life and death."

Now, I don't mean in any way to suggest that we should not be performing appropriate oversight or to suggest ill motives behind this hearing today. I certainly don't mean to do that. And I appreciate working with my chairman on this matter.

I should also note that these public hearings were not the only opportunity that the members of our Committee have had to pose inquiries to the Department of Justice. Several members have submitted numerous additional written questions following last week's hearing. The last time the Attorney General appeared before this Committee, Mr. Chairman, you alone directed 21 questions to him, with multiple sub-parts. By my own count, over the last 2 months you have submitted 12 letters to the Justice Department officials, requesting hundreds of pages of documents and posing dozens of questions, and that is your right to do.

Now, General Ashcroft, I again want to thank you, and particularly the men and women of the Department of Justice for their herculean efforts over the past number of weeks, and especially over the last week and a half in responding to the oversight efforts of this Committee. We have had a lot of questions, and your responses over the past week have helped allay many initially alarmist and sometimes hysterical concerns.

And let us not forget that these same men and women at the Department of Justice are the ones who are charged with the essential task of making sure that a day like September 11th never happens again on our soil or any action like those that occurred last week against us.

Now, if my colleagues would like to grant additional authorities to the President or the Attorney General to aid in this war and to save American lives, I for one will be all ears, as long as such powers are consistent with our Constitution.

Mr. Chairman, there is no real question remaining as to the constitutionality of the administration's initiatives to date. I want to thank you for your dedication to oversight, and I am hopeful that today's hearing will proceed as a fair examination into the administration's actions to stop terrorists and save American lives.

I want to thank you for this hearing. I thank the Attorney General for his willingness to be present and for his responsiveness to our oversight requests. Thank you very much.

[The prepared statement of Senator Hatch follows:]

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

As you know, I was pleased to co-author, with you, the letter we sent to our good friend and former colleague, the Attorney General, asking him to come before this Committee to describe for us, and for the American people, some of the recent initiatives undertaken by the Administration to protect Americans from terrorist attacks. And I am gratified that General Ashcroft readily accepted our invitation and has taken time from his critical duties to be here today.

Before beginning my statement, I would just like to correct the record on one score. At the time we sent our letter to General Ashcroft, it was widely misreported in the press that I was displeased with the Attorney General, and had "demanded" his appearance before the Committee. Nothing could be further from the truth.

I joined the letter to General Ashcroft requesting his appearance because I believed it would be helpful to us, and to the American people, for the Attorney General to come before us and provide us with an update on the Department's efforts

to combat terrorism and bring to justice those who helped to perpetrate the barbaric attacks of September 11th.

After we sent the letter, Mr. Chairman, you made some comments to the press in reference to the letter that were critical of the Attorney General. Because I was a co-signatory on that letter, your subsequent statements were attributed to me as well.

So that there will be no mistake, I would like to say here, in the presence of the Attorney General, that I have been extremely pleased with the degree to which he, and the Department as a whole, have been responsive to this Committee's oversight requests. Not only did the Attorney General promptly respond to our invitation to testify, he and the Department have diligently and thoroughly responded to all of the many questions and document requests that have been sent to them by this Committee throughout the year.

And the Department has not just been *responsive* to our oversight efforts, they have been *proactive* as well. Last week, when the first in this series of DOJ oversight hearings was convened, the Department of Justice was not invited to testify. Commendably, the DOJ reached out, saying that they believed it was appropriate, given the fact that they were the subject of the hearing, that they also be participants at the hearing. Assistant Attorney General Michael Chertoff made himself available, and provided testimony last week that, I think we can all agree, was very helpful to the Committee.

The same thing happened this week, when the Department was again not invited to testify at Tuesday afternoon's oversight hearing. Again, the Department reached out to us, and offered Assistant Attorney General Viet Dinh as a witness. And again, I think we can all agree, Mr. Dinh's testimony greatly contributed to the work of this Committee.

I must say, the candor and responsiveness exhibited by *this* Department of Justice in its dealings with this Committee is a refreshing departure from the responsiveness of the previous Administration to our oversight requests.

As you all know, I was Chairman of this Committee for the last six years of the previous Administration, and I can tell you that getting responsive answers from the Department of Justice during that period was like pulling teeth. Whether we were examining the previous administration's pardoning and release of 11 convicted terrorists affiliated with the FALN, or the campaign finance irregularities probe and the famous conflicting views within the Justice Department on whether to appoint a special counsel, to the Elian Gonzalez matter, to the last-minute pardons. . .and so on.

I must say, given this previous experience, Attorney General Ashcroft's candor and responsiveness to this Committee are all the more commendable. I would like to thank him for his honorable service to this country as Attorney General. I know this nation is a safer place due, in large part, to his tireless, honest efforts to rid us of crime.

Mr. Chairman, I am pleased to see, and supportive of, this Committee exercising its oversight authority over the Department of Justice.

I trust that we all agree as to the reason *why* it is important that we exercise this oversight function: it is, or at least it should be, to help the DOJ more effectively carry out its duties, and to ensure that it does so consistently with Congressional directives.

I hope that we can also agree, however, that there is a point at which aggressive oversight by this Committee becomes counter-productive. Certainly, we do not want to reach a point where the senior leadership at the Department spends all of its time responding to inquiries from our Committee regarding the terrorism investigation, and none of its time *actually tracking down terrorists*.

And, I know some might try to argue that this a partisan criticism. Well it is not, it is a bipartisan concern. I should note that one of our Senate Democratic colleagues yesterday properly observed in a press release that, "They need to get off his back and let Attorney General Ashcroft do his job. Military tribunals have been used throughout history. The Supreme Court has twice upheld them as constitutional. Now, we're at war, and we're talking about using military tribunals only for non-citizens. Why in the world would we try our own soldiers with this system of justice but not some foreigner who is trying to kill us? It's crazy. These nit-pickers need to find another nit to pick. They need to stop protecting the rights of terrorists. This is about national security. This is about life and death." Now, I don't mean in any way to suggest that we should not be performing appropriate oversight, or to suggest ill motives behind this hearing today.

My friends, in the last two weeks, we have heard from Justice Department officials, State Department officials, law professors, journalists, defense attorneys, and even an illegal alien from Yemen who was detained the week after the September

11th attacks with box-cutters in his possession. We have heard from two former Attorneys General of the United States, one from a Republican Administration and one from a Democratic Administration—who, I might add, both testified that they saw no Constitutional problem with any of the actions that are the subject of these hearings.

Some of our friends in academia have not been shy in their criticism of the Administration. One professor whom the Committee invited to testify at last week's hearing compared the United States government to certain authoritarian regimes in Latin America and the totalitarian regime in China.

Nor were these public hearings the only opportunity that the members of our Committee have had to pose inquiries to the Department of Justice. Several members have submitted numerous additional written questions following last week's hearing. The last time the Attorney General appeared before this committee, Mr. Chairman, you alone directed 21 questions to him, with multiple subparts. By my count, over the last 2 months you have submitted 12 letters to Justice Department officials, requesting hundreds of pages of documents and posing dozens of questions.

Which brings us to today. Mr. Chairman, as I said earlier, a couple of weeks ago, I joined you in inviting the Attorney General to testify before us on these matters. I continue to believe it is appropriate to have General Ashcroft testify here today. These are important topics, and I know that General Ashcroft welcomes the opportunity to address any concerns that may be raised by the members of the Committee.

General Ashcroft, I want to thank you, and particularly the men and women of the Department of Justice, for their Herculean efforts over the last week and a half, in responding to the oversight efforts of this Committee. We have had a lot of questions, and your responses over the past weeks have helped allay many initially alarmist and hysterical concerns.

And let us not forget, these same men and women at the Department of Justice are the ones who are charged with the essential task of making sure that a day like September 11th never happens again.

As we continue to hold these hearings, I would hope that we don't forget our own essential task of confirming the President's nominees to the positions so important to winning the war against terrorism, and to ensuring that we have justice and liberties. As you know, there has been increasing criticism from around the country for this Committee to take action on the President's nominees—both for judgeships and for important posts in the Administration. Even the Washington Post, has criticized this Committee's failure to act on these important judicial nominations, particularly given the vacancy crisis we face in our judiciary today. As we all recognize, justice delayed is justice denied. This was not a digression, but I think that our duty to act on the President's nominees is at least as critical as our duties of oversight and I would simply hope that we will be as diligent in that role in the coming weeks and months as we are with our oversight responsibility.

Mr. Chairman, what the hearings over the last two weeks have shown is this: the vast weight of legal authority confirms the constitutionality of military tribunals. And, if the issue to be analyzed is not the constitutionality of the tribunals, but rather the fairness of the procedures to be used, then any criticism is entirely premature, because the Administration has not yet promulgated the procedures that will be employed. Any questions to Attorney General Ashcroft on this topic would be particularly pointless, because it is Secretary of Defense Rumsfeld, not General Ashcroft, who is charged with drafting the procedures.

On the issue of detainees, what we have learned is that every person being detained has either been charged with a violation of U.S. law, or is being held pursuant to the decision of a federal judge to issue a material witness warrant. Each of the detainees has had access to legal counsel and has the right to challenge the grounds for his detention. Every detainee may, if he wishes, publicize his plight, through legal counsel, friends, family, and/or the media. While there has been anecdotal evidence that the system has not worked flawlessly in the wake of September 11th, there is absolutely no basis for believing that the Department of Justice has initiated any systematic policy to deprive detainees of their Constitutional rights.

Now if my colleagues would like to grant additional authorities to the President or the Attorney General, to aid in this war, and to save American lives, then I am all ears—as long as such powers are consistent with our Constitution.

Mr. Chairman, a week ago the airwaves were filled with alarmist rhetoric, charging that the Administration's actions had trampled the Constitution. During the course of these oversight hearings, as expert after expert has affirmed the constitutionality of these measures, I have noticed a change in the tone of the criticisms being leveled at the Administration.

The principal complaints we now hear are not that the measures are unconstitutional, but rather that the Justice Department has engaged in insufficient consultation with Congress, or with this Committee, before announcing them.

I have a couple of observations on this topic.

First, let's put this issue in perspective. We are at war. We are battling an enemy committed to the absolute, unconditional destruction of our society. The principal means that the enemy employs toward this goal is the killing of our civilians in their homes and their places of business. To the extent that this war is being waged on American soil, the Attorney General is one of our leaders in this war. I would hope that, in this time of crisis, we could all check our egos, and for the good of the country, look at the merits of these proposals rather than the manner in which they are packaged.

I'm not saying that we don't have a solemn obligation to assess the Department's actions to ensure that they are both effective and sufficiently protective of our civil liberties. But do any of the members of this Committee really believe that, in this time of crisis, the American people—those who live outside the Capital Beltway—really care whether the President, the Secretary of Defense, or the Attorney General took the time to pick up the telephone and call us prior to implementing these emergency measures? I implore my colleagues—let's keep our focus where it matters—on protecting our citizens.

Certainly, the American people are not interested in watching us quibble about whether we should provide more rights than the Constitution requires to the criminals and terrorists who are devoted to killing our people. They are interested in making sure we protect our country against terrorist attacks.

To those of you who say that our input is necessary to make sure that these measures are done right, I say: look around, look at the actions of the President, what do you think is happening?

President Bush could have proceeded as President Franklin D. Roosevelt did in 1942. He could have privately called the Secretary of Defense and had him start working, confidentially, on procedures for military tribunals. Three months from now, President Bush could have announced: we have captured some terrorists in Afghanistan, we will try them by military tribunal, and here are the procedures for the tribunals that have been established by the Secretary of Defense.

President Bush did not proceed that way. Instead, he—responsibly in my opinion—announced that he wanted military tribunals to be one option for trying unlawful combatants against this country. He publicly tasked the Secretary of Defense with drafting the procedures to be employed. Since then, this Committee, the Armed Services Committee, numerous law professors, and just about every pundit with a microphone or a typewriter have each expressed their opinion as to how those procedures should be written. That is consultation.

And to show how serious the President is about this process, he reserved to himself the ultimate designation as to who will be tried in military tribunals—unlike FDR, who delegated the decision to members of our armed forces.

Mr. Chairman, there is no real question remaining as to the constitutionality of the Administration's initiatives to date. I thank you for your dedication to oversight, and I am hopeful that today's hearing will proceed as a fair examination into the Administration's actions to stop terrorists and save American lives. I thank you for this hearing and I thank the Attorney General for his willingness to be present and for his responsiveness to our oversight requests.

Chairman LEAHY. General Ashcroft, again, I appreciate your comment yesterday when we were talking that you welcomed the opportunity to be here. I think it is important that you are here. I appreciate that you felt the same way. The floor is yours.

STATEMENT OF HON. JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES

Attorney General ASHCROFT. Thank you, Mr. Chairman, Senator Hatch, and members of this Committee. I am grateful for the opportunity of appearing to testify before you today. It is a pleasure to be back in the United States Senate, and I am grateful.

On the morning of September 11th, as the United States came under attack, I was in an airplane with several members of the Justice Department en route to Milwaukee, in the skies over the Great Lakes. By the time we could return to Washington, thou-

sands of people had been murdered at the World Trade Center; 189 more were dead at the Pentagon; 44 had died in the crash to the ground in Pennsylvania. From that moment, at the command of the President of the United States, I began to mobilize the resources of the Department of Justice toward one single, overarching, and overriding objective: to save innocent lives from further acts of terrorism.

America's campaign to save innocent lives from terrorists is now 87 days old. It has brought me back to this Committee to report to you in accordance with Congress' oversight role. I welcome this opportunity to clarify for you and for the American people how the Justice Department is working to protect American lives while preserving American liberties.

Since those first terrible hours of September the 11th, America has faced a choice that is as stark as the images that linger of that morning. One option is to call September 11th a fluke, to believe it could never happen again, and to live in a dream world that requires us to do nothing differently. The other option is to fight back, to summon all our strength and all of our resources and devote ourselves to better ways to identify, disrupt, and dismantle terrorist networks.

Under the leadership of President Bush, America has made the choice to fight terrorism—not just for ourselves but for all civilized people. Since September 11, through dozens of warnings to law enforcement, a deliberate campaign of terrorist disruption, tighter security around potential targets, and a preventative campaign of arrest and detention of lawbreakers, America has grown stronger—and safer—in the face of terrorism.

Thanks to the vigilance of law enforcement and the patience of the American people, we have not suffered another major terrorist attack. Still, we cannot—we must not—allow ourselves to grow complacent. The reasons are apparent to me each morning. My day begins with a review of the threats to Americans and to American interests that have been received in the previous 24 hours. If ever there were proof of the existence of evil in the world, it is in the pages of these reports. They are a chilling daily chronicle of hatred of Americans by fanatics who seek to extinguish freedom, enslave women, corrupt education, and to kill Americans wherever and whenever they can.

The terrorist enemy that threatens civilization today is unlike any we have ever known. It slaughters thousands of innocents—a crime of war and a crime against humanity. It seeks weapons of mass destruction and threatens their use against America. No one should doubt the intent, nor the depth, of its continuing, destructive hated.

Terrorist operatives infiltrate our communities—plotting, planning, waiting to kill again. They enjoy the benefits of our free society even as they commit themselves to our destruction. They exploit our openness—not randomly or haphazardly, but by deliberate, premeditated design.

This is a seized Al Qaeda training manual—a "how-to" guide for terrorists—that instructs enemy operatives in the art of killing in a free society. Prosecutors first made this manual public in the trial of the Al Qaeda terrorist who bombed U.S. embassies in Afri-

ca. We are posting several Al Qaeda lessons from this manual on our Web site today so that Americans can know about the enemy.

In this manual, Al Qaeda terrorists are now told how to use America's freedom as a weapon against us. They are instructed to use the benefits of a free press—newspapers, magazines, broadcasts—to stalk and to kill victims. They are instructed to exploit our judicial process for the success of their operations. Captured terrorists are taught to anticipate a series of questions from authorities and, in each response, to lie—to lie about who they are, to lie about what they are doing, to lie about who they know in order for the operation to achieve its objective. Imprisoned terrorists are instructed in this manual to concoct stories of torture and mistreatment at the hands of our officials. They are directed to take advantage of any contact with the outside world. This manual instructs them to, and I quote, "communicate with brothers outside prison and exchange information that may be helpful to them in their work. The importance of mastering the art of hiding messages is self-evident here."

Mr. Chairman and members of this Committee, we are at war with an enemy that abuses individual rights as it abuses jetliners. It abuses those rights to make weapons of them with which to kill Americans. We have responded by redefining the mission of the Department of Justice. Defending our Nation and its citizens against terrorist attacks is now our first and overriding priority.

We have launched the largest, most comprehensive criminal investigation in world history to identify the killers of the September 11th tragedy and to prevent further terrorist attacks. Four thousand FBI agents are engaged with other international counterparts in an unprecedented worldwide effort to detect, disrupt, and dismantle terrorist organizations.

We have created a national task force at the FBI to centralize control and information sharing in our investigation. This task force has investigated hundreds of thousands of leads, conducted over 500 searches, interviewed thousands of witnesses, and obtained numerous court-authorized surveillance orders. Our prosecutors and agents have collected information and evidence from countries throughout the Middle East and Europe.

Immediately following the September 11th attacks, the Bureau of Prisons acted swiftly to intensify security precautions in connection with Al Qaeda and other terrorist inmates, increasing perimeter security at a number of key facilities.

We have sought and received additional tools from Congress for which we are grateful. You have cited them, and they were important. Already we have begun to utilize many of these tools. Within hours of the passage of the USA PATRIOT Act, we made use of its provisions to begin enhanced information sharing between the law enforcement and intelligence communities. We have used the provisions allowing nationwide search warrants for e-mail and subpoenas for payment information. And we have used the Act to place those who access the Internet through cable companies on the same footing as other individuals.

Just yesterday, at my request, the State Department designated 39 entities as terrorist organizations pursuant to the USA PATRIOT Act.

We have waged a deliberate campaign of arrest and detention to remove suspected terrorists who violate the law from our streets. Currently, we have brought criminal charges against 110 individuals, of whom 60 are in Federal custody. The INS has detained 563 individuals on immigration violations, has in detention today.

We have investigated more than 250 incidents of retaliator violence and threats against Arab Americans, Muslim Americans, Sikh Americans, and South Asian Americans.

Since September the 11th, the Customs Service and Border Patrol have been at their highest state of alert. All vehicles and persons entering this country are subjected to the highest level of scrutiny. Working with the State Department, we have imposed new screening requirements on certain applicants for non-immigrant visas. At the direction of the President, we have created a Foreign Terrorist Tracking Task Force to ensure that we do everything we can to prevent terrorists from entering the country and to locate and remove those who are already here.

We have prosecuted to the fullest extent of the law individuals who waste precious law enforcement resources through anthrax hoaxes.

We have offered non-citizens willing to come forward with valuable information a chance to live in this country and one day to become citizens.

We have forged new cooperative agreements with Canada to protect our borders and the economic prosperity that our borders, and the appropriate maintenance of the flow of commerce across those borders, sustain.

We have embarked on a wartime reorganization of the Department of Justice. We are transferring resources and personnel to the field offices where citizens are served and protected. The INS is being restructured to better perform its service and border security responsibilities. Under Director Bob Mueller, the FBI is undergoing a historic reorganization to put the prevention of terrorism at the center of its law enforcement and national security efforts.

Outside Washington, we are forging new relationships of cooperation with State and local law enforcement.

We have created 93 Anti–Terrorism Task Forces across the country in each U.S. Attorney's district to integrate the communications and activities of State, local, and Federal law enforcement.

In all these ways and more, the Department of Justice has sought to prevent terrorism with reason, careful balance, and excruciating attention to detail. Some of our critics, I regret to say, have shown less affection for detail. Their bold declarations of so-called facts have quickly dissolved, upon inspection, into vague conjecture. Charges of kangaroo courts and shredding the Constitution give new meaning to the term "fog of war."

Since lives and liberties depend upon clarity, not obfuscation, and upon reason, not hyperbole, let me take this opportunity to be clear: Each action taken by the Department of Justice, as well as the war crimes commissions considered by the President and the Department of Defense, is carefully drawn to target a narrow class of individuals—terrorists. Our legal powers are targeted at terrorists. Our investigation is focused on terrorists. Our prevention strategy targets the terrorist threat.

Since 1983, the United States Government has defined terrorists as those who perpetrate premeditated, politically motivated violence against non-combatant targets. My message to America this morning, then, is this: If you fit this definition of a terrorist, fear the United States, for you will lose your liberty.

We need honest, reasoned debate, not fear-mongering. To those who pit Americans against immigrants and citizens against non-citizens, to those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends. They encourage people of good will to remain silent in the face of evil.

Our efforts have been crafted carefully to avoid infringing on constitutional rights while saving American lives. We have engaged in a deliberate campaign of arrest and detention of lawbreakers. All persons being detained have the right to contact their lawyers and their families. Our respect for their privacy and concern for saving lives motivates us not to publicize the names of those detained.

We have the authority to monitor the conversations of 16 of the 158,000 Federal inmates and their attorneys because we suspect these communications could facilitate acts of terrorism. Each such prisoner has been told in advance his conversations will be monitored. None of the information that is protected by attorney-client privilege may be used for prosecution. Information will only be used to stop impending terrorist acts and to save American lives.

We have asked a very limited number of individuals—visitors to our country holding passports from countries with active Al Qaeda operations—to speak voluntarily to law enforcement. We are forcing them to do nothing. We are merely asking them to do the right thing: to willingly disclose information they may have of terrorist threats to the lives and safety of all people in the United States.

Throughout all our activities since September the 11th, we have kept Congress informed of our continuing efforts to protect the American people. Beginning with a classified briefing by Director of the FBI Mueller and me on the very evening of September 11th, the Justice Department has briefed members of the House, the Senate, and their staffs on more than 100 occasions.

We have worked with Congress in the belief and the recognition that no single branch of Government alone can stop terrorism. We have consulted with members out of respect for the separation of powers that is the basis of our system of Government. However, Congress' power of oversight is not without limits. The Constitution specifically delegates to the President the authority to, and I quote, "take care that the laws are faithfully executed." And perhaps most importantly, the Constitution vests the President with the extraordinary and sole authority as Commander-in–Chief to lead our Nation in times of war.

Mr. Chairman and members of this Committee, not long ago I had the privilege of sitting where you now sit. I have the greatest reverence and respect for the constitutional responsibilities you shoulder. I will continue to consult with Congress so that you may fulfill your constitutional responsibilities. In some areas, however, I cannot and will not consult with you.

The advice I give to the President, whether in his role as Commander-in–Chief when at war or in any other capacity, is privileged and confidential. I cannot and will not divulge the contents, the context, or even the existence of such advice to anyone—including Congress—unless the President instructs me so to do. I cannot and will not divulge information, nor do I believe that anyone here would wish me to divulge information, that would damage the national security of the United States, the safety of its citizens, or our efforts to ensure the same in an ongoing investigation.

As Attorney General, it is my responsibility—at the direction of the President—to exercise those core executive powers the Constitution so designates. The law enforcement initiatives undertaken by the Department of Justice, those individuals we arrest, detain, or seek to interview, fall under these core executive powers. In addition, the President's authority to establish war crimes commissions arises out of his power as Commander-in–Chief. For centuries, Congress has recognized this authority, and the Supreme Court has never held that any Congress may limit it.

In accordance with over 200 years of historical and legal precedent, the executive branch is now exercising its core constitutional powers in the interest of saving the lives of Americans. I trust that Congress will respect the proper limits of executive branch consultation that I am duty-bound to uphold. I trust, as well, that Congress will respect this President's authority to wage war on terrorism and to defend our Nation and its citizens with all the power vested in him by the Constitution and entrusted to him by the American people.

I thank you for your willingness to allow me to complete this statement.

[The prepared statement of General Ashcroft follows.]

STATEMENT OF HON. JOHN ASHCROFT, ATTORNEY GENERAL, DEPARTMENT OF JUSTICE

Mr. Chairman, Senator Hatch, members of the Judiciary Committee, thank you for this opportunity to testify today. It is a pleasure to be back in the United States Senate.

On the morning of September 11, as the United States came under attack, I was in an airplane with several members of the Justice Department en route to Milwaukee, in the skies over the Great Lakes. By the time we could return to Washington, thousands of people had been murdered at the World Trade Center. 189 were dead at the Pentagon. Forty-four had crashed to the ground in Pennsylvania. From that moment, at the command of the President of the United States, I began to mobilize the resources of the Department of Justice toward one single, over-arching and over-riding objective: to save innocent lives from further acts of terrorism.

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tice Department has briefed members of the House, the Senate and their staffs on more than 100 occasions.

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In accordance with over two hundred years of historical and legal precedent, the executive branch is now exercising its core Constitutional powers in the interest of saving the lives of Americans. I trust that Congress will respect the proper limits of Executive Branch consultation that I am duty-bound to uphold. I trust, as well, that Congress will respect this President's authority to wage war on terrorism and defend our nation and its citizens with all the power vested in him by the Constitution and entrusted to him by the American people.

Thank you.

Chairman LEAHY. No, I think it is important you do, and I again appreciate you doing that.

Senator Thurmond has asked to make a short statement of support, and with no objection from the other members to the senior member of this Committee, I would yield to Senator Thurmond.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Mr. Chairman, I am pleased that you are holding this important hearing on the President's law enforcement initiatives in the war against terrorism. This Committee has an important oversight role, and we must ensure that the actions of the Government are in accordance with the Constitution.

Mr. Attorney General, thank you for taking time from your busy schedule to be here today. You have done an excellent job of leading the Department of Justice during these difficult times, and I thank you for your faithful service to our Nation.

I believe that the criticism directed towards the administration is unfounded. The duty to prevent future attacks is a great responsibility. The President has responded with actions that will protect American lives while preserving civil liberties.

Mr. Chairman, I believe that the policies of the administration are reasonable law enforcement tools and are constitutional. The efforts of the President and the Attorney General will further our

war against terrorism. I look forward to hearing the testimony of the Attorney General today.

Thank you very much.

[The prepared statement of Senator Thurmond follows:]

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Mr. Attorney General, thank you for taking time from your busy schedule to be here today. You have done an excellent job of leading the Department of Justice during these difficult times, and I thank you for your faithful service to our Nation.

I believe that the criticism directed towards the Administration is unfounded. The duty to prevent future attacks is a great responsibility. The President has responded with actions that will protect American lives while preserving civil liberties.

The President and the Attorney General are employing a variety of tools in the fight against terrorism, such as the use of military commissions and the current detention of suspected terrorists. I believe that these policies are reasonable law enforcement tools that will further our efforts to rid the world of terrorism.

President Bush's military order providing for the trial of foreign terrorists by military commissions has been criticized as an affront to our Nation's tradition of impartial justice. I disagree with this criticism. Not only is the President's order historically based, but it is in accordance with current law. Military commissions are rooted in American history, from the trial of deserters in the Mexican-American War to the trial of President Lincoln's assassins. The Supreme Court has repeatedly upheld the use of military commissions. In *Ex Parte Quirin*, 317 U.S. 1 (1942), the Supreme Court unanimously upheld President Roosevelt's use of a military commission to try Nazi saboteurs during World War II. The Court also approved the use of a military commission to try the Japanese commander in the Phillippines for violations of the laws of war. *In re Yamashita*, 327 U.S. 1 (1946).

In addition to historical and legal precedent, Congress has approved, as part of the Code of Military Justice, the use of military commissions under the law of war. 10 U.S.C. δ? 821, 836. Some critics have suggested that the President does not have authority under the Code of Military Justice because we are not officially in a state of war. However, the murderers who flew commercial airliners into the World Trade Center towers and the Pentagon perpetrated nothing less than acts of war. The unimaginable destruction in New York and the damage done to the symbol of American military power are sobering reminders of the acts of war that were committed on our soil.

At this moment, American forces are engaged in a real war against terrorism. It is a unique war because al Qaida is a loosely organized group spread throughout many different countries. Because the enemy is a shadowy network of international terrorists, it is unreasonable to insist that an official declaration of war be made.

Congress also recently acknowledged, in authorizing the President's use of force against those responsible for the terrorist attacks, that the "President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Pub. L. No. 107–40, 115 Stat. 224, (2001). Because the President has clearly determined that the use of military commissions would serve to prevent future terrorist attacks, he is acting according to Congressionally recognized powers under the Constitution.

It is important to stress that the President's military order invokes his powers as Commander-in-Chief, which is derived from the Constitution and is not dependent upon statutory authority. The President's powers and responsibilities in defending our Country are separate and distinct from his authority to enforce domestic laws. The ability to try enemy war criminals in an efficient manner is an important component of our war on terrorism. It is just one part of the President's war arsenal. To fight the war effectively, we must demonstrate that the barbaric actions of al Qaida will not go unpunished, and we must disrupt their ability to operate by bringing their members to trial.

Military commissions are preferable to trial in civilian courts because of the unique conditions of war. For example, these commissions would allow for the more flexible use of classified information. If such information were disclosed in a civilian court, intelligence operations could be seriously endangered. Critics have pointed to

the fact that Federal courts are currently able to handle classified information under the Classified Information Procedures Act. 18 U.S.C. app. 3. However, the Act provides for the disclosure of classified information under certain circumstances, and defense lawyers can use this as a bargaining chip to frustrate the prosecution. While this system may be acceptable in domestic law enforcement, it presents serious roadblocks to the effective use of trials as a national security tool.

Military tribunals would also better protect witnesses and other trial participants. Additionally, more flexible rules would allow for the use of evidence collected during war. Rules governing the gathering of evidence for use in trial courts in the United States do not necessarily apply to evidence gathered on the battlefield.

I would also like to point out that the President, in issuing this order, does not intend to convene commissions that render unfair judgments. On the contrary, the order specifies that a "full and fair" trial must be given. If used appropriately, military commissions will be constitutional, lawful, and effective tools in the war against terror. It is in fact a testament to our sense of fairness that we are providing trials for an enemy that has a sworn duty to destroy the American way of life.

The detention policy of the Department of Justice has also been heavily criticized. I believe that the detention policy is not only necessary for our national security, but is also a legitimate use of power under the Constitution. Two aspects of the policy have been highly criticized: the detentions themselves and the lack of public information released on detainees. We have heard the stories of detainees that would, if true, cause us concern. We should take these stories seriously, and we must ensure that all detainees have access to lawyers and are treated properly. However, we must not allow isolated incidents to lead us to the conclusion that the government is shamelessly violating the civil rights of detainees.

Congress and the Administration have worked together to fashion a sensible policy on the detention of those charged with immigration violations or criminal laws. Once a person is taken into custody, the USA PATRIOT Act provides that the Attorney General may certify that he has reasonable grounds to believe that someone is a terrorist or security threat. The Attorney General then has seven days to charge the alien with an immigration or criminal violation. Upon the expiration of seven days, he must release the alien or charge him with a violation of law. This procedure provides for review in Federal court.

The Attorney General is using material witness warrants to hold all other detainees. Some critics question the practice of holding people as material witnesses, but the government must balance its need for crucial information with the liberty interests of detainees. Furthermore, current law allows for the detention of material witnesses for a "reasonable period of time" under 18 U.S.C. δ 3144. It is important to remember that the government's power of detention is not unchecked. Detainees have recourse to review by Federal courts.

As with the use of military commissions, Congress in this instance should give deference to the President's powers as Commander-in-Chief. The detention of suspects and witnesses serves not only law enforcement objectives but national security objectives as well. We are involved in a war against terrorism, and we should be sensitive to the national security concerns regarding the detentions. In fact, the Supreme Court has acknowledged that there may be circumstances where national security concerns call for deference to the executive branch's use of detentions. *Zadvydas* v. *Davis*, 121 S. Ct. 2491 (2001).

Some critics have also raised concerns about the Department of Justice's failure to release extensive details regarding detainees. As former Attorney General Barr indicated in his testimony before this committee last week, the Supreme Court has never interpreted the Constitution to require that all details of a law enforcement investigation be disclosed. For example, grand jury proceedings are kept secret so that the integrity of a criminal investigation is not tarnished. And even more relevant, affidavits in support of arrest, material witness warrants, and indictments are commonly filed with the court under seal if their disclosure would compromise an investigation.

Under current circumstances, detailed information about the detainees could provide crucial information to the cells of the al Qaida terrorist network. If terrorist cells operating in this Country were able to determine how their movements were being detected, they would adjust their operations in order to avoid the detection. We must remember that we are at war, and the United States is still vulnerable to terrorist attacks. The United States government has a legitimate need for secrecy in its effort to disrupt the functioning of al Qaida.

There is a misconception that the identities of all charged persons is secret. This is not so. According to Assistant Attorney General Michael Chertoff's testimony before this committee last week, the identity of every person arrested on a criminal

charge is public information. Additionally, the government is not preventing a detained individual from identifying himself. There is nothing to indicate that detainees are being held in secret.

By not providing a list of detainees to the public, DOJ is actually protecting the privacy of the detainees. Because the detention itself is not secret, an individual detainee would not benefit from the publication of his name. In fact, a list could only serve to invade the privacy interests of the detainees by making their detention available to anyone. If such a list were published, there would surely be criticism that this list served no purpose but to smear the reputations of people caught up in the investigation.

Mr. Chairman, I am pleased that we are carefully considering the President's efforts to fight terrorism. It is important that we fully discuss these issues. I think that the Administration has done a good job of developing ways to bring terrorists to justice, and I find them to be reasonable tools in the fight to protect the American people. I hope that my colleagues will join me in supporting the Administration's efforts to combat terror.

Chairman LEAHY. Thank you.

General you have stated that the authority for the Military Order arises out of the President's position as Commander-in–Chief, and the Supreme Court has never held that the Congress may limit it. But the fact is that the Supreme Court has never upheld the President's authorities extending so far as to allow him to unilaterally set up military tribunals absent congressional authority.

So basically this is a calculated risk that the Supreme Court would uphold something it has not upheld before. I mention that because I look at *Ex Parte Milligan*, for example, which says that military tribunals for non-military personnel cannot be justified on the mandate of the President because he is controlled by law, and his sphere of duty is to execute, not to make the laws, and there is no unwritten criminal code with resort to be had as a source of jurisdiction, thus raising the very highly questionable—or saying it is highly questionable that he could do this absent congressional authority.

Now, there is interest in the Congress in defining what a military tribunal could be, the President, what would be his authority. The administration officials have stated the planned scope of military tribunals was far narrower than had been suggested by the original Order. More recent assurances that it would be applied sparingly have been very helpful. So I wanted to see how the administration would use the Military Order.

First, as written, the Military Order applies to non-citizens of the United States. That would cover about 20 million people here in the United States legally today. But the President's Counsel now says that military commissions would not be held in the United States but, rather, close to where our forces may be fighting. And then an anonymous administration official said there is no plan to use military commissions in this country but only for those caught in battlefield operations.

Secondly, while the Military Order is essentially silent on the procedural safeguards that would be provided to military commission trials, the White House Counsel has now explained that military commissions would be conducted like courts martial.

Third, nothing in the Military Order would prevent commission trials from being conducted in secret, which was done, for example, with the eight Nazi saboteurs after World War II, most often cited by the administration.

But now Mr. Gonzales says that trials before military commissions would be as open as possible. Mr. Chertoff said something similar.

Now, this is in sharp contrast to the statements before our hearings that quote from the administration, "proceedings promise to be swift and largely secret," with one military officer saying that "the release of information might be limited to the various facts like the defendant's name."

Finally, the Order expressly states that the accused in military commissions shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, in any court. But now the administration says this is not an effort to suspend habeas corpus.

So now, with the explanations that have come out subsequently, I understand first that the administration does not intend to use military commissions to try people arrested in the United States; secondly, the military commissions will follow the rules of procedural fairness used for trying U.S. military personnel; and, thirdly, the judgments of the military commissions will be subject to judicial review.

Is that your understanding also?

Attorney General ASHCROFT. Well, you have given me a lot to think about with that question. You have spoken a number of things that I would like to comment on.

Chairman LEAHY. Sure.

Attorney General ASHCROFT. First of all, about the authority of the President of the United States to wage war under the Constitution and to address war crimes in the process of waging war, I believe that is clearly the power of the President and his power to undertake that unilaterally.

The Supreme Court did address in the *Quirin* case 60 years ago the issue of war crimes commissions, and in that case, it cited the authority of the congressional declaration of war as language recognizing the President's power to create war crimes commissions. But I don't believe that the Court indicates that—or predicates its assumption and accordance of the President that power upon that particular authority.

Nevertheless, the identical authority found in the article of declaration of war in the Second World War is now the authority which is listed in the Uniform Code of Military Justice at 10 U.S.C. Section 821. And it is my position that the President has an inherent authority and power to conduct war and to prosecute war crimes absent that indication in the Code of Military Justice. But for those who would disagree with that, the identical provision authority that was existent and was present in the *Quirin* situation is now present in the U.S. Code of Military Justice.

Chairman LEAHY. But, General, if I might just for a moment, the *Quirin* case did not address the question of whether the President could set up a military tribunal absent congressional authority. They did not address that question, and the previous *Ex Parte Milligan* apparently did.

But my question still goes to this: Aside from—and understand there are members on both sides of the aisle who are willing to work with you to try to establish an authority, a congressional au-

thority for military tribunals, but in a certain framework. But with all the changes and switchbacks and everything else and the statements that have come from different parts of the administration, my question is still basically: Does the administration—whether these are legal or not, is my understanding correct that the administration, one, does not intend to use military commissions to try people arrested in the United States; two, the military commissions would follow the rules of procedural fairness used for trying U.S. military personnel; and, three, the judgments of the military commissions will be subject to judicial review? Are those three points—is that understanding correct? Is that your understanding?

Attorney General ASHCROFT. I cannot say that I have that understanding in the way that you have it. I do not know that the United States would forfeit the right to try in a military commission an alien terrorist who was apprehended on his way into the United States from a submarine or from a ship, carrying explosives or otherwise seeking to commandeer an American asset to explode or otherwise commit acts of terror in the United States.

Chairman LEAHY. But not my question, General.

Attorney General ASHCROFT. Your question asked about people arrested in the United States. It would be possible for that person to be so arrested. I think—I don't want—let me just indicate this, two points.

One, I want to mention that *Ex Parte Milligan* was limited in the *Quirin* case, limited to its facts, and the *Quirin* case upheld the use of commissions in the United States against enemy belligerents.

And, number two, the President's Order, which I believe to be constitutional, assigned to the Department of Defense the development of a framework that would answer many of these questions, and it is premature to try and anticipate exactly what that framework would be, in my judgment.

I stand ready, as provided in the President's Military Order establishing commissions to try war crimes, to assist the Department of Defense. And, frankly, I would stand ready to convey, if you wanted me to be the conduit, to convey suggestions from the Congress to the Department of Defense, although you all have complete access to the Department of Defense for the achievement of those purposes.

Chairman LEAHY. Just so members of the Committee will understand, originally—and I am advised that we are going to have three votes beginning at 11:00 on three Federal judges, one being a court of appeals judge, the other two being district judges. I have asked—I have sent word to the floor and asked if they might do by voice vote the two district judges because they were both ones that we voted unanimously to pass out of the Judiciary Committee. The Court of Appeals would be then done by roll call, and if that procedure is followed, which I understand they will, we would not have that first vote until 11:40.

With that, I yield to Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman.

General Ashcroft, some have questioned the continuing validity of Ex Parte *Quirin*, that case's authority for further Presidential orders establishing military commissions. On the other hand, that case was unanimously decided by the eight Justices who heard it.

Further, the Supreme Court reaffirmed *Quirin* just 4 years later in *In Re Yamashita*, and in both cases, they followed the historical practice since our country's founding.

Now, given the case law, the historical practice, and Section 821 of Title 10 of the United States Code, which continues to expressly recognize military commissions, passed by Congress, is it your view that the current United States Code is sufficient legal basis for the President's Military Order?

Attorney General ASHCROFT. It is my view that the United States Code of Military Justice as enacted by the Congress provides the same kind of support it provided or the articles provided relied upon in the *Quirin* case, so that if one were to come to the conclusion that the President is absent the power without congressional authorization, then one clearly has a Supreme Court opinion that indicates that such power is existent in statute.

I do not have the view, however, that the President needed that in order to have such commissions, and I don't believe that the *Quirin* case indicates that either. So that we come to a place of perhaps a disagreement without a difference. In either event, the President has the authority to constitute military commissions for the trial of crimes of war, and I think that is very important. These commissions by the Order will be full and fair proceedings. The Department of Defense has been asked to construct a framework for conducting full and fair proceedings, and I believe—

Senator HATCH. And the Order suggests that all other agencies of Government cooperate with the Department of Justice. So I presume your agency will cooperate with the Department—

Attorney General ASHCROFT. We would be pleased to render any assistance to the Department of Defense when they—

Senator HATCH. Department of Defense, yes.

Attorney General ASHCROFT. —if they were to call upon us, and, frankly, it is expected that we would be standing ready for that responsibility.

Senator HATCH. The Executive Office of United States Attorneys reports that for fiscal year 2001 the conviction rate of civilians tried on criminal charges in Article III courts around the country is 91 percent. In the Southern District of New York, the conviction rate is 97.2 percent. Given that the conviction rate of the military commissions used after World War II was approximately 85 percent, do you think there is any basis for prejudging military commissions as unfair to defendants, or somehow that they lack the constitutional safeguards or would lack the constitutional safeguards, although admittedly, not all of the additional rights that some of the extreme interpreters would wish to grant to criminals, even terrorist defendants?

Attorney General ASHCROFT. Well, it is pretty clear that military commissions for the litigation of war crimes, international commissions to litigate war crimes, are not uncommon. As a matter of fact, the United States Senate has indicated that it supports them where Bosnians were abused as a result of war crimes. We have supported the use of military or war crimes commissions to litigate those wrongs about war crimes committed by the perpetrators of those horrific acts. Now, whether we are talking about Rwanda in Central Africa or Bosnia in Central Europe, we are looking histori-

cally to Nuremberg and the trials there and the additional war crimes tribunals after there, these have been full and fair proceedings. They have been understood by the Congress of the United States to have been full and fair and have been supported by the Congress. As recently as two years ago, the Congress of the United States voted 90 to nothing—pardon me—the Senate of the United States voted 90 to nothing that Milosevic should be tried in a war crimes commission. So this is not an unusual way to resolve war crimes committed in time of war.

Senator HATCH. General, some recent press reports have suggested that the Department has forced the FBI to abandon its long-term investigations and its historic approach to investigating counter-terrorism. I would like you to comment on this and explain what change or changes if any the FBI has made to its mission.

And on this issue, I would also like to read excerpts from a letter to the "Washington Post" from a former FBI agent that intends to set some of these recent misrepresentations straight. This letter says: "In regard to the article entitled 'Ex FBI Officials Criticize Tactics on Terrorism' by Jim McGee, printed in your newspaper November 28, 2001," he offers the following comments. And let me just read a few, and I will put the letter in the record.

"The article quotes me out of context." Now, I had better get the name here. The name is Oliver B. Revell, "Buck" Revell. "The article quotes me out of context, and therefore conveys an inaccurate portrayal of my views on the current FBI and Justice Department efforts in the aftermath of the September 11th terrorist attacks. First, I believe that the FBI associated law enforcement agencies in the Justice Department are doing a very good job under difficult circumstances. Two, the terrorist attacks and subsequent anthrax incidents have presented our law enforcement agencies with the most difficult problem that they have had to face in their entire history."

And he goes on through the rest of this letter. So, again, could you comment on this and whether or not the FBI and the Justice Department are using the appropriate investigatorial techniques that have been long used, and/or whether you have to use those plus additional ones to be able to get the job done in protecting the American people?

Well, can I ask unanimous consent that that letter go in the record?

Chairman LEAHY. Of course.

Attorney General ASHCROFT. Very frankly, we have set as a priority the prevention of additional terrorist attacks, and we do not ever want anything like September 11th again to visit the United States on our own soil with innocent victims. And we hope to improve our performance regularly by making whatever changes we can to upgrade our ability to detect and to prevent terrorism, to disrupt it and to make it difficult, in fact, impossible. So we will do what we can to learn from the past, and we will implement new strategies to protect America in the future. We did not have the kind of protection we needed on September 11th. So for us to continue and to act as if no changes would be appropriate may not be in our best interest.

It is with that in mind that we will use whatever new techniques we can develop, and we will try and be open to suggestions from the American people, from the Congress, and to those who have served the Bureau in the past, and those who now serve the Bureau. Our objective is to secure American liberty and to protect American lives.

Senator HATCH. Thank you, Mr. Attorney General.

Chairman LEAHY. Thank you. I have a number of other items also for the record, and without objection, they will be submitted for the record.

Senator Kennedy.

STATMENT OF HON. EDWARD KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you very much. Thank you.

General like Senator Leahy, I am profoundly concerned about the administration's broad plan on the military tribunals, and the plan raises extremely serious questions about fundamental civil liberties, questions that have not yet been satisfactorily answered by the administration's officials defending it. History has shown that the military courts have been effective, but they have also shown that they have been abused, and this time we want to try and get it right. And it is of profound importance to the country that we defend our ideals and our security.

President Bush's Executive Order is a broad proposal that has enormous potential for abuse. There are few if any due process rights granted to defendants and trials may occur in complete secrecy. So constitutional experts have told us, however, that we can implement fair military trials that ensure fundamental civil liberties. We know it can be done. We know it should be done, but we have not heard that it will be done.

So I am interested in what steps are being taken to give the meaning to the principle, which you have referenced here yourself this morning, of full and fair military tribunals and how the administration will work with the Congress to protect the constitutional ideals, and when will we hear about this? What can you tell us about the scope?

Attorney General ASHCROFT. Well, I am pleased to say that the President's Order requires that there be full and fair proceedings. Those are the kinds of descriptive terms that have governed the development of war crimes commissions and that govern the proceedings of war crimes commissions that operate today. The President has ordered—and it is a Military Order to the Department of Defense. It is out of his responsibility as Commander-in–Chief of a nation in conflict that he ordered that the Defense Department develop a framework that would provide full and fair proceedings. There are, obviously, some hints in the President's Order that indicate a level of fairness that I think is clearly understood. He has indicated that the hearings should be closed when it is in the national interest to close them, and I think the administration has made clear its desire not to close hearings when they are not in the national interest.

It is to be noted that every judicial or adjudicatory process that I know of has some provision for closing hearings to protect the

system and to protect the integrity of the operation. Our courts provide for sealed orders. They sometimes even have gag orders. They have, in certain areas, plans to protect the identity of witnesses. Similarly, the ongoing war crimes efforts in the Hague that relate to war crimes have those kinds of similar procedures. I believe that the Department of Defense, which has over 3,000 active full-time working lawyers, and which conducts a wide variety of military operations that relate to the adjudication of charges, has the capacity to develop a plan and framework that will work effectively, and I expect it to do so, will stand ready to assist them in doing so.

Senator KENNEDY. Can you give us some idea when that will be announced, and can you be any more precise in terms of the scope, or is that the way you want to leave it?

Attorney General ASHCROFT. Well, Senator, I cannot, and I just do not have specific information about the timeline. I would mention that the time of this setting is one where the President has sought to create a tool to protect American lives through his conduct of this war, and to create it in advance, and to make it known to the Congress and to the people of this country, well in advance of any demand for its services. In the Roosevelt Administration 60 years ago we did not have the luxury of that kind of commentary, and I am sure contributions made by the Congress and those in the culture would be welcomed by the Secretary of Defense.

Senator KENNEDY. I would have liked to have gotten into the questions on the administration's automatic stays of immigration judges' release orders and the attorney/client communications, but let me, in the time that I do have left, just get into one area. And that is in reference to the "New York Times" story this morning. Last month a manual entitled "How Can I Train Myself for Jihad"—it is a manual very similar to the one that you mentioned here—was found in a terrorist safe house in Kabul. It states in other countries, and in some states of the U.S., it is perfectly legal for members of the public to own certain types of firearms. If you live in such a country and obtain an assault weapon legally, prefer AK–47 or variations, you can learn how to use it properly and go and practice in the areas allowed for training. In September a Federal Court convicted a number of members of the terrorist group Hezbollah on 7 counts of weapon charges and conspiracy to ship weapons and ammunition to Lebanon. He had purchased many of the weapons at gun shows in Michigan. We have been trying to deal with this problem for many months. A potential terrorist can walk into a gun show, walk out with a gun, no questions asked.

The report in today's "New York Times", that "officials at the Department of Justice refused to let the FBI examine its background checklist to determine whether any of the 1,200 people detailed following the September 11th attacks recently bought guns."

Why is the Department handcuffing the FBI in its effort to investigate gun purchases by suspected terrorists?

Attorney General ASHCROFT. Than you, Senator, for that inquiry. The answer is simple. The law which provided for the development of the NIC, the National Instant Check system indicates that the only permissible use for the National Instant Check system is to audit the maintenance of that system, and the Department of Jus-

tice is committed to following the law in that respect. And when the—

Senator KENNEDY. Do you think it ought to be changed?

Attorney General ASHCROFT. When the request first came, obviously, the instinct of the FBI was to use the information to see. When they were advised by those who monitor whether or not we are following the congressional direction, we stopped, and I believe we did the right thing in observing what the law of the United States compels us to observe because the list has—

Senator KENNEDY. Do you think it ought to be changed in that provision? The FBI obviously wants that in order to try and deal with the problems of terrorism. Do you support it?

Attorney General ASHCROFT. I will not comment on specific legislation in the hypothetical.

Senator KENNEDY. Would you submit legislation to do what the FBI wants to have done; would you work with the FBI and submit legislation to deal with this issue?

Attorney General ASHCROFT. I will be happy to consider any legislation that you would propose.

Senator KENNEDY. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Kennedy.

And, Senator Grassley?

Senator GRASSLEY. Thank you, Mr. Chairman, and welcome to our former colleague.

In the *Quirin* case the Supreme Court held that the Nazi spies were defined as unlawful belligerents. As such, the Court held that they were subject to the laws of war with trial by military tribunal. By the same token, would a member of al Qaeda be classified then as an unlawful belligerent?

Attorney General ASHCROFT. *Quirin* demonstrates the fact that there is what is called habeas corpus review, even of military commissions, and this is this question, but the Court clearly, using the language of the Roosevelt Administration, to bring the war crimes commission into effect there, said that it would exercise its habeas corpus jurisdiction to decide whether or not the commission was constitutional, and secondly, whether the belligerents were actually eligible for trial under the commission.

We would anticipate that the same kind of review by the United States Supreme Court, which had been exercised with virtually identical language in the Order in *Quirin* would be exercised by the Supreme Court in the order that has been the Military Order for war crimes commissions by President Bush.

Senator GRASSLEY. Well, then al Qaeda members are, quote "unlawful belligerents", unquote?

Attorney General ASHCROFT. Well, the order indicates that those to be tried under the order have to have committed war crimes, and I believe that is the test as to whether or not there is an adjudication of someone's case by the war crimes commission. And members of al Qaeda are unlawful belligerents under the law of war. The laws of war are different than the criminal laws of our culture. They exist outside the criminal codes, but there are offenses that are very clear. For instance, the targeting of innocent civilians as targets for destruction, I mean, that is very clear. The World Trade Center, not a military target, not part of the command

and control of a military unit. The taking of hostages and killing of innocent hostages is a war crime that violates the law of war. That certainly was done when innocent individuals were taken hostage aboard airplanes and then brutally murdered when those were crashed. So the al Qaeda are unlawful belligerents under the law of war. They are not armed forces of any state. They do not bear arms openly as normal combatants do, but they are unlawful combatants because they secret themselves and because they conduct acts which are violations of the law of war.

Senator GRASSLEY. Would the procedural rules that the Secretary of Defense will be drafting, would it be your advice to him that they would be less or more than those rights afforded members of our owned armed forces in military tribunals?

Attorney General ASHCROFT. My view is that the President has ordered that there be full and fair proceedings, that they be open when possible basically, and closed when necessary to protect our interest. It is inconceivable to me that the President would intend that those who seek to destroy the American system of liberty and rights, would have greater rights than those who are seeking to defend those rights in our military.

Senator GRASSLEY. The purpose of my question is—am I not right on this or maybe my colleagues can correct me—but there has been some justification for the President's action besides the constitutional power of Commander-in–Chief that Congress has given the President, some authority under the Military Code of Justice in regard to this. So my question comes from that comparison, and that point of the President's power.

Attorney General ASHCROFT. Well, it is my view that the Congress has recognized the power inherent in the President, both in the Articles of War that supported the Roosevelt Administration's establishment of the commission in the 1940s, and the Bush Administration's establishment of the commission most recently. I might add that these Presidents are not alone. From George Washington to Abraham Lincoln, to George Bush and to Franklin Delano Roosevelt, Presidents have undertaken these responsibilities, and they have done so both with and without the specific language of the Uniform Code of Military Justice found in the law today.

Senator GRASSLEY. Could you provide us with more details on the constitutional statutory authority supporting the Department of Justice's decision to monitor attorney/client communications? The new regulations indicate that procedural safeguards will be implemented to prevent abuse of monitors of confidential information. Could you say in detail the specific safeguards as well as how the Department plans to implement the new regulation? And also, is the new regulation different from current and past Justice Department policies and practices regarding the monitoring of attorney/client communications?

Attorney General ASHCROFT. I am very pleased to address this topic of attorney/client communications. The Supreme Court has defined the rights that are involved in this setting in a case known as Weatherford v. Bursey, a 1977 case of the United States Supreme Court. In that case the monitoring was unannounced. In other words, it was genuinely eavesdropping. The word "eavesdropping" does not define what the United States Justice Depart-

ment proposes doing in certain cases now. Eavesdropping would be unnoticed, no information given to the inmate or to the lawyer. The Department's first rule would be that you first give notice to the individual and to his lawyer. Secondly, this is done by individuals who are forbidden to have association with or communication with any prosecutors. Thirdly, no information can be used at all that flows from the understanding or the auditing of these conversations without first being approved by a Federal Judge, unless, fourthly, it is information which could help avert a terrorist attack.

Now, let me go briefly for the reason for this. First of all, there are only 16 people out of the 158,000 people in the Federal Prison System to whom this order now applies. They are the only 16 people in special administrative procedures. And we are simply, for terrorists, who would seek to follow the al Qaeda manual and assist those brothers in their operation on the outside, and continuing to perpetrate acts through hidden messages and other signals they send through their attorneys, we simply are not going to allow that to happen.

Now, I believe that the safeguards we have crafted fully satisfy well beyond the kind of conditions which were sanctioned or at least accepted by the Court in the Weatherford case, and it is not the intention of this Justice Department to either disrupt the effective communication between lawyers and the accused, but it is neither our willingness to allow individuals to continue terrorist activities or other acts which would harm the American public by using their lawyers and those conversations to continue or to extent acts of terrorism or violence against the American people.

Senator GRASSLEY. Mr. Chairman, I have a statement I want to put in the record, and then I have two questions I want to submit for answer in writing, and both of them refer to an incomplete letter I have received from you, plus an answer from the FBI that has not been responded to yet.

[The prepared statement of Senator Grassley follows:]

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Thank you, Mr. Chairman. I'd also like to welcome the Attorney General and to thank him for his testimony today. This series of hearings is designed to explore the constitutional and legal authorities behind the recent Administration's policies involving military tribunals, alien detention, and the monitoring of attorney-client communications. Congress has oversight responsibility of these policies, and the public has the right to know what these policies are and whether they comply with the law of the land. I think we'd all agree that there needs to be a proper balance between the real and pressing need for enhanced national security after the September 11th attacks and the protection of our civil liberties.

President Lincoln reminded us during the Civil War that the security of the nation is the basis upon which the exercise of all other rights depends. The Constitution, by design, appreciates and accommodates this principle. Article II vests in the President the broad responsibilities and powers of the Commander-in-Chief of the armed forces, and the chief law enforcer through the Office of the Attorney General. At the same time, the broad legislative powers of the Congress in Article I and the. judicial powers of review in Article III of the- Constitution .provide the kind of checks and balances that are the hallmark of our government.

I realize that these are basic principles that everyone understands, but they are principles that we need to be reminded of, particularly when circumstances such as the current war against terrorism test the strength of our Constitution.

Earlier this week, we heard testimony by the Justice Department, some prominent legal experts, as well as individuals who were affected directly by these new policies. As we reviewed the President's executive order and the Administration's

policies, it's clear that the President has the legal authority to do what he's done so far. The Supreme Court has upheld the use of military tribunals as constitutional, and these tribunals have been used many times before in a fair manner. Furthermore, I think it is a fair point that we should not be providing more and special protections to non-citizens as compared to our own military people who are subject to military proceedings. The President's executive order on military tribunals is specifically limited as to whom it would apply. We should allow President Bush to have the option of military commissions as a tool in the fight against terrorism. And while I would have liked to have had more information on the Administration's policies as they were crafting them, President Bush did not need the express consent of Congress to take the actions that he did. We're at war, and our President needs to be able to act quickly.

At this time we must be prepared to ask hard questions. In fact, I understand and appreciate the concerns expressed by my colleagues and others. These trying times don't justify violations of the Constitution or our laws. I still want to hear more about the Administration's policies regarding the treatment of detainees and the monitoring of attorney-client communications. But it appears that the actions by the Administration are based on strong legal authority.

As I've said, it's the responsibility of the Congress and this Committee to ask questions about the appropriateness of these policies, and we need to take this responsibility seriously. So I'm glad that Attorney General Ashcroft is here today to give us more insights into the Administration's policies and to provide us with assurances that they are in compliance with the Constitution and our laws.

As an aside, one of the key voices absent from these hearings is that of the thousands of law enforcement officials deployed across the country immediately after the attacks of September 11th, the agents in the field trying their level best to protect the American public. I think that these brave men and women are doing everything they can to prevent any other heinous terrorist attacks, and we need to recognize that they have a difficult job to do. I fully agree with a statement made during one of these hearings - we're dealing with a "completely different ball game."

We need to remind ourselves of the extremely complicated context in which our law enforcement officials are operating. What we have is a well-financed, organized and committed group that has explicitly declared war on the United States with the financial support of various business and non-profit organizations that have been able to penetrate and operate in this country. In addition, this group is waging that war not through conventional battlefield means, but through attacks on American institutions and people wherever they exist. The enemy is here among us now, the enemy is hiding on our soil waiting to strike. The goal of these terrorists is not just to destroy our way of life, their goal is to take our lives. Thus, it is not only appropriate but necessary that our law enforcement officers perform their job aggressively, albeit fairly and consistent with the Constitution.and the laws. of the nation.

Mr. Chairman, thank you for holding this hearing.

Chairman LEAHY. Thank you, Senator Grassley, and the record will be open for statements of any senators who wish. And of course, the Attorney General has been around here long enough to know there may well be follow-up questions to be submitted to him, and I would—

Attorney General ASHCROFT. Indeed I do.

Chairman LEAHY. And I would expect your help and cooperation in getting those answered, as you always have.

Attorney General ASHCROFT. I will do my best.

Chairman LEAHY. Senator Kohl.

Senator KOHL. Thank you, Mr. Chairman.

Mr. Attorney General, since the events of September 11th, the President and the Justice Department have commanded the trust and the support of the American people and the Congress more than ever as they prosecute the war on terrorism, and this is as it should be. With that trust, however, comes, as you know, responsibility. That responsibility is to make sure that the American people understand and trust the actions that the government is taking, especially when it comes to issues like civil liberties and the rule of law. It causes a great deal of consternation in our country

when we hear about Americans abroad who are subject to foreign or military courts. We are outraged when we hear that the Americans on trial may not get an attorney, an impartial jury, or even a fair chance to defend themselves. So we should never open our country to that kind of criticism from abroad. I believe that no one should ever doubt that American justice holds the high moral ground, and I am sure that you agree.

Mr. Attorney General, it is with that regard with respect to military tribunals, we, and I believe that you need to do a little more, and we would like to help you with that effort. No one believes that defendants should receive all of the protections afforded in normal proceedings. For example, I do not see a need for the defendant to get his Miranda warnings or a jury of his peers, but there are five basic principles that I believe should be respected, and I would be interested in your response.

No. 1: At some point we need a clear understanding of who will be subject to these tribunals.

No. 2: The defendants must receive the assistance of counsel in mounting a defense, and with that counsel, defendants must be permitted timely access to evidence and the right to cross-examine witnesses, and have the right to present exculpatory evidence.

No. 3: If the standard of proof is to be less than "beyond a reasonable doubt," then it must be at least as high as guilt by "clear and convincing evidence."

No. 4: The death penalty must not be imposed simply by a vote of majority of the jurors. And

No. 5: The system must guarantee the defendant a right to a meaningful appeal.

Now, my question to you as the Attorney General of the United States speaking to the American people in advance of the rules that may come forth from the President as you have suggested, what would be your response to those five principles?

Attorney General ASHCROFT. Well, first of all, these are obviously laudable principles as they relate to the adjudication of criminal charges against an individual, and I am sure these are the kinds of considerations that these kinds of principles will be weighed in the deliberations of the Department of Defense. I think a full and fair proceeding is very likely to require many of these things you have mentioned in the war crimes tribunals which this Congress and this country has supported for the litigation of an adjudication of war crimes against others. You know, Bosnia and Romania and other settings, some of these kinds of principles exist there, and I think that it is very important for members of the Congress to state their considerations in this regard, and to make them known to those officials who will be developing the final rules that exist here. I do not know of anything in the Order of the President which would preclude the vast majority of the items which you have indicated. The kinds of guidelines which support the war crimes tribunals, for instance, in The Hague, are the kinds that exist in the President's Order to develop the procedures which are now before the Secretary of Defense.

So I would urge you and members of the Committee to make these as contributions to the Secretary of Defense, and I believe that it is the intention of the Secretary of Defense to fashion a sys-

tem which will support the world's respect for the way in which America always conducts justice.

Senator KOHL. Thank you, Mr. Attorney General.

Chairman LEAHY. Senator Specter.

Senator SPECTER. Thank you.

Attorney General Ashcroft, the regulations which you promulgated for detention of aliens provides that even after the immigration judge orders release, that is stayed by an appeal; and even after the appellate tribunal orders release, that is stayed automatically if it is certified to you as Attorney General. But there are no standards set forth as to why the person would be detained further. There is a generalized requirement that these detention rules are articulated for national security, but even after releases by two courts, the detention remains automatic without any procedure, establishment or articulation of standards as to why. Should there not be some standard? And how do you make that determination for continued detention in the face of the two judicial orders?

Attorney General ASHCROFT. Well, in the cases which prompted us to embark upon this procedure, we came to the conclusion that it may be necessary for us, from time to time, to ask for the detention of an individual pending the final outcome and adjudication of the charges against that individual, and they have to do with national security.

Senator SPECTER. But what is the standard for detention after two judges have ruled that he should be released

Attorney General ASHCROFT. Well, those judges are part of the process that is assigned to the Immigration and Naturalization Service function, which is a process which is overseen by the Attorney General, and if the Attorney General develops an understanding that it is against the national interest and would in some way potentially violate or jeopardize the national security, then those orders are overruled.

Senator SPECTER. Attorney General Ashcroft, let me ask you to supplement your answer in writing. What you have just said is very generalized. I would like you to provide to the Committee what standards the Attorney General uses and how that ties in to the statute which requires release after 7 days. The statute, of course, would take precedence over a regulation, but I want to move on to another question now, and if you would supplement that in writing.

Attorney General ASHCROFT. I will be happy to do that. The statute re*Quiring* release after 7 days is, I believe the statute says they can be held without charges for 7 days. We are talking about individuals against whom charges remain.

Senator SPECTER. Well, there appears to me, at least on the face, to be some inconsistency, but if you would address that in writing?

Attorney General ASHCROFT. Would be very happy to do so. Thank you for the opportunity.

Senator SPECTER. Specifying why your decision is to keep him in detention after those two judicial orders, I would appreciate it.

The Constitution provides, Article I, section 8, clause 14, empowering Congress to establish courts with exclusive jurisdiction over military offenses. There has been a statute which was referred to in the Executive Order, which delegates certain authority to the

President providing that procedures may be prescribed by the President by regulations, which shall, so far as he considers practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States District Courts.

Now, under that statute, there is a pretty plain presumption of using the regular rules of law and rules of evidence unless the President makes a determination that it is not practicable. When you commented that you were not going to notify the Congress when you have conversations with the President, I agree with you totally. I think that is a privileged communication, and that is the same kind of privilege which some of us are looking toward on an examination of monitoring attorney/client conversations. Any person of the United States has the same attorney/client privilege that the President does, and I appreciate your determination to respect that, but we are not really talking about notifying Congress on something you talked to the President about. We were talking about consulting with the Judiciary Committee. You used the sit next to me, right here.

Attorney General ASHCROFT. It was a pleasure. It is easier on that side.

[Laughter.]

Senator SPECTER. A pleasure both ways. But you get more than 5 minutes.

[Laughter.]

Attorney General ASHCROFT. What makes you think that is a pleasure?

[Laughter.]

Senator SPECTER. But the question that I have for you, because my red light is on, is given Congress's congressional authority—and this is not your fault—when Assistant Attorney General Michael Chertoff testified, he told us that the Department of Justice was not even involved in this Executive Order, and that the regulations for the implementation go to the Department of Defense, which was a little surprising, since it is the Department of Justice which has the institutional knowledge and experience.

I note that in the brochure you passed out, that the Executive Order is on paper with the masthead of the Department of Justice, but as I understand it, DOJ did not have anything to do with the Executive Order. What I would like you to address is your sense as to the appropriate relationship between the Judiciary Committee, the Senate, and the promulgation of the Executive Order and the rule that the Department of Justice ought to have in the rules to implement the generalizations of the Executive Order.

Attorney General ASHCROFT. That is a very, very interesting question. And first of all, I do not believe this is an Executive Order. I believe this is an order of the Commander-in–Chief, and it is a Military Order. Inasmuch as it is, many times I think a number of us have slipped to call it an Executive Order, but the President operates in two ways to deal with crime. It is his responsibility in the criminal justice system to have as his administration the prosecution of crime. But in his conduct of his responsibility to pursue the war powers and to defend the United States in those settings, he has the right to call forth, through the Military Order,

the development of a way to adjudicate war crimes which are separate and distinct from the criminal justice system.

I believe that the President indicated in the Order which he issued, establishing war crimes commissions, that practicability—I believe is the word that is in the statute—if it were to be applied to this particular commission order, does not exist, which would require adherence to those rules.

Senator SPECTER. Thank you very much.

Chairman LEAHY. Thank you.

General I am advised that what was to be the first of several confirmation votes on judges is to begin in about 3 minutes, and my request to have anything after the first one be by voice vote will be granted. So what I am going to do is take a 10-minute break. Senator Hatch and I will go over, as will others, and be prepared to come back and begin immediately at the end of that time, and we will go to the Senator from California, Senator Feinstein at that time. You would probably like to stretch your legs anyway.

Attorney General ASHCROFT. Yes, sir, thank you.

Chairman LEAHY. We stand in recess.

[Recess from 11:37 a.m. to 12:05 p.m.]

Chairman LEAHY. Our former colleague, the Attorney General, knows that just like 5-minute questions that often are not, 15-minute roll calls often are not, but I appreciate the senators who went over to vote and came back. I have also been told we will not have another roll call for a while. We just are about to finish the vote on confirming a Circuit Court of Appeals Judge, and we will then voice vote other District Judges.

But Senator Feinstein was next in line, and, Senator, I appreciate you being here and I will yield to you.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Mr. Attorney General, I would like you to know personally that I am very supportive of what your Department is doing and what you are trying to do. Perhaps as a member of the Intelligence Committee we learn things about what is happening that we cannot really disclose, but I am convinced that there is reason for deep concern, and there are good reasons for doing what the President has proposed.

It was interesting for me to read through the al Qaeda manual, the translation of which you just distributed to us. And so that everybody might know, I just want to read one small part. It is under "Principles of Military Organization." And it says "Missions Required of the Military Organization." "The main mission for which the military organization is responsible is the overthrow of the godless regimes and their replacement with the Islamic regime. Other missions consist of the following: gathering information about the enemy, the land, the installations and the neighbors; kidnapping enemy personnel, documents, secrets and arms; assassinating enemy personnel as well as foreign tourists; freeing the brothers who are captured by the enemy; spreading rumors and writing statements that instigate people against the enemy; blasting and destroying the places of amusement, immorality and sin, not a vital

target; blasting and destroying the embassies and attacking vital economic centers; blasting and destroying bridges leading into and out of the cities."

That is a pretty clear statement of military mission. Having said that, and just following up on Senator Kennedy's questioning, I am also aware that many people who may well be associated with terrorist organizations, how they buy their weapons, and the manual also speaks to that, how to buy these weapons. And you very nicely offered to look at any proposal. I would like this afternoon to send you a proposal, which Senators Corzine, Inouye, and Reed and I will shortly introduce, which is for a universal background check for the purchase of weapons, and which is modeled after the Pennsylvania law which I believe was signed by Governor Ridge. I would like to ask that you take a good look at that proposal and tell me what you think about it.

Also, having participated in the other hearings, I want to express one thought to you. The resolution the Congress passed authorizing the President to use force, was quantified, and it was quantified because a country, as in a full declaration of war, is not what we are fighting against, so no country was named. But the President was authorized to use all military force against the perpetrators of 9–11 and where that would take him in terms of using that military force.

Now, it may or may not have the same legal standing as a full declaration of war, but I think there is room for some problems here. So I am of the opinion that we should pass an authorizing resolution that really gives you, as the Executive Branch, the authority to do what you need, and also state some things like the standard of proof, like whether it is open or partially closed, the right to counsel, those kinds of things in that declaration.

And I have a series of questions, and I will not have time to ask them all, about where you stand with respect to precise points that would be in that declaration, but I would like to ask one question because I think it is the heart of a lot of the concern, at least on this side of the aisle. The White House counsel, Alberto Gonzales, wrote an Op–Ed for the "New York Times" recently, in which he explained some of the legal provisions in the President's November 13th Order. And I would like to state this. Mr. Gonzales, and I quote: "The Order covers not only foreign enemy war criminals, it does not cover United States citizens or even enemy soldiers abiding by the laws of war."

Now, two days ago Ambassador Prosper testified that he interpreted this sentence to mean that only those who commit—and I quote—"grave violations that require organization, leadership, promotion of purpose" will be tried by a military commission. However, the order is sufficiently broad to leave open the concern that this order could cover many people who have a very peripheral relationship to the September 11th attack.

Does the Order—and this is getting at the intent—does the Order only apply to the leaders of al Qaeda and those directly involved in the September 11th attacks and other international terrorist attacks, or will it also apply to those only peripherally involved in criminal activity?

Attorney General ASHCROFT. I think it is, first of all, important to note that it does not apply to American citizens, nor does it apply to people who violate the criminal law of this country generally.

Senator FEINSTEIN. What about legal aliens?

Attorney General ASHCROFT. Legal aliens are obviously subject to this Order. But the point is that the commissions were called into existence by issuing a Military Order by the President that would try war crimes. So individuals who have committed war crimes in the context of this time of conflict are subject to this order unless they are United States citizens, and technically, in that respect, the universe of individuals eligible for coverage is a large number. But similarly, every criminal law that we pass in the United States has a potential coverage of 280 million people. That is the population of individuals. And we see those laws as protecting the 280 million people, not putting them in jeopardy. Similarly, I believe the President's purpose in this war crimes commission, which he has issued, and obviously it calls for the right to counsel and things in the commission order, it is to protect people, not to place them in jeopardy. And, obviously, the 20 million people in the United States that it would protect, even though the fact they would be eligible for prosecution here, are people who also fear the kind of terrorism that destroyed a number of individuals, not citizens of the United States, in the World Trade Center bombing and in the other incidents that related to September 11th.

It is important that the President's directive that we have a full and fair hearing be reflected in what the Department of Defense eventually details as the procedures, and I would—I think it would be appropriate for discussion and contribution to be substantial in that regard to the Department.

Senator FEINSTEIN. I know my time has expired. Let me just clear this up. You are saying then that the military tribunal will only be used for those who would be prosecuted for war crimes?

Attorney General ASHCROFT. War crimes.

Senator FEINSTEIN. Thank you.

Attorney General ASHCROFT. And the order limits the jurisdiction of the commission to the commission of war crimes.

Senator FEINSTEIN. Thank you.

Chairman LEAHY. It also says those who harbor or assist or anything else; is that correct?

Attorney General ASHCROFT. When it talks about the trials to be conducted, it talks about trials to be conducted for war crimes.

Chairman LEAHY. General—and I do not expect that you have had time to see this yet—but I faxed down to your office yesterday some proposed legislation, and I am not asking questions on that because it would not be fair, you have just gotten it. But I wish you and your experts would look at some proposed legislation. I know Senator Feinstein has raised this issue with me, I think several days ago actually, as Schumer and others have, as members in both parties of the Armed Services Committee have raised the issue. I have to tell you, I think, from a constitutional and historical point, the President, you, the Secretary of Defense and others, will be strengthened in your resolve, but also in your abilities, by having a congressional mandate and framework for these military

tribunals. Nobody up here has questioned the fact that you can have military tribunals, but as an Op–Ed piece in the Post and others said today, very, very special circumstances when they are done, but if you have congressional framework, congressional approval, a lot of the questions that are being asked would stop. And I really think, as the Senator from California and others have suggested, you should do that. Please take a look at some of the ideas I have sent and others will send you, because ultimately we work better when we work together. We do not give the best image to the rest of the world when we work apart.

Senator FEINSTEIN. Mr. Chairman, would you just allow me, because the order is a little different from what the Attorney General said. The order states: "To be tried for violations of the laws of war and other applicable laws by military tribunals."

So you are saying strike "the other applicable laws."

Attorney General ASHCROFT. I believe that the correct construction of the order would indicate that only individuals who had committed war crimes would be subject to the jurisdiction of the commission.

Senator FEINSTEIN. Thank you.

Chairman LEAHY. Again, I think that is why we should have it laid out very specifically in the law, not by Executive Order, but in the law, what is and what is not allowed.

Attorney General ASHCROFT. I guess I would refer you to Section 4, part (a). "Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law including life imprisonment and/or death."

I do not think that is instructive. I have been handed something that is in response to some other question.

[Laughter.]

Chairman LEAHY. General, this is not a game of "gotcha."

Attorney General ASHCROFT. I am informed that it is instructive, and this is war crime language.

Chairman LEAHY. I thought you were going to say you were informed it is a game of "gotcha."

Attorney General ASHCROFT. I will be glad to confer with you on this. Thank you.

Chairman LEAHY. The point is, we are laying down not only a legal history, we are laying down a historical history here. So I would ask, in reviewing the transcript, certainly if there is additions, changes you want to make, do so, and I say that the same for members of the panel.

The Senator from Arizona has been very patient.

Senator HATCH. Mr. Chairman, if I could just make one comment about that.

Chairman LEAHY. Not as patient as the Senator from Utah. Yes, go ahead.

Senator HATCH. We have all seen how cooperative the Congress is on something as mundane, as simple as a economic stimulus package. You can imagine what they would do with this if we—you know, I was just amazed, honest to goodness, I was amazed to see

some of the comments of Julian Bond against our Attorney General. Some of the things he says are really quite offensive.

Chairman LEAHY. We are talking about this—

Senator HATCH. Wait just a second. And I am just saying that there are differences on these matters, but one difference that I do not think anybody can dispute, is that we have had presidential military commissions from the time of George Washington, and Congress has generally always gone along with them because of the need to cooperate and resolve these problems of war. So I just make that point for whatever it is worth.

I would like to put in the record some remarks that I would make, and also a report by Cecil Angel, the "Free Press" staff writer, about some of the comments made against our—I think inappropriate comments and very, very inflammatory comments made against our Attorney General. I think terrible comments from somebody who I believe should be in a position of respect.

Chairman LEAHY. We have a number of things that will be put in the record. Of course, every Senator will be allowed to put whatever they want in the record.

But, General, please take a look at the legislation we have sent down to—this Committee does not deal with economic stimulus packages; it deals with the criminal codes and others of this country, and we move pretty rapidly working together on the antiterrorism legislation, and we demonstrated we can do that when the country's future is at stake.

Attorney General ASHCROFT. Under the category "the staff is always right" let me just say that this does say, "all offenses triable by military commission" and that is artful language designed to mean war crimes.

Chairman LEAHY. I understand.

Attorney General ASHCROFT. But I will be happy to go further with that and clarify that in another setting.

Chairman LEAHY. But do take a look at the legislation. I would like to have your views on it, the legislation we have sent you.

Attorney General ASHCROFT. Thank you.

Chairman LEAHY. Senator Kyl.

Senator KYL. Thank you, Mr. Chairman. I would just note that Senator DeWine was here before I was. Are we just going in the regular order or—

Chairman LEAHY. Oh, I am sorry.

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. I would be happy to defer to Senator DeWine.

Senator DEWINE. Go ahead. It does not matter.

Senator KYL. All right, thank you.

Chairman LEAHY. I am sorry. That was my mistake.

Senator KYL. All right. I thank the Senator from Ohio.

I just have three questions. Let me just make a quick comment in view of the colloquy that has occurred here before. The Attorney General today and Michael Chertoff last week, made it clear that the President's order is pursuant to his authority as Commander-in–Chief directed to the Department of Defense for both the execution of the military commissions, as well as the development of the

rules and procedures for their conduct, that he is perfectly willing to pass on any suggestions that we have. This is not a Judiciary Committee responsibility or a congressional responsibility, and I would hate to think that we would take time out from holding hearings on the 100 plus judges that are pending before us, for example, to try to come up with the rules and procedures for conducting these military commissions. It is a Defense Department responsibility, a presidential responsibility, and while I am sure they will have the able advice of the Department of Justice, should they request it, as the Attorney General has volunteered, it is not something that either we, as a Committee, nor the Congress generally, should start getting into at this point in the session, and with all of the other business that is pending before this Committee. That is my opinion of that.

Just three questions, Mr. Attorney General. First of all, Senator Feinstein's comment got me thinking about this. Our special forces round up a couple hundred of these radical Arabs who we have been reading about, who even shoot the Taliban soldiers in the back when they think they are trying to flee, they are so tied in with the al Qaeda. So they fall into our hands, and it seems to me we have got three choices. I suppose what we could say is, "Here," to the Northern Alliance, "You take them." And I would hate to think about their civil rights in that situation, but that would be the easiest thing because military commissions are a lot of trouble, but we could also try them before the military commissions. It seems to me the third option is clearly not an option, and that is bringing them to the United States for Article III trials.

So my first question is: what your take is really on the need for the commissions. We have talked a lot about the potential rules and procedures, but why do we need them in the first place?

Secondly, the point has been raised about the law to be applied to U.S. citizens. There already is a United States citizen, a fellow by the name of John Walker, who tied up with these Taliban fighters and was recently captured, and there have been questions about what will be done with him, and I wonder if you could tell us what the Department of Justice, if anything, what the Department of Justice intends to do about the case of John Walker.

And third, if you would, again because the Defense Department is the department of government responsible for the development of the procedures for the conduct of the military commissions, you alluded to something in your statement I think could well justify a lot more comment, especially relating to the oversight authority of this Committee, and that is, you have said that the Justice Department is in some respects being restructured to fight this war on terrorism. We have a new obligation and a new mandate here, and to the extent you would like to edify us about what you are intending to do to make us safer, I would appreciate hearing more on that as well.

Attorney General ASHCROFT. Thank you very much, Senator. Let me first say why commissions. I believe the President has a duty in time of war to see to it that those individuals that are involved in whatever war there is against the United States do not target innocent civilians. And if we do not impose a penalty to those who violate the laws of war, we will provide an incentive for the viola-

tion of the law of war. The war crimes commission, ordered by the President, now being developed by the Department of Defense, is designed to say that attacks on innocent civilians that are not military targets, taking hostages and killing them, are acts of war.

Now, when we come to those responsible for this, say who are in Afghanistan, are we supposed to read them their Miranda rights, higher a flamboyant defense lawyer, bring him back to the United States to create a new cable network of Osama TV or what-have-you, provide a worldwide platform from which propaganda can be developed? We have judges in the United States now that are constantly protected because of their prior involvement in terrorist trials. Can you imagine making a courthouse in a city a target for terrorist activity as a result of focusing the world's attention on some trial in the normal setting for these war crimes?

War crimes are well understood in the international community. We have ongoing war crimes tribunals that relate to atrocities conducted against the Rwandans, that relate to atrocities conducted against the Bosnians. There have been a few atrocities conducted against the United States of America, and I think it's appropriate that we exercise the discipline of a war crimes commission to hold those responsible who violated the law of war in that respect.

Now, you raise the case of an individual said to have been a U.S. citizen who joined the other side. I really am not in a position to respond regarding any specific prosecution or case or alleged crime committed by an American. I would say very clearly that history has not looked kindly upon those that have forsaken their countries to go and fight against their countries, especially with organizations that have totally disrespected the rights of individuals, that make women objects of scorn and derision, that outlaw education. That is certainly the case. And I will not belabor you right now with a list of the kinds of criminal actions that could be taken in the criminal justice system against such individuals. I can tell you that no person will be—no citizen of the United States will be tried in a war crimes tribunal. The commission order of the President indicates that that is limited to noncitizens.

Senator KYL. General Ashcroft, did you want to comment at all about the restructuring of the Department of Justice for the purpose of protecting?

Attorney General ASHCROFT. Well, thank you. I believe that there is a noble purpose in justice, and that is to prevent crime. Whenever we prosecute, we are trying to remedy the absence of justice that came when someone's rights were infringed. And I have always said that we are the Justice Department, not just the prosecution department. So we have begun even a more pervasive shift toward prevention, finding ways to disrupt and prevent this activity, rather than to try and remediate it, because we know that the scare that is left by thousands of people who die in even a single terrorist incident is a scar that cannot be remediated, and all the prosecutions in the world are not as good as preventing that. So if we have a sea change in terms of our effort, it is to try and reconfigure our thinking toward prevention, not just prosecution.

We are going to be sending people from Washington to the front lines in our offices to prevent and to prosecute and to disrupt terrorism, rather than have so many people in Washington, D.C. But

we are going to be learning about how we can additionally deploy our resources so as to make sure this does not happen again. This is something that is intolerable and unacceptable, and we have got to fight to make sure it is not repeatable.

Senator KYL. I appreciate that. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman.

Thank you, Mr. Attorney General, for the opportunity for all of us to ask you questions today. I would like to just start with a general question. There is often an attempt at hearings like this to set a room tone at the beginning, to put everything in context, and one thing that my good friend, the Senator from Utah, the ranking member, said, I believe quoting another Senator, that we ought to get off the back of the Attorney General. And in your own statement, you referred to people who scare Americans with "phantoms of lost liberty" as aiding the terrorists by eroding national unity.

I would just like your assurance that you do not consider the hearings that we have been holding, under the leadership of the chairman, and the hearing today as in any way being too much on your back or in any way aiding the terrorists by eroding national unity.

Attorney General ASHCROFT. I am very pleased to repeat what I said in my statement, that I was pleased to be here, that I am honored to be here, that we do need reasoned discourse.

I did indicate that we need reasoned discourse as opposed to fear-mongering, and I think that is fair. This is the place where reasoning and discourse take place. And we do need to be fair enough about this to allow the details to be known.

When news organizations across America—from all sides of the spectrum, I might add—trumpet as a headline, "Attorney General eavesdrops conversations between lawyers and clients," and they leave it there, that is a gross misrepresentation about civil rights.

Senator FEINGOLD. Let me get into the specifics, and I appreciate that, and I take your response as certainly suggesting that this process is entirely appropriate.

Attorney General ASHCROFT. Absolutely.

Senator FEINGOLD. So let me proceed with that.

Attorney General ASHCROFT. And it includes other hearings held to which we have sent members of the Department.

Senator FEINGOLD. Fair enough. Let me turn, then, to the topic of one of those hearings, the issue of the secret detention of hundreds of individuals, most—

Attorney General ASHCROFT. May I just indicate that—and I guess I should not interrupt, but "secret detention" is something I would like—

Senator FEINGOLD. Let me strike the word "secret" so my time doesn't get used up in the description.

Attorney General ASHCROFT. Yes, let's do that.

Senator FEINGOLD. The detention of hundreds of individuals, mostly of Arab or Muslim backgrounds, and many, if not most, for minor immigration violations. So far, Mr. Attorney General, you have refused to provide a full accounting of these individuals. At first you said that the law prevented you from disclosing the identi-

ties of the roughly 550 individuals held on immigration charges. When I asked Mr. Chertoff last week to cite the law that prevents the Department from releasing the information, he confirmed that there is no such law.

You also stated that you did not want to help Osama bin Laden by releasing a list of the detainees. Yet you and Mr. Chertoff have said nothing prevents the detainees from self-identifying.

Now, this, it strikes me, just entirely undercuts the argument that giving out this information will help bin Laden, because if you really thought it would, you wouldn't permit self-identification. You wouldn't have released the names of 93 individuals who have been charged with Federal crimes.

Moreover, as the hearing the Committee held on Tuesday showed, saying detainees can self-identify is sometimes questionable at best. Mr. Al–Maqtari, a former detainee who testified, was allowed one phone call of no longer than 15 minutes a week for almost the entire 2 months he was held in detention.

So I would like to specifically ask you about the right of the people being detained to consult with an attorney. Mr. Chertoff testified before this Committee last week that every one of these individuals has a right to counsel, every person detained has a right to make phone calls to family and attorneys. But the right to an attorney is meaningless if in practice it is impossible for an individual in custody to contact his attorney.

And we heard testimony in the Committee Tuesday of at least two instances where individuals were unable to speak with their lawyers for days or even weeks after they were detained. We know that these are not the only such instances.

Furthermore, it became clear that the roadblocks to individuals' consulting with counsel not only cause great hardship to the clients and violate their rights, but it also hinders the investigation and wastes the resources of law enforcement on people who, it turns out, have no connection to terrorism. So I would like you to answer two questions in this regard.

Will you commit to this Committee today that the Department of Justice will take immediate steps to assure that every detainee is made aware of his right to be represented by counsel and made aware of organizations or groups that will represent him without charge if he can't afford a lawyer, that counsel are able to locate and consult with their clients without difficulty, and that detainees are permitted to contact their attorneys as often as they need to and receive or return all calls from their attorneys without interference?

And, second, until the full disclosure requested in my October 31st letter is made, I would request that the Department of Justice determine if any of the people currently held in detention are not now represented by counsel. Will you do that?

Attorney General ASHCROFT. I think I can promise to do virtually everything you have said. You have made a pretty particular and detailed proposal. You have said that they will be able to return every phone call. And there are reasonable limits that I think have to be imposed, even on those individuals who have violated the law and want to confer with their attorneys.

I believe it is the right and will take steps to make sure, again, that every detainee understands that we believe it to be his or her right that they have counsel. For those for whom government counsel is not provided, in other words, that there is not a government-funded counsel, we have a practice of providing a list of pro bono counsel, and we have been bringing people of those pro bono counsel into the detention facilities regularly so that individuals who are being detained can have an opportunity to see an attorney. If they haven't called them or haven't chosen to, they still have a chance to confer.

I want to do that, and I do not intend to hold individuals without access to counsel, and we will take steps to make sure that we don't. I don't believe that we are. And I will make available to individuals an understanding of pro bono counsel or free counsel in the event that they are not classified as individuals entitled to an attorney at Government expense.

Let me clarify a couple things, if I might, and I will try not to take too much time.

When Mr. Chertoff was answering the question, he said, "I don't know that there is a specific law that bars the disclosure of the names." That was his testimony. And let me just tell you what the frame of reference is when I talk about the law regarding detainees.

The law varies in relation to the nature of the detainee. If a detainee is a permanent resident but an alien to the United States, the law prohibits the disclosure of his name or her name. If the person is not a permanent resident but is here on another kind of visa or authority, the law recognizes the duty of the Attorney General or the authorities to protect prosecutions and investigations by not providing lists of the names.

These laws are basically summed up in the FOIA legislation, which talks about freedom of information, and one of the considerations I have is that the privacy rights of individuals in this setting should be respected, that people should not be labeled as terrorists while we are still investigating any connections they might have to terrorism.

With that in mind, in addition to protecting from disclosing information about who we have in custody or don't have in custody as a coordinated list, I have refrained from developing a list and, frankly, don't intend to develop such a list.

You mentioned that each of these individuals has had the right to self-disclose their incarceration. Each of these individuals obviously has had the right to contact a lawyer. You cited some who have said that their contact hasn't been with free enough access, and I will look carefully into that. I know that one of the individuals that I believe you had at your hearing was an individual that I, immediately when I heard that there may have been an irregularity regarding his detention, sent FBI members to his home the minute he—when I heard about that, upon his release, and our report was that he didn't allege a problem at that time. But I am eager, was then, remain eager to observe these rights.

It is with that in mind that I would say that we have detained about 563—we have in detention about 563 individuals who are being detained on Immigration and Naturalization Service items

related to the events of 9/11. We have a total of about 20,000 people detained in the Immigration and Naturalization detention program. We have about 54 people detained on criminal charges, and those individuals obviously, unless the court has sealed the nature of the charge, there is a public record of their detention, although it is not a coordinated list.

We have detained some other individuals, and I am not at liberty to discuss their detentions because they are the subject of material witness warrants.

Senator FEINGOLD. Sorry, Mr. Chairman. I know my time is up, but let me just say quickly in response that there still has been no law cited for us that suggests that the law prohibits the disclosure. We have no citation to that effect, and we are still wondering what that is.

Mr. Chairman, I appreciate the Attorney General describing the practice with regard to right to counsel, but I want your commitment, Mr. Attorney General, that everyone in detention will get a lawyer and will be able to consult with them. Can you give me that commitment?

Attorney General ASHCROFT. No, I can't. I cannot force lawyers on individuals who refuse lawyers. I can make a lawyer available to every person in detention in terms of the availability to lawyers for calling them. I am not authorized to provide lawyers to those in the INS detention at public expense, but I will promise to do everything—

Senator FEINGOLD. But you commit to making a lawyer available to every person in detention?

Attorney General ASHCROFT. If the lawyers are willing to provide service to those individuals and we are helping generate those lawyers, we will do that.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Attorney General ASHCROFT. If I might?

Chairman LEAHY. Yes, go ahead, General.

Attorney General ASHCROFT. I would cite Privacy Act 5 U.S. Code 552A at (a)(2) and the FOIA 5 U.S. Code 552(b)(6), especially as to the prohibition regarding naming legal permanent residents.

Senator FEINGOLD. You are citing this as a prohibition on disclosing any of the names of those in detention?

Attorney General ASHCROFT. Not any of the names of those in detention. As I indicated earlier, Senator, there is a varying legal standard depending on the status of the individual. The prevention is on a narrow group of individuals that are permanent residents. The authority not to disclose relates to those who are not permanent residents, but disclosure of which in the judgment of law enforcement authorities would be ill-advised as it relates to aiding the enemy or interfering with a prosecution.

Senator FEINGOLD. Mr. Chairman, I would simply add that this confirms that there simply is no blanket prohibition in the law of disclosure, and I would just like that on the record.

Attorney General ASHCROFT. I can agree with the Senator and would stipulate to the fact that there is no blanket prohibition.

Senator FEINGOLD. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you both.

Senator DeWine?

STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Mr. Chairman, thank you.

Mr. Attorney General, thank you for your testimony, and thank you for the good job that you are doing for our country.

We had the opportunity in this country for the last several weeks to have a spirited debate about military tribunals. I think after that debate it is clear, after your testimony it is clear that military tribunals are constitutional, that there is certainly historic precedent for doing it.

I think also it is clear that in certain limited cases, you do have the need in this country to protect the trier of fact, judge or jury, witnesses in some cases, and I think it is also clear that in some cases we have the need to protect intelligence sources and intelligence information.

I would, though, like to talk for a moment with you about—and I understand that it is not your Department that is putting out the protocols and writing the rules, but I again assume that you will have some input into that.

I would like to talk a little bit about some of the public policy issues and public policy concerns that I have and foreign policy concerns I have about the use of military tribunals.

We have every day in this world hundreds of thousands, maybe millions of U.S. citizens who travel or who live in other countries. I think we have to be concerned about the perception of what we are doing, not just the reality of what we are doing. I certainly have confidence in this administration in doing it correctly, but I think also the perception is very, very important.

So I would certainly hope that when the administration comes out with the protocols, in addition to what has already been stated, that there would be some other things that would be very clear: one would be very clear guidelines as to the rules of evidence; second, that the rules would provide very clear standards of proof and burden of proof, ultimate burden of proof that would have to be met before someone could be convicted; third, I would hope that there would be a provision for a review, a final review of the verdict beyond the initial court or the initial trier of fact; and, fourth—and certainly not least—is that I would hope that these would be held in public, in the open, they would be as open as possible unless there is a compelling reason for their closure.

Tribunals throughout history certainly of the last century and into the current century have provided an opportunity for mankind and for civilization to advance. We all cite and think about, I guess, the Nuremberg trials, controversial with some people at the time, but I think as we look back, those hearings, those trials, we look back as an advancement in civilization, that we do, in fact, hold people accountable for what they do, but we do it in the right way and we do it, when possible, in a public way.

So I think these are tools for us to advance, tools for us to learn, and tools for us to teach. One of the great things this country teaches and one of the great things that we export—when we talk about what we export, I think the greatest thing we export is the

rule of law. And we see it in—and you have traveled to foreign countries, I have traveled, and we do a great job in trying to convince people that if they really want to advance, if they want to protect rights, if they want to have advancement in civilization, they will, in fact, have the rule of law.

And so I think we just need to be very, very careful as we approach this. I think it has been demonstrated, the need to have these, but I think it has also—in each particular case, I will take the President at his word, he will make the decision, and in each case there will be, I would hope, a very compelling reason—a compelling reason to have a military tribunal and a compelling reason to go beyond that if they have to be closed, a compelling reason to close those particular hearings.

Let me just ask you a question, and I will let you comment if you could. I am learning after a few years in the Senate how to do this. You get all your comments in, and then you give the witness the opportunity to comment right as the red light comes on.

It is clear, based on, I think, what we have read and based upon good common sense and some of the things that you have said today, that there has to be have been a fundamental shift in how the Department operates and what it sees as its mission. And I don't want to put words in your mouth, but we would all, I think, assume that there has been some change in the mission and the change has to do with the protecting of the United States citizens against future terrorist activities.

With that change, as you look at the future of the Department, doesn't that mean that there will be some things that you simply will not do as well or you simply will not be able to emphasize as much? And maybe you have not had a chance to sit back and think about this or do the long-range planning, but it seems to me that as a country, as a Department, as an administration, and ultimately as this Committee that has oversight, that is something that we have to think about as a people, the mission of your Department, which I think, I will say, at least, fundamentally had to change after September 11th.

Your comments?

Attorney General ASHCROFT. I thank the Senator. Not only is the red light on, but it is flashing.

I am glad you mentioned the rule of law. I can't think of a more savage interruption and disruption and violation of the rule of law than the events of September the 11th. They are war crimes, and to fail to prosecute war crimes is to reinforce the idea that somehow we can forget about the rule of law.

I believe we need to send a message to the world that America does not tolerate the disruption of the rule of law, the slaughter of innocents, war crimes. So I think the President has a duty, a solemn duty, to constitute a commission to resolve the war crimes issue.

It is not as if war crimes issues are not a part of the everyday discourse of the world seen by our allies and our enemies alike. I think a number of members of this Committee have visited the Hague and have actually witnessed proceedings, which I would be surprised if they are not ongoing today, where atrocities against other nations are being remedied in a war crimes tribunal setting

that has very similar language and structure to the language and structure proposed by the Order of the President.

This Order of the President talks about openness. It talks about evidence needing to have probative value. It talks about the kinds of votes that would have to be taken in order to make sure that a verdict is appropriate.

And I believe the Order signals enough in terms of respect for those rights of the accused that the Department of Defense will act appropriately and be—as a matter of fact, I expect it to. I just want you to know that I believe that there are fundamental rights at stake here, and it is the right of the American public to expect not to be abused by war criminals and that the President has a duty and responsibility, in his words, I think, to bring them to justice or to bring justice to them. And this is a part of getting that done.

Senator DEWINE. Do you want to take a crack at the second part of the question?

Attorney General ASHCROFT. It is said that those organizations that have too many priorities express no priority at all. I recently totaled up the way the Justice Department has grown, and I have found that in our records we had stated that there are 56 priorities for the Department of Justice.

Chairman LEAHY. You may want to submit all 64 for the record, General.

Attorney General ASHCROFT. Pardon?

Chairman LEAHY. Feel free to submit the 64 for the record.

Attorney General ASHCROFT. I said 56.

Chairman LEAHY. Oh, 56. You can submit them for the record.

Attorney General ASHCROFT. That is inflation for you.

[Laughter.]

Attorney General ASHCROFT. But, anyhow, it might as well be 64. If you try to do everything, perhaps you can't do anything well.

It is pretty clear to me that there are some things that we might not do well, but we better do well the job of preventing, as well as possible the job of preventing terrorism.

Now, I have some reticence about saying that because preventing terrorism is a very difficult job. We witnessed this week the carnage in Israel. It is a society that has far fewer freedoms than we do and a far greater investment in terrorism detection and prevention, and yet 25 innocents were slaughtered in Israel this last week in terrorist activities.

So it is with that in mind that it is an awesome mandate to try and focus our energy, and there may be some things we won't do at the same level of priority we did before because we understand that saving lives is the highest priority.

Senator DEWINE. Thank you.

Chairman LEAHY. Thank you.

Senator Schumer?

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman, and thank you for holding these hearings. And I want to thank you, Mr. Attorney General, for being here, and we understand the large job you have

ahead of you and appreciate all your efforts, whether we agree with all of them or not on that behalf.

Let me say that you gave a strong, eloquent statement about the danger before us when you opened and how you needed to get every tool that you could to fight terrorism. I think that is something that most Americans in one degree or another would agree with.

But it seems to me that there is one place where you are not seeking that tool at all, and that is the right of illegal immigrants—or whether, to find out whether illegal immigrants have guns, particularly the people on your detainee list.

Now, there was an article in the New York Times that said that the people in the FBI want this power, want this ability, and the Justice Department has overruled them. I was troubled to read that when the FBI ran an initial check as to whether some of these detainees, 186 of them, had purchased guns, that two had, and when the ATF checked its database, they found out that 34 had purchased guns.

I don't have to tell you that for all illegal immigrants, and for most legal immigrants, they have no right to a gun. And this would seem to somebody, to most with any knowledge of law enforcement to be an important tool that you could use in helping make us safe.

And so my questions are going to be all about this because I am little befuddled. We are looking for new tools in every direction. I support most of those. But when it comes to the area of even illegal immigrants getting guns and finding out if they did, this administration becomes weak as a wet noodle. And the question is why and how we can change that.

So I would like to ask you a few questions about that. I would note that most people read the law to allow you to do this right now. In the Federal Register of November 25, 1998, it says, "Routine Use C"—C is the category that deals with this—"provides the necessary authority for further coordination among law enforcement agencies for the purpose of investigating, prosecuting, and/or enforcing violations of criminal or civil law or regulation that may come to light during NICS operations." That seems pretty clear.

And so I just want to ask you a couple of questions about that. The first is: Do you believe that you do not have the right right now to ask for checks? We ask for checks of these illegal immigrants' immigration status, and we look at have they violated other laws. Do you believe you don't have the right to ask, to check whether they have purchased a gun illegally?

Attorney General ASHCROFT. I believe I could ask an immigrant whether or not he or she has purchased a gun illegally. I don't think there is any problem with me asking any citizen whether or not they have purchased a gun illegally—

Senator SCHUMER. Do you believe—

Attorney General ASHCROFT. —or a permanent resident alien or an illegal alien.

Senator SCHUMER. Do you believe—then if you could do that, is there anything wrong with checking the database you now have, the NICS system, to see if they have done it, to see if they are telling the truth?

Attorney General ASHCROFT. It is my belief that the United States Congress specifically outlaws and bans the use of the NICS database, and that is the of approved purchase records for weapons checks on possible terrorists or on anyone else, that the—

Senator SCHUMER. I would say most, in all due respect, Mr. Attorney General, most disagree with you. But let's just assume that is the case. Why didn't you ask us for—you asked us for a whole lot of things in the anti-terrorism bill, a whole lot of different things that you said new circumstances required us to need. A, why didn't you ask us for that authority if you believe you don't have it? Which most people do. And, B, would you support legislation that I will drop in tomorrow to give you that authority?

Attorney General ASHCROFT. Well, I would be very pleased if you would send me legislation. I will review it. If Congress passes a law to help us fight terrorism by keeping guns out of the hands of illegal aliens and other individuals that should not have guns in their possession, I will fight to sustain the law—

Senator SCHUMER. Right, but in all due—

Attorney General ASHCROFT. —and I will enforce the law.

Senator SCHUMER. In all due respect, sir, I am asking you a slightly different question—two slightly different questions. Number one, why wasn't this asked for in the counter-terrorism bill, a bill I supported—in fact, I took your side against my chairman on some of the issues there. Why didn't we ask for it then if it was at least ambiguous? And, B, why not support it right now? I appreciate the fact that you would review it if I sent it to you, but let's assume that it is very simple legislation that simply allows NICS checks of illegal immigrants, of those, for instance, that you have detained. Why can't you just tell us right now that you would support such legislation? It seems perfectly logical to do. It seems, as you said—and I agree with you—that illegal immigrants here don't have more rights or even the same rights as American citizens. Why couldn't we just make that simple proposition and solve this problem right now? Because at least according to the New York Times—and I realize the difficulty in dealing with unnamed sources—there are large numbers of people in your own FBI who believe that would be a very important power for them to have.

So, again, would you be willing to support such legislation or the concept? I am not saying—we could draft it together.

Attorney General ASHCROFT. I will say again to you that I don't want to make a commitment to legislation without seeing it. If you will send me legislation like that, I will review it. And I would, upon passage by the Congress of the United States, enforce it vigorously. The only—

Senator SCHUMER. Just one final—I am sorry.

Attorney General ASHCROFT. May I?

Senator SCHUMER. Please, please.

Attorney General ASHCROFT. The only recognized use now of approved purchaser records is limited to an auditing function, and I believe that my responsibility, which was rather forcefully provided to me as admonition as I took this job and took the oath of office, is to enforce the law. And I believe that the law prohibits in its current state any other use of approved purchaser records. That is a

sub-category of data used by the FBI. So if you will send me legislation, I will review it, and we can confer about it.

Senator SCHUMER. But you are certainly allowed to use the system because these people don't have the right to have a gun.

Attorney General ASHCROFT. I believe that the United States Congress, in enacting the law which created this database, limits the lawful use of this database, and I believe that it is my responsibility to live within the law.I don't want to hear two messages from this Committee, both in the same day, or on a variety of different days, not that you want me to enforce some laws and not other laws, and you want me to ignore laws or respect some rights and not other rights.

I am very pleased to tell you that if you send me the legislation, I will review it, and if you pass the legislation, I will enforce it.

Senator SCHUMER. Thank you, Mr. Chairman.

Senator HATCH. Mr. Chairman, if I could just make one comment. As one of the authors of the NICS legislation, which everybody admits has worked very well, one of the biggest parts of the debate was whether or not you could disclose matters in NICS because one side felt that if you did, it would be wrong; the other side felt if you did not, it would be wrong. And it got into a big mishmash there, and so that is why the legislation turned out the way it is. But I will be interested in whatever the Senator suggests.

Attorney General ASHCROFT. My staff has added a piece of information here that may or may not be of interest. Approved purchaser records are those that are denied use in the law. Denied purchaser records can be used and are being used. So there is a difference. The law is as the Congress wrote it, and I intend to enforce the law as it has been written and signed by the President.

Senator HATCH. We wrote it that way because we had to. It was the only way we could pass it.

Senator SCHUMER. Mr. Chairman, if you don't run the checks, you are not going to know who should be denied.

Attorney General ASHCROFT. I don't think we—we are ships passing in the night, or maybe I am a rowboat passing you as a ship. I may—whatever it is here, I don't mean—

Senator SCHUMER. Well, I hope we can be rowing in the same direction on this issue.

Attorney General ASHCROFT. All right. We will work on it.

Senator SCHUMER. Okay. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

The Senator from Alabama?

Senator SESSIONS. Attorney General Ashcroft, congratulations to you and your staff for the extraordinary effort, including the FBI, Immigration, and all of the agencies that you have marshalled and invigorated to do everything possible to protect the people of America from further attacks. I think it has got to be concluded that the things you have done have helped prevent further attacks. I think few of us after September 11th thought we would be this far along without additional attacks, so some things you are doing are working.

Now, we have had a lot of criticisms and suggestions and explicit condemnations of actions saying that they violate laws of the United States or the Constitution of the United States. Let me sim-

ply ask you directly the same question I asked Mr. Chertoff. Is there anything that you have done and the Department of Justice has promulgated that you believe violates the Constitution or any statutes of the United States in your effort to fight terrorism?

Attorney General ASHCROFT. I believe that every action we have taken is authorized by the Constitution of the United States and is lawful.

Senator SESSIONS. I think that is important, Mr. Chairman, and I know a lot of people on our Committee and others around the country are saying they have concerns. Well, when this all came up, I could see people having concerns. But after we have had some time here to look at it, I think in my opinion, as a Federal prosecutor of 15 years and just as a person who can read plain language in cases, we are looking at a circumstance where no laws of this country are being violated, no precedent, no historical rights that we have come to be known have been violated by what you have done. And I think we ought to recognize that. If anybody has a specific, explicit example of an action that is in violation of the law, let's have them say it. Just saying concerns is not enough. And to use irresponsible and reckless language, I think, accusing the Department of Justice prematurely perhaps without full study of violating the law and the Constitution, as some have, I think does have the tendency to erode unity in the country and undermine respect for our leadership in a time of war, and that just ought to be carefully done.

So I would just note that Senator Schumer had an excellent hearing earlier this week, and we had some of the Nation's foremost experts on military commissions and professors. We had two well-known Democratic, liberal professors, Cass Sunstein and Laurence Tribe, among others, who I believe quite clearly indicated their firm belief that the commissions are legal. Cass Sunstein indicated the only question is how they would be conducted. I think that is a real final, I would say, affirmation of the legality of what you are doing here.

One of the questions that I was somewhat troubled about when I first heard it as a lawyer and as a prosecutor who knows the delicacy of lawyer-client privilege was the suggestion that you would monitor communications between the lawyers and clients. That was blown up in the newspapers in a way that caused me concern. But as I have understood that, before you would monitor—at this point you have concluded only 16 people in the whole Federal system might be subject to this monitoring. Is that correct?

Attorney General ASHCROFT. To be subject to it, you have to be subject to special administrative measures, and our population of that category is now 16 out of 158,000 detainees in the Federal prison system. That is not in the INS system but the Federal prison system.

Senator SESSIONS. Well, that is very few, and they are targeted in a way that I think is rational. The *Weatherford* case that you cited, which I had not been familiar with and put a board up on the board, the *Weatherford* case certainly suggests that the right to attorney-client communication is not absolute. The Attorney General's Manual, which I had pulled, that Attorney General Janet Reno has cited, provides circumstances—very controlled and very

carefully done, but it does provide circumstances, does it not, for monitoring attorney-client, seizing attorney-client records, and other things under certain limited circumstances?

Attorney General ASHCROFT. I am not an expert in the manual as promulgated by my predecessor, but we do not believe the right to be without reason, and the *Weatherford* case is our guide.

Senator SESSIONS. Well, I remember Justice Goldberg made the comment once that the Constitution is not a suicide pact. I don't think we are required to assume that we are prohibited from doing things that are legitimate under the circumstances. And I believe from my experience as a prosecutor—I know in experience dealing with drug dealers and Mafia people that those criminals have conducted criminal enterprises from inside the jail. Isn't that true in your experience as a former Attorney General?

Attorney General ASHCROFT. Yes, it is.

Senator SESSIONS. And it seems to me that the mechanism you have devised is the way to do it. It provides for, Mr. Chairman, an entirely independent group to monitor the conversations only after the jailed person and his lawyer have been told the conversations will be monitored. They would be required by law to not utilize that information unless they found within those communications actions or comments that would further criminal attacks against the United States and that they would not be given to the prosecutors who are prosecuting the individual in jail for the criminal offense. Isn't that correct?

Attorney General ASHCROFT. That is correct.

Senator SESSIONS. And, Mr. Attorney General, would you use your supervisory power, such as it is, would you use your power to prosecute criminals if any of those people who monitored the conversations breached that wall as they were ordered to do?

Attorney General ASHCROFT. I would prosecute to the fullest both with disciplinary action and legal action those who would abuse this responsibility and trust.

Senator SESSIONS. Mr. Chairman, I would just conclude with the words of Justice Jackson who discussed in the Nuremberg military commission trials, he said this—we are going to be judged not so much on the procedures we set forth—those are my words. I think you will be judged, the administration and the President will be judged not just on the procedures and words used to set up these commissions but on whether justice is done. He said this: "We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice."

I think that is our challenge, to make sure that when this is over that occurs, and I am encouraged by the fact that the President of the United States has taken this burden upon himself personally to guarantee this, and history will hold him to account if they are not fair.

Thank you.

Chairman LEAHY. Senator Durbin?

Senator DURBIN. Thank you, Mr. Chairman. And, Mr. Attorney General, thank you for joining us today and taking our questions.

On November 10th, before the United Nations General Assembly, President Bush said, "We have a responsibility to deny weapons to terrorists and to actively prevent private citizens from providing them."

I think the President was right. Do you agree with his premise?

Attorney General ASHCROFT. I think we do have a responsibility to deny weapons to terrorists.

Senator DURBIN. I also believe that you were correct earlier in your statement when you said that we need to focus on prevention, not just protection. Let me give you a few examples of things that I think we could do to deny weapons to terrorists and to prevent terrorist activity as opposed to just prosecuting those who have committed these heinous crimes.

Last year, Connor Claxton, who was accused of being a member of the Irish Republican Army, testified that he had purchased firearms at gun shows in South Florida to smuggle back to Northern Ireland. On September 10th, the day before the attack at the World Trade Center, Mohamed and Ali Boumelhem, members of Hezbollah, were convicted on charges of conspiring to smuggle guns and ammunition to Hezbollah. The FBI had observed these two individuals buying weapons at gun shows in Michigan. On October 30th, long after September 11th, when we were clearly doing everything we could to stop this kind of activity, Mohamed Navid Arwar, a Pakistani, pleaded guilty to immigration violations and illegally possessing a firearm. Mr. Arwar bought his firearm at gun shows in Michigan.

You passed out—someone did on your behalf—this Al Qaeda manual, which you showed us earlier, and I had a chance to just glance through it very quickly. Here is their advice to their operatives and terrorist cells around the world in buying guns: "Don't lengthen the time spent with the seller. It's important to depart immediately after purchasing the weapons." The quote that was given earlier from another training manual that was disclosed in Kabul, gives this is advice to terrorists: "In countries like the United States, it's perfectly legal for members of the public to own certain types of firearms. If you live in such a country, obtain an assault rifle legally, preferable an AK–47, or variations, learn how to use it properly, and go and practice in the areas allowed for such training."

Mr. Attorney General, many of us supported your request for additional authority to fight terrorism despite criticism from the left and from others that we were invading the rights in the Bill of Rights. We believe that you and the President and America needed the tools to fight terrorism.

My question to you follows on earlier questions by my colleagues. Why is it when it gets to the Second Amendment, when it gets to this question of purchasing firearms, particularly by illegal immigrants who are here in the United States, who have connections with terrorism, that there is such a blind eye from the Department of Justice? The President said about military tribunals, he reminded us we must not let foreign enemies use the forums of liberty to destroy liberty itself. Couldn't the same be said about some

of our rights under the Bill of Rights? Should we let our foreign enemies use the rights of Americans to bear arms to attack and destroy liberty itself?

The bottom-line question is this, following Mr. Schumer: Can we expect this administration to come forward proactively rather than reactively to deal with this proliferation of guns to the hands of terrorists and would-be terrorists that clearly threaten Americans and may threaten our men and women in uniform overseas?

Attorney General ASHCROFT. Obviously, the balancing of the rights of individuals is the responsibility of the development of policy. I have indicated to Senator Schumer that I agree that illegal aliens should not be armed and that I would be very pleased to consider proposed legislation that would enhance our security by making it clear that they are not to be armed.

In all of the efforts of the Al Qaeda operation, they look for avenues of freedom which they can then exploit. They look at our judicial system and seek to exploit it. They look at freedom of speech and seek to exploit that. And we always have to balance very carefully when we legislate to curtail their activities in ways that respect the freedoms, understanding the value of the freedoms, but also understanding the vulnerability that may come if there are those who seek to abuse them. It is with that—

Senator DURBIN. May I ask you this question—

Attorney General ASHCROFT. —in mind that I am willing to review legislation that you would send me in this respect.

Senator DURBIN. Would you agree, then, that illegal immigrants to this country and would-be terrorist should not be able to buy guns at gun shows and ship them back to their terrorist organizations overseas or use them in some conspiracy or plot in the United States? Would you agree with that?

Attorney General ASHCROFT. Well, the Brady law currently prohibits illegal aliens, felons, and terrorists from buying guns. So I would agree with that. I will enforce that to the extent that I—whenever we come upon those—

Senator DURBIN. Well, what about the gun shows?

Attorney General ASHCROFT. You just cited for me the fact that illegal aliens were being prosecuted, via the Justice Department, for possessing such weapons.

Senator DURBIN. But how many have we missed?

Attorney General ASHCROFT. Well, I can't tell you how many we have missed—

Senator DURBIN. Because we don't check their backgrounds at gun shows, Mr. Attorney General. That is the whole point of changing the law. That is why we need your help and the support of the administration. We have worked with you to give you more powers to deal with terrorism. Isn't this an important weapon for you to have to fight terrorists who are buying guns at gun shows?

Attorney General ASHCROFT. You know, the gun shows provide a basis for the sale of guns by individuals, not so much at the gun show but frequently contacts are made there that are subsequently involved in private treaties over the sale of guns. Federally licensed gun dealers selling guns at gun shows are subject to the Brady law, and the Brady law does prohibit all felons, including terrorists and illegal aliens, from purchasing guns.

Senator DURBIN. It is such a small part of the problem. If we are going to deal with the whole problem and give you the authority to deal with it effectively, I hope the administration will be as forthcoming when it comes to the Second Amendment as they have on other amendments, have an open mind on finding ways to make America safer. I believe you are dedicated to that. I think the President is by his very words. But if we can cooperate and put something in place to keep these guns out of the hands of terrorists at gun shows, I think it will make America safer.

Thank you.

Attorney General ASHCROFT. I would be happy to confer with you.

Chairman LEAHY. Thank you, Senator Durbin.

Senator McConnell, who has been very patient.

STATEMENT OF HON. MITCH MCCONNELL, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator MCCONNELL. Thank you, Mr. Chairman. When you are the last man, you have no choice but to be patient. Coming back on this Committee after all these years as the least senior member reminds me that when you get down to the end of the table, everything has been said, but not everyone has yet said it.

[Laughter.]

Senator MCCONNELL. In listening to my colleagues, Mr. Attorney General, the first thing I want to do is congratulate you. We are exceedingly proud of you as a former member of this body for the truly outstanding job that you are doing, were doing before 9/11 but particularly since 9/11.

The best evidence, it seems to me, that you have won already in the public discussion over military commissions is that this hearing seems to be becoming a hearing about gun control. Obviously many of our friends on the other side feel that the military commission argument has largely been lost. But at the risk of bringing up an argument that we have already essentially won, because I think you are absolutely right on this, right on the Constitution, right on the propriety, and right on the necessity of having military commissions available to the President during the prosecution of this war, I think you have won that argument. But I do want to, even though it has been won, make my one question on that subject.

On Tuesday, one of the members of this Committee asked whether a trial by court martial rather than a military commission would work for war criminals. Like you, I think there would be operational problems with using courts martial rather than military commissions in these kinds of circumstances.

For example, I don't think we should have to perfectly establish the chain of custody of evidence that our armed forces came across on some Afghan battlefield or in a cave. But aside from the operational problem inherent in using a trial by courts martial for foreign war criminals, do you think it would be perverse, really, to give war criminals all the privileges and procedures that we give to American citizen soldiers under the United States Code of Military Justice when our soldiers are not war criminals? This would also send a perverse message to foreign war criminals, go ahead

and commit war crimes, and you will be treated just like an American soldier who does not commit war crimes.

Would not treating foreign unlawful combatants just like American lawful combatants remove a disincentive for committing war crimes?

Attorney General ASHCROFT. I thank the Senator. I believe the President has two responsibilities:

One is to see to it that his Justice Department vigorously prosecutes laws that are passed/enacted by the Senate and House and, in conjunction with the President, signed into law.

There is another responsibility when he is conducting a war. That is to make sure that the world does not commit war crimes against the citizens of the United States, and in resolving each of those issues, it is important for him to protect the national interests at the highest level possible.

Because the constitutional Founders did not expect us to have war conducted by Committee, they vest in the President of the United States very substantial powers and focus those powers in him for the conduct of the war, and that includes the creation of war crimes commissions.

The President of the United States, while he is obviously interested in protecting the national interests and intends to do so vigorously, is committed to full and fair hearings. I think, as Senator Sessions has indicated, the world will judge us based on whether or not we have full and fair hearings. But let us never forget that the world also understood, and understands, the nature of the war crimes perpetrated and also understands that there are conditions during the time of war which might mean that it is inappropriate to have certain procedures which might reveal or place in jeopardy the interests of the United States about our tactics, about our troops, about our positions or even vulnerabilities which we might have that might be disclosed; so that there is clearly a need to tailor the proceedings not to avoid fairness or fullness of opportunity, but to make sure that the interests of the United States are protected.

It is in that respect that I think we should make it clear that we are not going to allow war criminals to try and exploit the justice system of the United States, so as to perpetrate an attack upon the United States designed to destroy that justice system, whether that justice system be in the criminal justice system or the Uniform Code of Military Justice.

For that reason, I think the President assigned the responsibility to the Secretary of Defense that he create a system attentive to these principles that was full and fair, but was designed to protect the United States of America, and I hope that the system also signals unmistakably to the world that innocent lives are not to be destroyed by war criminals and such activity will not go unnoticed or uncompensated or unresponded to by the United States.

Senator MCCONNELL. Again, Mr. Attorney General, I want to congratulate you. I think you have won the public discussion on military commissions. You have done it in an outstanding way, and we thank you very much for being here today.

Chairman LEAHY. Attorney General, I think everybody would assume that we have demonstrated very much to the world that we

do not take lightly these attacks on our soil. All you have to do is turn on the evening news and see the tens of billions of dollars of effort, bombs being dropped, our special forces, Marines, even giving up their lives to carry that out. We also want to demonstrate to the American people, at the same time, that we also have an equal commitment to preserving those liberties that have made us free.

Attorney General ASHCROFT. We could not agree more profoundly on that, Mr. Chairman.

Chairman LEAHY. I understand.

Senator Cantwell?

Senator CANTWELL. Thank you, Mr. Chairman, and General Ashcroft, thank you for your patience and testimony today. Hopefully, I can bring up a few subjects that have not been discussed, and I appreciate your help in getting through a few questions, if we could.

Obviously, the cumulative nature of the Department's actions over the past few months, the expansion and the eavesdropping authority in the terrorism bill, the expansion of use of e-mail searching with technologies like Carnivore, the compilation of databases on Arab Americans, and just this week a request made to the Intelligence Committee to broaden the FISA wiretap authority even further brings a lot of questions in America that maybe we may just be going too far, too fast.

Given that, I guess my first question is, and given that really the safeguards in judicial review that have been in place before on some of these wiretap and eavesdropping measures are being eased, what do you believe should be the process of oversight? And to be specific, if I could, if we are expanding the watching capacities of the FBI and the Justice Department, who should be watching the watchers in our oversight?

Attorney General ASHCROFT. You remind me of a spate of cartoons that has appeared in the last week, and it is generally a kid sitting on Santa's knee and the Santa saying, "I know when you have been sleeping. I know when you have been awake. I know when you have been bad or good," and the kid looks up and says, "Who are you—John Ashcroft?"

[Laughter.]

Senator CANTWELL. I am not sure everybody in America is laughing at that.

Attorney General ASHCROFT. Well, let me apologize if that is offensive to you. I do not take it lightly. I do know that the things I do are serious, although I try not to take myself too seriously.

I think this Committee has a valuable and appropriate oversight responsibility. It is why I was eager to respond to the Committee. I volunteered to come in on Thursday of last week and was told that Thursday would be an inappropriate day last week, so I am here this week.

I do not take lightly your responsibility, and I do not take lightly the responsibilities that we have to enforce the law, but neither do I take lightly the responsibility we have to safeguard the liberty of individuals. That is why, when we wanted additional authority and we seek additional authority, we do not take it lightly. An author-

ity that we do not have, we come and ask this Congress for and work with them on.

The Intelligence Committee has recently sought to make four adjustments in the law. Two of them are really the corrections of what have to be viewed as almost typographical sorts of housekeeping things that were with the U.S.A. Patriot Act, and another two are minor adjustments that the Intelligence Committee believes would be appropriate.

But I fully agree, if you are suggesting, that you have a solemn responsibility to see to it that we do not go too far, and I think that is always an appropriate question, and it is a question that I never want to fail to ask myself.

Senator CANTWELL. Well, in following that line of questioning, particularly in the areas and use of Carnivore and Magic Lantern, which is technology that I believe that the FBI is using and, in our expansion in the antiterrorism bill, I mean, I just want you to know I am voting for that legislation and giving my constituents the assurance that we were going to monitor carefully and have oversight. I am asking you now if the Department of Justice will meet with Congress on a regular basis, maybe four times a year, in closed-door session, if necessary, and provide information to us on the usage of Carnivore and Magic Lantern as eavesdropping on electronic mail that I think America is concerned about.

Attorney General ASHCROFT. I need to try and clarify something. Carnivore was a proposal, which has been very significantly adjusted to meet a number of concerns expressed I think by the people who have dealt with you, and I have dealt with, and I dealt with when I was in the Senate. It has now, with those adjustments, been referred to by a different name, DCS–1000 I believe is the name of it.

I am interested in working with the Congress to make sure that capability is appropriately deployed and respectfully deployed and would be pleased to find a way to do that, and we will work with you to get that done.

Senator CANTWELL. So you think possibly meeting four times a year, reports on the usage of that technology—I know that you mentioned earlier, and I know that sometimes headlines can be unfair, but in probably the category of headlines that John Ashcroft would hate, yesterday's ZDNet online publication had, "Warning: We know what you're typing, and so does the FBI."

The article goes on to talk about how the expanded authority under the Patriot Act could mean that the FBI would be using the Magic Lantern technology, which really creates a worm, if you will, on an e-mail. So the suspect who may be your target then sends an e-mail to another individual, thereby sending this worm and virus and then leaving them open to having their keystrokes monitored.

I think, in the interest of not wanting to have more headlines like this, if we can work more closely together to understand how this technology is used and making sure that Americans' e-mails, under this broad expansion of power to catch terrorists, are not being overly used and invading U.S. citizens' rights to communicate electronically.

Attorney General ASHCROFT. I welcome the opportunity for the Department to work with you toward these objectives.

Senator CANTWELL. Thank you. If I could, I appreciate your signing of the U.S.–Canadian agreement on cooperation on immigration and asylum. Obviously, we are in the last days here of working very diligently on the Northern border issues. One of the concerns that we have, in the antiterrorism bill, we authorized the tripling of Northern border inspectors, INS, Customs agents, and yet we, in the supplemental that has been submitted by the administration, have very few dollars for those activities.

So I am asking whether you support the homeland defense measures here in the Senate that would appropriate dollars for that effort that we did authorize in the Patriot Act.

Attorney General ASHCROFT. Senator, I believe we need additional resources along the Northern border. We have about 5,500 miles of border with Canada. Even with the assignment of National Guard troops to try to back-fill some of the overstressed individuals there, we are at a very low number. In some respects, we have less—I think it is about one person per every 100 miles, if we count the way the shift would have to be so that people do not work full time all of the time.

I will urge upon the administration the devotion of the appropriate resources to provide us with not only a secure border, but with the border that gives us the facility and flow necessary to keep commerce going and the valuable trade between our countries.

I was in Detroit and Ottawa both this week earlier, and we have about $1.3 billion a day that crosses our borders in trade between the United States and Canada. About $1 out of every $5 of trade the United States does anywhere in the world is with Canada. If we do not have the capacity to move that trade expeditiously, we hurt ourselves economically very badly. That is the basis for our effort to provide additional cooperation.

This President has instructed me, in the homeland defense and security arena, to work with the Canadians to the advantage of both of our countries, and I will try and work with you in the same respect.

Senator CANTWELL. I know my time has expired, Mr. Chairman, but if I would, I think I will submit one last question on the U.S.–Canadian agreement as it relates to biometrics. There is a mention in there of agreement working with Canada on the permanent residency, you know, green card status and use of biometrics.

I think what our language in the antiterrorism bill envisioned is more working on visas of people seeking to come into the country on a temporary basis and using some sort of biometric standard there to positively identify people that we do not want into the country as opposed to people who are working here on a permanent basis having to submit, when they actually already do, for those green card standards, but I will submit a question on that.

Thank you.

Attorney General ASHCROFT. Thank you.

Chairman LEAHY. The Senator from North Carolina?

STATEMENT OF HON. JOHN EDWARDS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator EDWARDS. Thank you, Mr. Chairman.

Good afternoon, Mr. Attorney General.

Attorney General ASHCROFT. Good afternoon.

Senator EDWARDS. Appreciate your patience. I know this has been a long hearing.

We want very badly to make sure that you have the tools you need to protect the American people, including new laws and new measures, but while we are protecting American lives, we also need to be certain that we protect American values and American principles.

It seems to me that these times of crisis and times of war are times when those principles and values are most at risk, when people get caught up in the passion of doing what is necessary under the circumstances. We have seen in the past, during World War II, the internment of over 100,000 Japanese Americans by a great President. I am sure at that time that was a very popular move, but it is not something, I do not think, that we are very proud of today. I am not suggesting that these military tribunals are equivalent to that, but whatever we do, I want to make sure that your children, and mine, and our grandchildren will be proud of what we have done.

My concern about the whole issue of military tribunals is not the notion of using them. I can easily see that there would be circumstances in which it would make sense to use them. My concern is that this directive, this order, is extraordinarily broad, and I want to ask you about three or four areas, if I can, to see if we can make sure that some of the things that the order would appear to allow, in fact, are not something that you intended or intend to do.

Number one, the order says that a person who is subject to the order shall be detained, and then goes on to say, if that individual is tried—so subject to the order you shall be detained, if you are tried. So, on the face of the order, it would appear to allow unlimited detention without trial.

First, can you tell us today that that is not something that will happen under this order?

Attorney General ASHCROFT. Senator, I believe, and I am trying to recreate some of this order in my mind, but I believe that when you get to the trial part, it talks about when tried, and I think that is the intent of the order.

Senator EDWARDS. Well, I am looking—excuse me for interrupting you—I am looking at the language right now. "If the individual is tried," is the language of the order, at least the language that I have in front of me.

Attorney General ASHCROFT. I think there is another part of the order.

Senator EDWARDS. Without getting caught up on the semantics, though, you do not intend to use this order to detain people and detain them for an unlimited period of time without trial; is that true?

Attorney General ASHCROFT. I believe it is completely fair to say that.

Senator EDWARDS. Second, there is a provision in the order that says the President or the Secretary of Defense makes the final decision. I believe you are familiar with that provision.

Attorney General ASHCROFT. Yes.

Senator EDWARDS. On the face of the order, that would allow the President or the Secretary of Defense to, in fact, overturn an acquittal by a tribunal; in other words, to come in after the case has been tried, there has been an acquittal, and the Secretary of Defense decides we do not agree with that, we are going to overturn it. And, in fact, on the face of the order, it would allow the Secretary of Defense alone to impose the death penalty.

What I want to know is, is that the intent of the order or can you tell us today that if, in fact, there is an acquittal at the tribunal level, that that will not be overturned by the Secretary of Defense?

Attorney General ASHCROFT. I believe it is settled practice of war crime commissions that you cannot overturn an acquittal. I feel confident in telling you that is not the intention of—

Senator EDWARDS. That will not occur.

Attorney General ASHCROFT. I do not believe that to be intended by the order.

Senator EDWARDS. Third, burden of proof. There is nothing in the order that deals with the issue of burden of proof. That, on its face, would allow someone to be convicted and, in fact, receive the death penalty on a greater weight of the evidence standard or a preponderance of the evidence standard, 51 percent versus 49 percent.

Can you tell us that, in order for someone to be convicted under this order and for the death penalty to be imposed against them, that you will require a significantly higher burden of proof than preponderance of the evidence or greater weight of the evidence, which is only used in civil cases in this country?

Attorney General ASHCROFT. I think it is pretty clear that the President has asked the Secretary of Defense to develop a set of regulations and procedures governing the war crimes commissions that are full and fair. Admission of such evidence would be evidence of probative value. There is a provision for the accused to be represented by counsel. The conviction and sentence would be upon two-thirds majority vote.

Senator EDWARDS. Mr. Attorney General, excuse me for interrupting you, but the only thing I am asking you about—I am not asking you about either of those things—I am only asking you about the burden of proof. Will you require, in order for somebody to be convicted and the death penalty to be imposed against them, that the burden of proof be more than just a preponderance of the evidence?

Attorney General ASHCROFT. I think that is an issue which is still to be determined, and it would be beyond my power to speculate on that. The Secretary of Defense is formulating the procedures, and among those procedures may be items like appeals procedures and other instructions to those conducting the trials, but I cannot provide further information than to say that at this time.

Senator EDWARDS. You are the Attorney General of the United States. You are an experienced lawyer. I am asking you whether you believe it is appropriate for somebody to be convicted and re-

ceive the death penalty based on 51 percent of the evidence? Do you or do you not, you, just you, personally?

Attorney General ASHCROFT. I am not going to try to develop a set of rules or regulations on that evidentiary standard or other standards at this time. That is the responsibility of the Secretary of Defense in regard to this very serious matter, and I would expect him to very carefully make judgments in this arena. I, personally, have not given that the kind of thought, at this moment, to say what exactly I would do were I to have the responsibility, which I do not have.

Senator EDWARDS. Now you just mentioned a provision in the order that says that the conviction can occur on a two-thirds vote, as opposed to a unanimous vote. Does that mean that under this order, if there is a three-person tribunal, that somebody could be convicted, receive the death penalty and be executed based upon a 2-to–1 vote?

Attorney General ASHCROFT. I would believe that this states a minimum standard in its direction to the Secretary of Defense. It means that two out of three of the triers of fact have to come to a conclusion before a sentence could be imposed.

Senator EDWARDS. Which means that if the tribunal is composed of three people, the case is presented, two of the three say that the death penalty should be imposed, one says it should not, it could be imposed, and the person could be executed; is that what you are saying?

Attorney General ASHCROFT. If you are talking about a two-thirds rule, and if that is the rule that eventually is adopted by the Secretary of Defense, two out of three is two-thirds. I agree with that.

[Laughter.]

Senator EDWARDS. All right.

Attorney General ASHCROFT. U.N.-sponsored tribunals allow conviction on a simple majority, like the ones at The Hague and the ones that are litigating and adjudicating the atrocities against those in Central Africa, and it seems to me that—

Senator EDWARDS. Excuse me, Mr. Attorney General, do those allow the death penalty?

Attorney General ASHCROFT. I do not know.

Senator EDWARDS. I do not believe they do.

Let me ask you one last area, the area of the whole question of appeals. We have seen in our court system—which most of us believe is one of the best, if not the best, in the world—over the last 2 decades, people who, based on later-found evidence, DNA evidence, for example, have absolutely been found to not have been possible that they committed the crime.

The White House counsel has said that a challenge can be made to the jurisdiction of the Court. Now you and I understand that the jurisdiction is very different than whether, in fact, the person committed the crime, whether they are guilty, whether evidence should have been admitted that would have shown that the person could not have committed the crime, all of those issues that go to the basic question, which I think most Americans are concerned about, about these kinds of issues, is did this person do it? Did they, in fact, do what they have been accused of doing?

Do you believe that there needs to be a process that allows some appeal that looks at the fundamental question of how the trial was conducted, whether evidence was properly considered by the Court, and whether, in fact, there was evidence that was not considered by the Court that would have shown this person, in fact, did not do it, did not commit this crime?

Attorney General ASHCROFT. In the President's order to the Secretary of Defense to develop procedures here, I believe there is adequate latitude for the Secretary of Defense to develop a potential and a framework for—

Senator EDWARDS. And is that something you believe should be done?

Attorney General ASHCROFT. I believe that the President and the Secretary of Defense, both according to the order, constitute appellate authorities, and I think those appellate authorities are consistent with systems that provide the kind of justice that is less likely to have error.

Senator EDWARDS. The President and the Secretary of Defense are the people who decided the prosecution should be brought in the first case. Do you believe there needs to bean objective third party that looks at the trial, looks at the conviction, looks at the imposition of the death penalty, if that, in fact, has occurred, and looks at whether it should have happened?

Attorney General ASHCROFT. The Secretary of Defense would have the authority to develop appellate procedures under the order, military order, for the development of war commissions issued by the President. I believe that that authority is available to him, and if he chooses to confer with me about that, I will provide advice to him regarding appellate procedures.

Senator EDWARDS. Do you believe, in fact, there needs to be a review, an objective review, by a third party. That is what I am asking you.

Attorney General ASHCROFT. I am going to reserve my comments to provide advice to the President and the Secretary of Defense regarding any questions they have for me regarding what should be or should not be added in terms of procedures for this order.

Senator EDWARDS. Thank you, Mr. Attorney General.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Edwards.

I think, as I hear this testimony, I think all of the more reason guidelines should be set by the Congress for military tribunals, especially on the question of preponderance of evidence, the death penalty, but I think we can do that.

I would suggest that Senator Hatch, and I, and others at least have that discussion.

Senator HATCH. Could I make just one last comment? I would like to read one person's defense of the military tribunal system, and let me quote it.

"It is of the utmost importance that no information be permitted to reach the enemy on any of these matters. How the terrorists were so swiftly apprehended; how our intelligence services are equipped to work against them; what sources of information we have inside al Qaeda; who are the witnesses against the terrorists; how much we have learned about al Qaeda terrorist methods,

plans, programs and the identity of other terrorists who might be or have been sent to this country; how much we have learned about al Qaeda weapons, intelligence methods, munitions plants and morale."

"All of the testimony given at a trial bears, to some degree, upon these matters. There is no satisfactory way of censoring and editing this testimony for the press without revealing, by statement or significant omission, the answers to many of the questions which may now be puzzling our enemies. We do not propose to tell our enemies the answers to the questions which are puzzling them. The only way not to tell them is not to tell them. The American people will not insist on acquiring information which by the mere telling would confer an untold advantage upon the enemy."

Now these are not my words. These are the words of Franklin Delano Roosevelt's Attorney General, Francis Biddle, in announcing the military tribunal that FDR constituted in connection with the *Quirin* case. Now I merely substituted "al Qaeda" for "Germany" and the word "terrorist" for "saboteur."

The reason I read this is to provide some perspective. The issues we are confronting here are not new. The same issues that concern us today, concerned our forefathers during World War II, and the same reasoning that persuaded FDR to constitute a military tribunal still ring true today.

So, if I could submit for the record the full remarks of Attorney General Biddle, I think it would be appropriate.

Chairman LEAHY. We will close with this, just to, now that you have raised that point, note that on that tribunal, not only was there, of course, congressional authorization, but I would also point out that history has now shown the driving force behind that tribunal was to cover up the mistakes of J. Edgar Hoover at a time when he was about to receive a medal from Congress—

Senator HATCH. I do not believe there was congressional authorization.

Chairman LEAHY. Be that as it may, this was, had there been an open trial, they would have found the evidence came from two of the saboteurs who had to beg the FBI to arrest them. I think we have a far different FBI today, a far better FBI today. I think that the Attorney General and Director Mueller deserve a lot of credit for that.

General, I thank you. You have been here for almost 3 hours. You have been patient. You know there will be other questions that will be asked for you. I appreciate your comments earlier that you were perfectly willing, and even eager, to be here testify. I appreciate that. That is in the best tradition of oversight.

I, also, believe you appreciate the fact that we are all united in wanting to battle terrorists. We also want to make sure all of us—you, me, and everybody else—that we preserve our own liberties in doing it.

With that, we thank you.

We stand adjourned.

[Whereupon, at 1:48 p.m., the Committee was adjourned.]

SUBMISSIONS FOR THE RECORD

ST. MARY'S UNIVERSITY SCHOOL OF LAW
December 2, 2001

Hon. Senator Schumer
Hon. Senator Sessions

SENATE HEARINGS REGARDING: PRESERVING OUR FREEDOMS WHILE DEFENDING AGAINST TERRORISM

Dear Senators Schumer and Sessions,

The purpose of this letter is to provide a short statement to express my general support for the use of military tribunals to try suspected war criminals/terrorists who have committed grave breaches of the laws of war. I have carefully read the military order signed by President Bush. Given the fact that a current state of international armed conflict exists between the United States of America and the Taliban government of Afghanistan, military tribunals are the appropriate forums to bring to justice suspected war criminals. Specifically, these individuals would be those non-U.S. citizens who participated in the unlawful attacks on the United States on September 11, 2001, and any other non-U.S. citizens who have committed subsequent grave breaches of the laws of war—whether members of the Taliban or individuals who are harbored by the Taliban.

Traditionally, the Executive Branch has employed the use of military tribunals/commissions to try suspected war criminals for actions that amounted to grave breaches of the laws of war during war. Since the close of the American Civil War in 1865, all individuals referred to such military trials have been non-U.S. citizens and the Executive Branch has not only established the tribunals but also the rules associated-with the operation of said military trials. Apart from "fairness" issues associated with what rules the Executive Branch (through the Secretary of Defense) may ultimately establish for the *modus operandi* of the tribunals in the current situation, in my professional opinion, not only is the use of military tribunals to try non-citizens who have committed grave breaches of the laws of war a Constitutional exercise of power by the Executive Branch, but I believe that the Executive Branch has the legal authority to provide for the associated rules by which these tribunals will operate.

1 am currently a Visiting Professor of Law at St. Mary's University School of Law in San Antonio, Teas where I teach a variety of topics to include National Security Law. I retired two years ago after serving for 20 years in the U.S. Army's Judge Advocate General's Corps. While in the military I worked in a variety of legal positions to include the Deputy of the International Law Division in the Pentagon, Senior Instructor in law of war issues at the Army's The Judge Advocate General's School, and the senior legal advisor for the U.S. Army Special Forces (Airborne)

If I may be of any further help in this regard, please feel free to contact me at 210-431-2274, email *addicottj@law.stmarytx.ecu.*

Very Respectfully Yours,

JEFFREY F. ADDICOTT
Visiting Professor of Law

Statement of American Civil Liberties Union, Washington, D.C.

The American Civil Liberties Union is a non-partisan, non-profit organization consisting of nearly 300,000 members dedicated to protecting the principles of freedom and equality set forth in the Constitution and in our civil rights laws.

On September 11, thousands of Americans were brutally murdered in an audacious, coordinated attack. Our main office is only blocks away from the twin towers and our colleagues joined the terrified crowd rushing north from lower Manhattan. We recognize that the Department of Justice has a profound duty to prosecute the perpetrators and to try to protect the public against other attacks. We appreciate that this is a daunting task and that thousands of well-meaning people at the Department of Justice are working hard to accomplish this goal.

The ACLU has supported many of the efforts now underway to promote security, such as recent initiatives to toughen airport security. However, we remain convinced that the government need not sacrifice civil liberties to protect the public. We can be both safe and free.

This statement outlines how the conduct of the Department of Justice over the last ten weeks has undermined our most cherished rights, blunted the tools of accountability, and threatened the balance of power between the various branches of government.

From the outset, the Attorney General and other spokespersons for the Department of Justice have signaled that they would not erode civil liberties in response to the September 11 attacks. Unfortunately, the actions of the Department of Justice and of other agencies acting in concert suggest otherwise. The Attorney General and the Administration have detained more than a thousand people without providing information to the media or public, written new regulations allowing for the recording of privileged conversations between attorneys and clients, proposed military tribunals without constitutional protections, and expanded the government's ability to withhold information from the public. We are deeply troubled by these actions. We hope that today's hearing is a step in the direction of Congress taking responsibility for its role in overseeing the Executive Branch and protecting our democratic government.

MILITARY TRIBUNALS

"We will not yield in our determination to protect the constitutional rights of individuals. Very frankly, those who attack the United States would attack the constitutional rights as well as the safety of individuals. We're going to do everything we can to harmonize the constitutional rights of individuals with every legal capacity we can muster to also protect the safety and security of individuals. It's with this in mind that we would evaluate any potential changes in the law." Attorney General Ashcroft, Press Briefing, September 18, 2001.

On November 13, 2001, President Bush issued a "Military Order" providing for potentially indefinite detention of any non-citizen accused of terrorism, and permitting trial of such defendants in a military commission with no provision for judicial review.

These tribunals will not be governed by the Uniform Code of Military Justice and do not contain the protections provided by the UCMJ. The order was issued without a formal declaration of war or any authorization by the Congress for the establishment of military tribunals. It circumvents the basic statutory requirement - at the heart of the compromise that was the USA Patriot Act -that non-citizens suspected of terrorism must be charged with a crime or immigration violation within seven days of being taken into custody, and that such detainees will have full access to the federal courts.

The President's Military Order is unjustified and dangerous. It permits the United States criminal justice system to be swept aside merely on the President's finding that he has "reason to believe" that a noncitizen may be involved in terrorism. It makes no difference whether those charged are captured abroad on the field of battle or at home by federal or state police. It makes no difference whether the individual is a visitor or a long-term legal resident. Finally while the order applies in terms only to non-citizens, the precedents on which the President relies make no .such distinction, thereby permitting the order to be extended to cover United States citizens at the stroke of a pen.

The President does not have unchecked war power by virtue of his authority as Commander-in-Chief. Rather, he shares these powers with Congress. "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry." *Talbot* v. *Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801). This is true whether Congress authorizes "general hostilities" by declaring war, or "partial hostilities" by authorizing the use of force in a military action short of war, as it has done here. *Id*.

The Administration claims authority to establish military tribunals from the World War II-era precedent involving the trial of eight accused saboteurs, who landed on United States territory in 1942, shortly after the United States declared war on Germany. Their trial by military commission was upheld by the Supreme Court. *Ex Parte Quirin*, 317 U.S. 1 (1942). But unlike President Bush, President Roosevelt relied on the authority Congress had given him by its formal declaration of war. *Id* at 25–26. Roosevelt also relied on specific statutory authority permitting trials of enemy spies by military commission.[1] This authority has since been repealed.[2]

The scope of the President's Order is breathtakingly broad. It applies to any individual whom the President determines he has "reason to believe" is (1) a member of A1 Qaeda, (2) is in any way involved in "acts of international terrorism"—a term

[1] *Id.* at 21–23 (charging violations of Articles 81 & 82 of the Articles of War).
[2] *See* Pub. L. No. 84–1028 (1956) (repealing Articles 81 & 82).

which is not defined by the order—or (3) has "knowingly harbored" either of the above. If the term "acts of international terrorism" is defined by reference to any of several definitions of terrorism in the United States Code, as expanded under the USA Patriot Act, the universe of potential defendants could sweep in not only those who are directly involved in or knowingly support violent activity, but also many others on the basis of otherwise lawful, non-violent political activities and associations.

The Attorney General has sought to justify the order on the grounds that it applies only to noncitizens, whom he erroneously (and alarmingly) claims not to have any constitutional rights. The Supreme Court made clear just this past summer that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvvdas* v. *Davis*, 121 S. Ct. 2491, 2500 (2001) (emphasis supplied).

If United States courts can hear terrorism cases, and there has been no showing that they cannot, this severely undercuts the argument for military tribunals. Military tribunals, other than ordinary courtsmartial, are adopted as a last resort to ensure justice when the civil courts cannot function, not as a method of avoiding available forums for justice by undercutting basic constitutional rights. Military tribunals are used against "certain classes of offense which in war would go unpunished in the absence of a provisional forum for the trial of the offenders." *Madsen* v. *Kinsella*, 343 U.S. 341, 348 n.8 (1952) (emphasis supplied). Likewise, President Lincoln regarded military justice as permissible only if justified by military necessity, and refused demands to create military courts except where made necessary because of the inability of the regular courts to act.[3]

The Military Order also fails to respect the careful limits that the Constitution has placed on the use of military courts even in times of declared war. They are not a substitute for civil justice generally, but may be applied only to "unlawful enemy belligerents," a class which is far narrower than the universe of all persons who could be accused of terrorism crimes, particularly after the broadening of the definitions of terrorism in recent anti-terrorism legislation.

Finally, and perhaps most importantly, the order utterly fails to account for the evolution of both international law and American constitutional law since World War II, when military commissions were last extensively used. It does not guarantee due process for the accused and could permit trials that our own government has said are fundamentally unfair and violate basic international standards when such trials are held in other countries. If Congress chooses to authorize military tribunals for a limited class of accused terrorist war criminals, it is imperative that such standards apply.

DETENTIONS

"I'm deeply concerned about the civil liberties of all Americans. I'm especially concerned about the civil liberties of Arab Americans and Middle Eastern Americans who are patriotic citizens, who lament and regret this loss, perhaps as keenly or more keenly than any, and whose commitment to the strict enforcement and pursuit of these networks of terror that inflict this kind of injury is as strong as any." Attorney General Ashcroft remarks following his tour of the Pentagon, September 19, 2001.

The Department of Justice has launched what appears to be the most extensive program of preventative detention since the internment of over 100,000 Japanese and German-Americans during WWII. By the admission of the Department of Justice, over 1,200 people have been detained in connection with the September 11 attacks. According to media accounts of the detentions, approximately 1 percent or 2 percent of those detained in connection with the attacks are actually suspected of having any involvement at all. The rest are being held on the basis of unrelated immigration violations, minor crimes (usually under state law), and as material witnesses under 18 U.S.C. sec. 3144. It appears that the vast majority of the people being detained in connection with this investigation are being detained on pretexts: they have committed a minor offense that gives law enforcement or immigration authorities the power to detain them even though they would not under normal circumstances be detained for such conduct. By all accounts, virtually all of the detainees are Muslims or Arabs, and most are noncitizens.

An extraordinary wall of silence surrounds this preventative detention campaign. The public, though it has a right to know, has not been informed of even the most

[3] Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 Am. J. Int'l Law 213, 223–25 (1998). Of course, Lincoln's views of what was "necessary" conflicted with that of the Supreme Court in the *Milligan* case.

basic information such as who has been detained, why, for how long, and where the detentions have occurred. The Department of Justice has refused to release specific information about the detainees.

For these reasons, the ACLU wrote to the Attorney General asking him for information about the detainees. There was no response to that letter. We posed similar questions to the Director of the FBI, Robert Meuller, at two meetings during the month of October. We posed similar questions to Commissioner Ziglar of the Immigration and Naturalization Service on October 30. When all those requests for information failed, we filed, along with other organizations, a request under the Freedom of Information Act. Our requests have not been satisfactorily answered and we are considering further legal action. This wall of silence undermines public confidence in the investigation and raises questions about the fairness of the process and the safety of those detained.

Persons detained on immigration charges are of particular concern because their access to legal counsel is limited. Unlike defendants in criminal cases or persons held as material witnesses, those who face immigration charges are not entitled to counsel at government expense if they cannot afford an attorney. In New York, the immigration detainees are reportedly given a list of pro bono attorneys in the area. However, there is no guarantee that the attorneys listed are qualified to represent persons under these circumstances, nor is there any guarantee the detained person will have success contacting an attorney. In some cases, detainees are allowed only one telephone call a week to find an attorney. Predictably, many of those who are questioned are questioned without an attorney.

Another area of concern that is just coming to light is the fact that the Depart of Justice is planning on questioning 5000 men based solely on national origin. This constitutes blatant racial profiling, as some police departments have recognized.

EAVESDROPPING ON ATTORNEY-CLIENT COMMUNICATIONS

"I want to assure you that in our effort to make sure that law enforcement can gain the intelligence that it needs in order to protect America, we are also mindful of our responsibility to protect the rights and privacy of Americans." General Ashcroft, Press Briefing with FBI Director Robert Mueller, September 17, 2001.

To add to the concerns about the detainees, the Justice Department, unilaterally, without judicial oversight, and without meaningful standards, has issued rules that give it the power to decide when to, eavesdrop on the confidential attorney-client conversations of a person whom the Justice Department itself may be seeking to prosecute. This regulation, implemented without the usual opportunity for prior public comment, is an unprecedented frontal assault on the attorney-client privilege and the right to counsel guaranteed by the Constitution. It is especially disturbing that these provisions for monitoring confidential attorney-client communications apply not only to convicted prisoners in the custody of the Bureau of Prisons, but to all persons in the custody of the Department of Justice, including pretrial detainees who have not yet been convicted of crime and are presumed innocent, as well as material witnesses and immigration detainees, who are not accused of any crime. 28 C.F.R. § 501.3(f) (proposed amendment).

The rule disregards long-standing Supreme Court precedent that protects the attorney-client .relationship. The Court has repeatedly emphasized the importance of the need for attorneys to communicate openly with their clients and has grounded this principle in both the long-standing attorney-client privilege as well as the Sixth Amendment right to adequate counsel. Regarding the attorney-client privilege, the Court wrote:

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.

Upjohn Co. v. *United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682 (1981). Indeed, so well established is this privilege, and so compelling the societal interest in unobstructed communication between clients and their attorneys, that the Supreme Court has held that the privilege survives even after the client's death. *Swidler & Berlin* v. *United States*, 118 S. Ct. 2081, 2088 (1998).

Regarding the Sixth Amendment right to counsel the Court wrote: "[T]he Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding." *Weatherford* v. *Bursey*, 429 U.S. 545, 554 n. 4, 97 S. Ct. 837, 843 n. 4, 51 L.Ed.2d 30 (1977). It is noteworthy that the Court took this quotation from the Brief for United States as Amicus Cu-

riae indicating that even the government recognizes the importance of private communications.

The new rule gives the government the power to eavesdrop on a conversation between a detained person and his attorney any time the Attorney General finds that there is "reasonable suspicion" that a person in DOJ custody "may" use communications with attorneys or their agents "to further or facilitate acts of terrorism." The Attorney General makes the determination as to what constitutes "reasonable suspicion" without any provision for judicial review. The rule purports to provide safeguards such as "notice" that recording is taking place and the establishment of a "privilege team" within the Department of Justice that has the responsibility to review attorney client communications, then seek judicial approval before giving the information to the prosecuting attorney (unless the team alleges an imminent threat of terrorism, in which case judicial review is unnecessary).

This "privilege team" is not an adequate solution to safeguard the attorney-client relationship. Under the proposed regulation, the determination of what constitutes "properly privileged materials" is made not by a neutral and disinterested judge, but unilaterally by the Justice Department itself. It will therefore be impossible for prisoners and their counsel to know in advance what portions of their intercepted communications the Justice Department will ultimately deem to be "properly privileged materials." This uncertainty renders the privilege meaningless. "[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications. . ., is little better than no privilege at all." *Upjohn*, 449 U.S. at 393, 101 S. Ct. at 684.

Although promulgated in the name of preventing terrorism, the DOJ rule goes beyond intercepting potential "terrorist communications" between a lawyer and client. The Attorney General can authorize eavesdropping on all of a detainee's attorney-client communications, even when the detained person has been convicted of no crime and is merely planning his defense with his attorney, or has been detained on immigration charges and is not accused of any crime at all.

Lastly, this rule is unnecessary because current law already allows the government to seek a court order to record attorney client conversations if it has probable cause to believe that the attorney, with his client, is planning a serious crime such as terrorism.

Like so many other post-September 11 proposals, this rule is an attempt to vest with the Department of Justice, instead of the courts, the power to determine when communications between a lawyer and her client should be stripped of their privileged status. It is particularly disturbing to note that the standard for the Attorney General to authorize eavesdropping on conversations between attorneys and clients, reasonable suspicion, is less stringent than the standard of proof necessary to obtain an ordinary search warrant or a wiretap warrant, which is probable cause.

SECRECY

"As we do in each and every law enforcement mission we undertake, we are conducting this effort with the total commitment to protect the rights and privacy of all Americans and the constitutional protections we hold dear." Attorney General Ashcroft, testifying before the House Judiciary Committee, September 24, 2001

Americans have experienced the loss of privacy and the increase of secrecy take place with dizzying speed since September 11. Department of Justice regulations and Executive Orders have covered government operations with a shroud of secrecy.

FREEDOM OF INFORMATION ACT AND PRESIDENTIAL RECORDS

Attorney General John Ashcroft has issued a new statement of policy that encourages federal agencies to resist Freedom of Information Act (FOIA) requests whenever they have legal grounds to do so. The new statement supersedes a 1993 memorandum from Attorney General Janet Reno, which promoted disclosure of government information through the FOIA unless it was "reasonably foreseeable that disclosure would be harmful."

The Ashcroft policy rejects this "foreseeable harm" standard. Instead, the Justice Department instructs agencies to withhold information whenever there is a "sound legal basis" for doing so. "When you carefully consider FOIA requests and decide to withhold records, in whole or in part," the Attorney General advised, "you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis. . . ." It is noteworthy that Attorney General Ashcroft has committed to having DOJ defend the suppression of public access—rather than forcing the agency to provide its own defense if challenged in court.

As with many of the Bush Administration's new restrictions on public information, the new policy is only peripherally related to the fight against terrorism. Rather, it appears to exploit current circumstances to advance a predisposition toward official secrecy. At the same time that the government is acquiring more legal authority to obtain private information about people it is also cutting back on sharing the information that it has obtained, making it more difficult for individuals to learn what kind of files their government is keeping on them.

Another example of Administration secrecy is an Executive Order, issued November 1, that gives President Bush—as well as former presidents—the right to veto requests to open any presidential records. Even if a former president wants his records to be released, the executive order permits Bush to exercise executive privilege to prevent their release. The order also gives President Bush, and former presidents, an indefinite amount of time to ponder any requests. Bush's executive order openly violates the Presidential Records Act passed by Congress in 1978.

In defending the executive order, the White House has argued that these new restrictions balance public access with "national security concerns." This argument is specious given that national security documents are already shielded from public scrutiny.

The Presidential Records Act was designed to shift power over presidential records to the government and ultimately to the citizens. This shifts the power back.

ROLE OF JUDICIARY

"The Justice Department will never waiver in our defense of the Constitution nor relent our defense of civil rights." Attorney General Ashcroft, testifying before the Senate Judiciary Committee, September 25, 2001.

Instead of enlisting the help of the judiciary in the fight against terrorism, the Department seems intent on writing the judiciary out of the picture altogether. The President's executive order establishing military tribunals represents the ultimate form of court-stripping—literally removing Article III courts from the picture with no provision for judicial review of the tribunal's actions. The Attorney General's lawyer-client eavesdropping order likewise writes judges out of their Constitutional role in deciding wheather there is probable cause to strip communications of their privileged status.

CONCLUSION

The Justice Department's actions have antecedents stretching back to the earliest days of the Republic. The Alien and Sedition Acts of 1798, criminal restrictions on speech during World War I, the internment of Japanese-Americans following the attack on Pearl Harbor, and the blacklists and domestic spying of the Cold War are all instances in which the government was granted (or assumed) summary powers in a moment of crisis, to the inevitable regret of later generations. The diminution of liberty that accompanied these episodes was later understood as an overreaction to frightening circumstances; each is now viewed as a shameful passage in the nation's history. After the immediate danger passed, it was recognized that the government had possessed ample powers to address the threats at hand; the new tools were unnecessary at best and dangerous at worst.

Despite Attorney General Ashcroft's promises to uphold the Constitution and protect civil liberties, his actions belie his rhetoric. Our democracy is in real danger if any one branch of the government becomes too powerful. From establishing military tribunals without Congressional approval to expanding wiretapping authority while limiting judicial oversight, this Administration is demonstrating its disregard for the other two branches of government. The precarious balance of powers is becoming dangerously tilted toward an excess of Executive Branch power.

We are heartened that the Senate is taking the lead in reclaiming the Congressional role of overseeing the new police powers and hope this will be an ongoing practice. While all of the country is focused on waging the war against terrorism we ask Congress to make sure that the war on terrorism does not become a war on democracy.

Statement of Timothy H. Edgar, Legislative Counsel, Washington National Office, American Civil Liberties Union, Washington, D.C.

Senator Schumer and members of the Senate Judiciary Committee,

My name is Timothy H. Edgar and I am legislative counsel for immigration and national security issues for the American Civil Liberties Union (ACLU). The ACLU is a non-profit, non-partisan organization with approximately 300,000 members, dedicated to preserving the freedoms, rights, and checks and balances outlined in our Constitution.

The ACLU welcomes this opportunity to submit our views on President Bush's "Military Order" of November 13, 2001. We applaud your decision to exercise your oversight responsibilities with regard to the issue of military tribunals. We ask that you reclaim your proper constitutional role by determining for yourselves under what circumstances, if any, military tribunals should be used.

The Military Order applies to some 20 million non-citizens in the United States, most of whom are legal residents, and any other non-citizen anywhere else in the world, and permits indefinite detention without trial in violation of a key detention compromise made in the USA Patriot Act. It could, at the stroke of a pen, be expanded to include United States citizens.

These military tribunals will not observe the same procedures as ordinary courts-martial under the Uniform Code of Military Justice and do not contain the protections available in the ordinary military justice system. They could, at the discretion of the Pentagon, permit secret trials, permit conviction or even execution on only a two-thirds vote of military officers, require less than proof beyond a reasonable doubt, deprive a defendant of counsel of their own choosing, and do away with the presumption of innocence.

These fundamental rights not only ensure a fair trial of the accused, but the safety of the public. They help ensure that the government convicts the guilty—and only the guilty—thus making sure that the actual perpetrators of terrorism are not still at large because an innocent person stripped of constitutional protection was wrongly convicted.

While the ACLU does not believe that the use of military tribunals is unconstitutional in all circumstances, the ACLU strongly opposes the Military Order because:

- Unlike President Roosevelt's order permitting trial of spies and war criminals during World War II, the order was issued without Congressional authorization, as required by the Constitution, which gives Congress, not the President acting alone, the power "To define and punish. . .Offences against the Law of Nations."
- Regular courts have so far proven successful in prosecuting terrorism cases. Military tribunals should be authorized by Congress only if the regular courts cannot function in particular cases.
- Military tribunals, if authorized by Congress, may only be used constitutionally used against clearly identified "unlawful enemy belligerents,"—a class far narrower than all persons accused of terrorism crimes—and have normally been reserved for individuals captured in a zone of military operations.
- Military tribunals, if authorized by Congress, must comply with basic international and constitutional due process standards, which are not provided for by the order.

The ACLU strongly urges members of this Committee to consider carefully the breadth of the Military Order, and to reclaim its constitutional power by deciding for itself under what circumstances, if any, military tribunals should be authorized in terrorism cases and to ensure that basic due process protections are preserved.

As it stands, the Military Order dramatically upsets the basic constitutional system of checks and balances by reserving to the President alone the power to indefinitely detain and order the military trial of a terrorism suspect. It contains the following basic constitutional flaws:

First, the order exceeds the President's constitutional authority. It was issued without any authorization by the Congress to establish such tribunals and without a formal declaration of war. It circumvents the basic statutory requirement—at the heart of the compromise on detention in the USA Patriot Act[1]—that noncitizens suspected of terrorism must be charged with a crime or immigration violation within seven days of being taken into custody, and that such detainees will have full access to the federal courts.

Second, the breadth of the President's order raises serious constitutional concerns. It permits the United States criminal justice system to be swept aside merely on the President's finding that he has "reason to believe" that a non-citizen may be involved in terrorism. It makes no difference whether those charged are captured

[1] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107–56.

abroad on the field of battle or at home by federal or state police. It makes no difference whether the individual is a visitor or a long-term legal resident. Finally while the order applies in terms only to non-citizens, the precedents on which the President relies make no such distinction, permitting the order to be extended to cover United States citizens at the stroke of a pen.

Third, the basic, fundamental rights guaranteed in United States courts and in ordinary courts-martial will not necessarily be afforded the defendants. The order purports to prevent review by any civilian court—including the Supreme Court of the United States—to ensure that even those rights ostensibly granted in the military proceeding are not violated. The rules and regulations that govern the tribunals are still being formulated. But, at the Pentagon's discretion, trials can be conducted in secret, and evidence can be introduced without the defendant being able to confront it. Only two thirds of the military officers on the tribunal's jury need find a defendant guilty, and the order provides for no meaningful appeal, even in cases involving the death penalty.

Other basic rights remain unprotected. These rights seek to ensure that the government gets it right, punishing the guilty and permitting the innocent to be cleared.

Fourth, there has been no showing that the order is necessary to advance justice or preserve national security. Civilian courts remain open and available to hear terrorism cases, and statutes and rules exist to safeguard classified information, ensure the safety of jurors and witnesses, and address other special concerns in terrorism trials. Military justice, while constitutional under certain circumstances which do not include all terrorism cases, is always a last resort.

Finally, it is already plain that any verdict rendered by a secret military tribunal is likely to be regarded as illegitimate by a large portion of the world under international treaties to which the United States is a party. If Congress chooses to authorize the use of military tribunals in a narrow class of cases, such trials will still have to meet basic constitutional and international law standards. These standards have changed greatly since World War II and require basic due process for the accused. The procedures contemplated by the Military Order violate those standards.

I. Congress Must Determine Whether and How To Establish Military Tribunals

The President does not have unchecked war power by virtue of his authority as Commander-in-Chief. Rather, he shares these powers with Congress. In particular, the Constitution gives Congress, not the President, the power "To declare War" as well as the power "To define and punish. . .Offences against the Law of Nations." Art. I, § 8.

Chief Justice John Marshall wrote plainly, "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry." *Talbot* v. *Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801). This is true whether Congress authorizes "general hostilities" by declaring war, or "partial hostilities" by authorizing the use of force in an military action short of war, as it has done here. *Id*.

The Administration claims authority to establish military tribunals from the World War II-era precedent involving the trial of eight accused saboteurs, who landed on United States territory in 1942, shortly after the United States declared war on Germany. Their trial by military commission was upheld by the Supreme Court. *Ex Parte Ouirin*, 317 U.S. 1 (1942). But President Roosevelt relied on the authority Congress had given him by its formal declaration of war. *Id* at 25–26. This authority, the Supreme Court held, gave military commissions the sanction of Congress, a sanction which lasted "from [war's] declaration until peace is declared." *In re Yamashita*, 327 U.S. 1, 11–12 (1946). Roosevelt also relied on specific statutory authority permitting trials of enemy spies by military commission.[2] This authority has since been repealed.[3]

By contrast, President Bush acted without a declaration of war and without any express Congressional authorization establishing military tribunals. Indeed, he acted without even consulting Congress. President Bush cites two Congressional enactments as authority for his order. Neither authorizes the establishment of military tribunals.

First, President Bush relies on Congress's authorization of the use of military force against those "nations, organizations or individuals" involved in the attacks on

[2] *Ex Parte Quirin*, 317 U.S. at 21–23 (charging violations of Articles 81 & 82 of the Articles of War).

[3] See Pub. L. No. 84–1028 (1956) (repealing Articles 81 & 82).

the World Trade Center and the Pentagon. *See* Pub. L. No. 107–40 (2001). But that resolution makes no mention whatsoever of the use of military tribunals to try terrorists, nor was this discussed during debate on the resolution.[4] Members of the House and Senate Judiciary Committees who voted for the resolution, of both parties, have expressed strong reservations about the President's unilateral decision, including Senator Arlen Specter (R–PA), Chairman Patrick Leahy (D–VT), Representative Bob Barr (R–GA) and Ranking Member John Conyers (D–MI). Furthermore, the President's order applies to anyone accused of terrorism, not just those involved in the attacks of September 11. The order therefore exceeds the scope of the military force resolution in any event.

Second, President Bush relies on sections 821 and 836 of Title 10 of the United States Code. Neither section authorizes the President's action. Section 821 simply states that the extensive statutory provisions regarding courts-martial of members of the Armed Forces "do not deprive" other military tribunals, such as military commissions, of concurrent jurisdiction over offenders who "by statute or by the law of war" can be tried by such commissions. In other words, this section provides merely that if Congress authorized military tribunals, then they would not have to follow the same procedures as courts-martial. Likewise, section 836 give the President power to establish procedures for military tribunals, which, again, would be relevant only if Congress chooses once again to authorize them.[5]

Finally, the President did not merely act in the absence of Congressional authorization, but deliberately flouted Congress's will. The Military Order permits indefinite detention of non-citizens suspected of terrorism with no provision for recourse to the courts, a power which the Administration had sought, but was denied, by the Congress in the USA Patriot Act. That Act requires that non-citizens suspected of terrorism be charged with a crime or grounds of removal from the country within seven days of being detained. USA Patriot Act, § 412, adding new INA § 236A. It expressly permits judicial review of the detention by habeas corpus, the ancient and constitutionally-protected remedy against unlawful executive detention. *Id*. The President's action thus is directly contrary to Congress's own considered view of the subject.

In *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Supreme Court made clear that the President cannot, on his own, authorize detention without trial, saying only Congress had that power. While the justices were divided on when Congress could authorize military trials, even those who supported a broad view of the government's emergency detention powers agreed that when Congress put limits on those powers, the President was bound to respect them. *See id*. at 115; *id*. at 139–40 (concurring opinion). Because Congress had expressly permitted detention without trial under certain circumstances—but not those involving Milligan's case—the President could not unilaterally expand those circumstances.

Like the statute in *Milligan*, the USA Patriot Act expressly references the habeas corpus statute, 28 U.S.C. § 2241, and permits detention without charge for seven days—well beyond the presumptively constitutional 48-hour period.—*See County of Riverside* v. *McLaughlin*, 500 U.S. 44, 56 (1991). But *Milligan* an plainly holds that where Congress never "contemplated that such person should be detained in custody beyond a certain fixed period, unless certain judicial proceedings. . .were commenced against him," *id* at 115, the President cannot evade those restrictions through the mechanism of a Military Order.

II. The President's Order Sweeps Broadly, Stripping Away Basic Rights

The scope of the Military Order is breathtakingly broad, applying far beyond a narrow class of Al Qaeda leaders in Afghanistan. It applies to any individual whom the President determines he has "reason to believe" is (1) a member of Al Qaeda, (2) is in any way involved in "acts of international terrorism"—a term which is not defined by the order—or (3) has "knowingly harbored" either of the above. It applies retroactively and contains no time limit, allowing for such trials not only of conduct years ago, but long after the current crisis is over. Any one of the more than 20 million non-citizens in the United States, most of whom are legal residents, and anyone else in the rest of the world, could potentially face trial in a military tribunal.

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[4] See Cong. Rec. H5638–5683 (Sept. 14, 2001).

[5] It is true that the *Quirin* Court said that Congress had authorized trial of enemy spies not only under Articles 81 & 82 but also under the "law of war," citing what is now 10 U.S.C. § 821. But the Quirin Court had no occasion to consider the constitutionality of a unilateral Executive Branch decision to invoke this authority in the absence of a formal declaration of war or of any specific authorization of trial by military commission, and against a far broader class of defendants.

If the term "acts of international terrorism" is defined by reference to any of several definitions of terrorism in the United States Code, the universe of potential defendants could sweep in not only those who are directly involved in or knowingly support violent activity, but also many others on the basis of otherwise lawful, nonviolent political activities and associations. For example, under the federal criminal code, material support of a terrorist organization, regardless of whether that support furthers terrorist activity, is defined as terrorism. 18 U.S.C. § 233913. Supporting a school or day care center which is allegedly linked to a terrorist organization could thus be considered "acts of international terrorism" and subject a person to a military trial.

While the order is limited to non-citizens, the Supreme Court reaffirmed just this summer that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas* v. *Davis*, 121 S. Ct. 2491, 2500 (2001) (emphasis supplied). Moreover, the constitutionality of trial by military commission is simply not based on the status of the offender as citizen or non-citizen. The order could easily be extended at the stroke of a pen to include United States citizens, who were tried before such commissions in the case of the saboteurs. In that case, the Supreme Court held that one saboteur's status as a United States citizen "does not relieve him" from trial before a military commission. Quirin, 317 U.S. at 38. "[T]he offenders were outside the constitutional guaranty of trial by jury, not because they were aliens but only because they had violated the law of war by committing offenses constitutionally triable by military tribunal." *Id*. at 44 (emphasis supplied).[6]

The Military Order contains only the barest of details concerning the conduct of military trials of terrorism suspects. The Order requires that prisoners be treated "humanely" and that they be given "a full and fair trial." Other than that, the procedures are left to be defined later, by the Secretary of Defense. Conspicuous by their absence are any of the basic guarantees that give life to the Constitution's demand that trials be fair. Indeed, there is an express Presidential "finding" that "it is not practicable to apply. . .the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." This "finding" must be taken into account in the Secretary of Defense's regulations regarding trial by military commission.

The procedures that are defined do not inspire confidence. A defendant's right to confront the evidence against him or her is ominously curtailed by provisions prohibiting the disclosure of classified information—with no procedure for an adequate summary to take its place. The requirement of proof beyond a reasonable doubt is not guaranteed. The military tribunal is to try both facts and law, meaning that military officers—not Congress -will determine what constitutes a violation of the (otherwise undefined) "law of war" permitting execution or other punishment. Coerced confessions may be admissible, along with evidence obtained illegally. The only express requirement is that evidence must have "probative value to a reasonable person." Defense counsel will be chosen by the United States military, not the accused.

A two-thirds vote of military officers is required for conviction and sentence, which may include the death penalty. There is no direct appeal, except to the President himself or the Secretary of Defense as his designee the very officials who determine there is "reason to believe" a defendant is a terrorist or harbors terrorists. The order also provides that the accused "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly" in any court, whether federal, state, foreign or international.[7]

Finally, the entire trial can take place in secret, without any accountability to Congress, the press or the American people. The order permits military commissions to sit "at any time and any place" and expressly authorizes "closure" of the proceedings to public scrutiny. If those rights that the Secretary of Defense chooses to confer on the accused are violated, the order not only makes no provision for the

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[6] Likewise, supporters of the trial of accused terrorists fully expect (and desire) such trials to be used in domestic terrorism cases against United States citizens. Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 Okla. City U. L. Rev. 349, 372 (1996) ("[C]itizenship of the accused poses no obstacle.")

[7] Significantly, similar court-stripping language in President Roosevelt's order was held not to oust the Supreme Court's authority to review the prisoners' claims on habeas corpus in *Ex Parte Quinn*. In addition, *Ex Parte Milligan* makes dear that only Congress, not the President acting alone, has the power to suspend habeas corpus. Furthermore, the Supreme Court has made clear just this summer, in *INS* v. *St*. Cyr, 121 S. Ct. 2271 (2001), that Congress must explicitly invoke the habeas corpus statute, 28 U.S.C. § 2241, in order to modify the habeas corpus right, as it did in the USA Patriot Act. The order does not do this.

courts to stop it, but Congress, the press and public—key guarantors of our free society—may not even know about it.

III. There Has Been No Showing That the Regular Courts Are Inadequate to Hear Terrorism Cases

United States courts have proven they can successfully try terrorism cases. This severely undercuts the argument for military tribunals. Military tribunals, other than ordinary courts-martial, are adopted as a last resort to ensure justice when the civil courts cannot function, not as a method of avoiding available forums for justice by undercutting basic constitutional rights.

The Supreme Court has said that military tribunals are used against "certain classes of offense which in war would go unpunished in the absence of a provisional forum for the trial of the offenders." *Madsen* v. *Kinsella* 343 U.S. 341, 348 n.8 (1952) (emphasis supplied). Even President Lincoln regarded military justice as permissible only if justified by military necessity, and refused demands to create military courts except where made necessary because of the inability of the regular courts to act.[8]

Today, the regular criminal courts remain open to hear terrorism cases. Special statutes and rules exist to protect national security and to address other challenges of terrorism cases, such as preserving the safety of jurors and witnesses.[9]

The Classified Information Procedures Act (CIPA), 18 U.S.C. app. 3, was enacted precisely to avoid forcing the government to disclose essential intelligence information during discovery or forgo prosecution of terrorists, spies or other dangerous criminals. It successfully accommodates the government's need for secrecy with the fundamental imperative that an individual accused of crime must be able to confront the evidence against him and to challenge that evidence. It requires the government to provide the accused with an unclassifed summary of any classified evidence, which must be approved by a federal district judge as adequate to satisfy the standards of the statute and of the Constitution.

Likewise, in prior terrorism cases, and other sensitive cases involving organized crime or international drug trafficking, the government has used special procedures to safeguard the identity of jurors and to ensure their safety. The federal witness protection program exists to protect witnesses from potential reprisal from terrorists or other criminals.

Perhaps most importantly, the government has successfully prosecuted terrorists in the past. These include the trials of the original World Trade Center bombing conspirators, trial of conspirators in a foiled plot involving New York City tunnels, and the trial of those responsible for the bombings of United States embassies in Africa. Many of Al Qaeda's leaders are already under indictment, and are simply awaiting capture.

While those who support military tribunals argue that none of these prosecutions actually succeeded in preventing the attacks of September 11, that is not because previous defendants were acquitted. In fact, all such defendants have been convicted and sentenced to lengthy prison terms or death. The government cannot prevent attacks if it does not catch the perpetrators before the conspiracy is carried out, and the availability of a military court will do nothing to solve that problem.

Some who support military tribunals have argued that regular criminal trials simply take too long and cost too much. In fact, however, there is no reason to believe that a fair military trial would necessarily take less time than a regular criminal trial. Trials of United States military personnel under the Uniform Code of Military Justice closely resemble many of the procedures used in criminal cases.[10] Nor would there be any appreciable cost savings, since the lion's share of the cost of trials is the cost of investigation. As one commentator notes, "Put simply, the crime must be solved"—and that is true regardless of which forum will try the perpetrators.[11]

Punishment in civilian court can be both swift and severe. The Speedy Trial Act ensures that a criminal trial will not be subject to unreasonable delay. If the govern-

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[8] Burrus M. Carnahan, Lincoln, Lieber and the Laws of War The Origins and Limits of the Principle of Military Necessity, 92 Am. J. Int'l Law 213, 22325 (1998). Of course, Lincoln's views of what was "necessary' conflicted with that of the Supreme Court in the *Milligan* case.

[9] *See, e.g.*, 18 U.S.C. § 3521.

[10] This is one reason why supporters of military justice for accused terrorists contemplate a very different process. *See* Crona & Richardson, *supra*, at 375 (complaining that "[t]he UCMJ uses a form of due process almost as elaborate as the civilian criminal justice system.) But neither international law nor domestic constitutional law permit the sacrifice of basic due process, even where military justice is permitted.

[11] Daniel M. Filler, Values We Can Afford-Protecting Constitutional Rights in an Age of Terrorism: A Response to Crona and Richardson, 21 Okla. City U. L. Rev. 409, 413 (1996).

ment shows accused terrorists pose a danger to the community, the Bail Reform Act permits pretrial detention, resulting in immediate incarceration of the accused. Finally, if the death penalty is sought, limits on death penalty appeals enacted in previous antiterrorism legislation have greatly "streamlined" the death penalty appeals process, even at the expense of full and fair review of death sentences.[12]

Put simply, Congress has enacted very serious penalties for terrorism crimes, up to and including the death penalty. Terrorists have been tried, convicted, sentenced to death, and executed in the regular criminal justice system. Existing statutes protect the government's interests in national security, in protecting witnesses and jurors, in securing the immediate detention of terrorist suspects, and other concerns said to require military tribunals. If the Administration needs additional safeguards in the regular criminal courts, it can ask Congress for them. And if the Administration identifies a limited class of cases which require the use of military tribunals, it can ask Congress to authorize them.

Trial by a military tribunal will not necessarily result in swifter or surer punishment of the guilty—but, under the procedures permitted by the order, it does risk punishment of the innocent. Constitutional guarantees protect not only the rights of the innocent, but also the public safety because they help ensure that the government seeks conviction of the right people and if they are convicted, that they are actually guilty of the crimes charged.

For example, the right to assistance of counsel of one's own choosing helps ensure that a person is adequately represented and that the adversarial system at the basis of our criminal justice system can work to arrive at the truth. The requirement of a finding of guilt beyond a reasonable doubt also helps ensure that the innocent are not convicted. The right to see the evidence the government offers against the accused ensures an opportunity to refute, explain or put into context otherwise incriminating evidence. The right to a trial by a jury of one's peers, presided over by an impartial judge, also helps ensure a process designed to arrive at the truth, not at a pre-ordained conclusion.

Without enforcement of these rights, the government may focus on the wrong people, and even obtain convictions of innocent people, while the terrorists go free to engage in more acts of terror.

IV. The Constitution Permits Military Tribunals Only in Certain Narrow Circumstances

The Military Order also fails to respect the careful limits that the Constitution has placed on the use of military tribunals even when authorized by Congress in time of war. If Congress chooses to authorize military tribunals, it must respect these limits.

Military tribunals are not a substitute for criminal courts generally, but may be applied only to "unlawful enemy belligerents"—a class which is far narrower than the universe of all persons who could be accused of terrorism crimes, particularly after the broadening of the definitions of terrorism in recent anti-terrorism legislation. For sound policy reasons, they have most often been reserved for those captured abroad in a zone of military operations.

What are those "offenses constitutionally triable by military tribunal," *Quirin*, 317 U.S. at 44, as the Supreme Court determined was permissible in the trial of World War II saboteurs? While the line may be difficult to draw, it clearly does not extend to all offenses that could be labeled terrorism. We know this because of the 1866 case the Supreme Court expressly chose not to overrule in *Quirin—Ex Parte Milligan*. That case establishes beyond all doubt that the Constitution does not permit all terrorism offenses to be tried in military tribunals.

Lamdin P. *Milligan* was accused of very serious offenses, including "[violation of the laws or war," arising from his alleged participation in a conspiracy organized by a group called the "Order of American Knights" or "Sons of Liberty." 71 U.S. (4 Wall.) at 5. The organization planned to seize munitions, liberate prisoners of war and generally to conspire in aid of the Confederacy. In short, *Milligan* was accused of being a terrorist. Yet his conviction was overturned by a unanimous Supreme Court. The Court found that *Milligan* could not be tried by a military tribunal because he was a citizen of a state which had not been in rebellion against the United States, had never been in the military, of either side, and the regular courts were available to hear any criminal case against him. *Id*. at 121.

When the Supreme Court faced with the question whether *Milligan* permitted the trial of the saboteurs in *Quirin*, it was only with difficulty that the Court distin-

[12] For example, the Anti-Terrorism and Effective Death Penalty Act of 1996 amended 28 U.S.C. § 2255 to place a one-year time limit on habeas corpus challenges to federal convictions.

guished that precedent. It could not be distinguished on the grounds that *Milligan* involved a citizen, since one of the saboteurs was a United States citizen. Instead, the Court said that the saboteurs' case, unlike Mill, involved admitted agents of a hostile government "who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property. . . ." 317 U.S. at 35.

Whether today's terrorists are more like Lamdin *Milligan*, or the World War II saboteurs, the Military Order applies far more broadly than the narrow class of enemy belligerents who may constitutionally be tried in a military commission, if such trials were authorized by Congress with appropriate safeguards. The Constitution plainly does not allow this.

Finally, it should be noted that *Quirin* remains an exceptional case for other reasons as well, as we now know from historians. It was a rare case in which the government departed from its usual practice of using military tribunals only against captured enemy soldiers in a zone of military operations. Many of these revelations undercut any argument for relying on it today.[13]

When the World War II saboteurs were caught, following the defection of one of their number, there was an immediate public outcry. J. Edgar Hoover, then Director of the Federal Bureau of Investigation, was worried that the ease with which the saboteurs had penetrated the American coastlines and moved freely about the country would damage public morale—not to mention his own image. In public, he made it sound as though the FBI had solved the case on its own, without the extensive help of the defector. Indeed, other saboteurs may have intended to defect as well. A military trial would give the government greater secrecy—but this was needed not to protect national security, but to protect Hoover's image.

Lacking today's extensive criminal laws against terrorism, the government was concerned that any offense for which the saboteurs would be tried would result in only a minor prison sentence. The government knew it was on shaky ground in using military tribunals where the criminal courts were open, under *Milligan*. Nevertheless, President Roosevelt made clear he intended to see the saboteurs punished, even at the expense of the Constitution. "I want one thing clearly understood, Francis," he told Attorney General Francis Biddle. "I won't hand them over to any United States marshal armed with a writ of habeas corpus. Understand?"[14] President Roosevelt need not have been so worried. The Supreme Court quickly affirmed the prisoners' death sentences. The Court announced it would issue a full opinion later. The sentences were carried out.

Upon further reflection, however, the justices found the case was not nearly as simple as they thought. *Milligan* was not so easily distinguished, and the justices found themselves disagreeing on basic points, some of which could have changed the result if they had been considered at the time. Only after Justice Frankfurter issued a remarkable, and unusual, patriotic plea for unanimity did the justices fall in line.[15]

Justice Frankfurter later remarked that *Quirin* "is not a happy precedent." Justice Douglas said, "Our experience [in *Quirin*] indicated to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds. . .is made, sometimes those grounds crumble."[16] The Supreme Court's record on civil liberties in World War II does not inspire confidence. It was, after all, only two short years between *Ex Parte Quirin*'s "bending" of constitutional rules and the most shameful Supreme Court decision of the century, which upheld the internment of Japanese Americans. *See Korematsu* v. *United States*, 323 U.S. 214 (1944).

Under the Constitution, military tribunals can be used only in narrow circumstances. They must be authorized by Congress, and may be used only against clearly identified "unlawful enemy belligerents." They have ordinarily been reserved for those captured in a zone of military operations, and their use in other situations has been questionable. The Military Order simply does not respect these basic constitutional limits on military tribunals.

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[13] *See* Daniel J. Danelski, The Saboteurs' Case, 1 Journal of Supreme Court History 61 (1996).

[14] *Id*. at 68. A habeas corpus challenge was to be the prisoners' only real appeal. While the military commission permitted review by the President, it seemed unlikely such review would be meaningful, as the President was mainly concerned with the most fitting method of execution.

[15] *Id*. at 77–78.

[16] *Id*. at 80.

V. Military Tribunals Must Comport with Basic Due Process and International Standards

Finally, and perhaps most importantly, the order utterly fails to account for the evolution of both international law and American constitutional law since World War II, when military commissions were last extensively used. It does not guarantee due process for the accused and could permit trials that our own government has said are fundamentally unfair and violate basic international standards. If Congress chooses to authorize military tribunals for a limited class of accused terrorist war criminals, it is imperative that such standards apply.

In 1942, international human rights law was in its infancy. Today, a host of international instruments, including treaties to which the United States is a party, provide guarantees of fundamental due process to anyone imprisoned by the state. For example, Article 9 of the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, guarantees liberty and protects "the security of the person" from arbitrary arrest and detention. Article 14 requires the accused to be given a fair trial.

The procedures that the Military Order contemplates, however, fall far short of these standards, as the United States has recognized in its insistence on compliance with human rights around the world. For example, as noted in a letter to President Bush from Human Rights Watch, dated November 15, 2001, the United States government

- successfully insisted that a military terrorism trial in Peru against United States citizen Lori Berenson be set aside in favor of a trial which the State Department demanded be held "in open civilian court with full rights of legal defense, in accordance with international judicial norms,"
- condemned Nigeria for convicting and executing environmental activist Ken Aiwa and eight others after a trial before a special military court,
- condemned Egypt, in the State Department's most recent human rights report, for using military tribunals against suspected terrorists, noting that "military courts do not ensure civilian defendants' due process before an independent tribunal,"
- expressed serious concern about closed tribunals in Russia, where foreigners, including Americans, were convicted of espionage.

Already, these concerns have complicated efforts to extradite suspected terrorists from Spain and other European countries.[17]

Likewise, in 1942 the Supreme Court had yet to apply most of the guarantees of the Bill of Rights to trials in the state courts, viewing these as rights peculiar to the federal system. Over the next half century, however, many of the Bill of Rights' guarantees were extended to trials in state court. These constitutional protections did not directly apply to state courts but instead were seen as fundamental to a fair system of justice.

For example, in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the Supreme Court found that the right to assistance of counsel, protected by the Sixth Amendment, was indeed a fundamental right that applied to the states under the Due Process Clause of the Fourteenth Amendment. In so ruling, the Court overruled an earlier case, *Betts* v. *Brady*, 316 U.S. 455 (1942) which had ruled the right was not fundamental to a fair trial. But the Military Order greatly restricts the right to counsel, who will be a military officer chosen by the Department of Defense. These Supreme Court decisions paralleled statutory reforms of the Uniform Code of Military Justice, which now uses judges, not lay military officers, and permits review by a civilian court and by the United States Supreme Court.

So today, it is not sufficient for the Supreme Court to say, as it did in 1942, that the "Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission. . . ." *Quirin*, 317 U.S. at 45. Under current law, even if trials are not held in a federal court, they must observe basic constitutional rights. If military tribunals were authorized by Congress today, they would have to observe basic constitutional norms.

VI. Conclusion

The Administration's proposal to substitute military tribunals for the regular justice system poses a profound challenge to this nation's ability to preserve civil liberty as it combats terrorism in the wake of the heinous attacks on the World Trade

[17] See T.R. Reid, Europeans Reluctant to Send Terror Suspects to U.S., Washington Post, Nov. 29, 2001, at A23.

Center and Pentagon on September 11, 2001. The trial of crimes in our constitutional system includes a host of procedural protections vital to ensuring the government gets it right, punishing the guilty—and only the guilty. Some of these rights were affected by Congress's passage of the USA Patriot Act. The President's Military Order has the effect of rendering the compromises on detention of noncitizens made in the USA Patriot Act meaningless in those cases to which it applies.

According to its supporters, the President's Military Order does not simply limit constitutional rights in terrorism trials. It abolishes them altogether. The procedures to be followed under the President's Order simply will not be a matter for the Constitution, but rather for the pleasure of the Executive. And if the Executive chooses to violate even those rights it decides to confer, the order purports to preclude review at any level of federal judiciary, including the Supreme Court of the United States.

We are told, however, that military courts will only be used against accused terrorists. Attorney General Ashcroft informs us that, once accused of terrorism by our government, such persons "are not entitled to and do not deserve the protections of the American Constitution." [18]

It is worth repeating the Supreme Court's firm rejection of a similar argument well over a century ago:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." [19]

The Supreme Court made clear the stark choice that would face our nation if military rule was not expanded beyond the narrow circumstances permitted by the Constitution, but was permitted without Congressional authorization and where the civil courts were open, and their process, unobstructed. Then, the Court observed: "Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish." [20]

20 *Id*. at 124–25.

But does the advent of modern terrorism "change everything"? The strength of our democracy has lied in our ability to resist such arguments. In *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946), the Supreme Court faced a similar argument when it considered the continued constitutionality of martial law in Hawaii, during World War 11, after the immediate threat of invasion had passed. The government insisted that the invention of nuclear weapons required new thinking for a new kind of war that would not permit the luxury of rights enshrined in an Eighteenth Century constitution.

The Court rejected it. Justice Murphy said, "That excuse is no less unworthy of our traditions when used in this day of atomic warfare or at a future time when some other type of warfare may be devised." *Id*. at 330–31 (Murphy, J., concurring).

That future time may now be upon us, but the excuse is still unworthy of our Constitution. Trial by military tribunal represents the gravest possible abrogation of civil liberty. Such use must be carefully limited to the most pressing circumstances for civil government to survive. Congress must act to ensure that these limits, and its authority, remain intact.

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[18] Naftali Bendavid, Critics Attack Tribunal Proposal, Chicago Tribune, Nov. 15, 2001.

[19] Ex Parte *Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1866).

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Dear Senator Leahy and Hatch:

Enclosed is a Statement of Position of the American College of Trial Lawyers respectfully opposing the interim rule of the Department of Justice authorizing the monitoring by the Government of communications between prison inmates and their lawyers.

The College consist of more than 5,000 invited members from the United States and Canada. to qualify for invitation to membership, our members must have a minimum of fifteen years of active trial experience and have been committed to the highest ethical standards. The College draws its members from the plaintiffs' bar and the defense bar, and includes, as well, prosecutors and criminal defense lawyers. The College is a professional organization dedicated to improving the administration of justice.

The interim rule is of profound concern to the College for the reasons set forth in the Statement of Position. I respectfully request that this letter and the Statement of Position be made part of the record of the important hearing being held on this matter by the Senate Judiciary Committee.

Very Truly yours,

STUART D. SHANOR
President

Statement of American College of Trial Lawyers

POSITION

The American College of Trial Lawyers ("the College ") respectfully but firmly opposes the U.S. Attorney General's recent promulgation of an interim rule authorizing the Government, without prior court approval, to monitor communications between persons confined in prison and their lawyers.

The College, a professional organization consisting of more than five thousand lawyers invited to membership after a minimum of fifteen years trial experience, is dedicated to improving the administration of justice. The College recognizes the need for the Department of Justice to take action to combat terrorism. But those actions must not violate constitutional and other important legal rights related to the attorney-client privilege. They must not violate the constitutional right of those imprisoned to the effective assistance of counsel.

The attorney-client privilege is essential to our adversary system of justice. As Chief Justice Rehnquist has stated for the Supreme Court, "[Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader interests in the observance of law and administration of justice."

The Government's unilateral usurpation of authority to monitor confidential communications between persons it has imprisoned and their lawyers will destroy this "full and frank" communication. Under the rule, the lawyer and client are to be told their communications are being monitored. Knowing that the Government is listening to what is said, clients will not confide in their lawyers. Lawyers will not provide confidential advice to their clients. Indeed, their ability to do so will be undermined because their clients will not have given them the "full and frank" communication necessary for a lawyer to provide sound advice. This will defeat the purpose of the attorney-client privilege which, as Chief Justice Rehnquist has also explained, "exists to protect not only the giving of professional advice to those who can act on

it but also the giving of information to the lawyer to enable him to give sound and informed advice."

Further, this intrusion is unnecessary. Existing law allows for monitoring attorney-client communications under procedures which pass constitutional muster. First, the Government must have "probable cause" or "reasonable grounds" to establish that a lawyer is assisting or conspiring with his client and/or others to engage in terrorist activity, or is being used unknowingly for such a purpose. Second, the Government under existing law can then obtain authority from a court to wiretap or intercept these communications and, indeed, may do so without advising the lawyer and client that their communications are being intercepted. Importantly, however, prior court approval is a constitutional and statutory requirement. The Government cannot, in contrast to the interim rule, act unilaterally.

"Probable cause" or "reasonable grounds" to establish the likelihood of ongoing criminal conduct is also a constitutional and statutory requirement for such an intrusion. The far more lenient standard of "reasonable suspicion" permitted by the rule to monitor attorney-client communications does not satisfy this constitutional requirement, even if sanctioned by a judge. Certainly, that standard is unacceptable when the Government acts unilaterally, without court approval.

To any claim that national security interests argue against permitting prior approval by any member of the federal judiciary, the Foreign Intelligence Surveillance Act ("FISH "), if amended, could provide a statutory mechanism for requiring and obtaining prior judicial approval based on probable or good cause.

It is no defense or justification, as the Department of Justice claims, that this rule will apply to only a few "inmates." One is one too many. If allowed to apply to a few, whoever they may be, the lenient standard of "reasonable suspicion" to be used by the Government can readily have expanded application to many.

Nor is it a defense or justification that a "firewalled" or separate Department of Justice "privilege team" will monitor the attorney-client communications and disclose their contents to investigators and prosecutors only with court approval. As explained above, the known existence of the monitoring already will have "chilled" the "full and frank" communication that the Supreme Court has held the privilege is designed "to encourage." There will be virtually nothing of substance to monitor, but the inmate will have been denied effective assistance of counsel. "[T]he purpose of the privilege. . . to encourage clients to make full disclosure to their attorneys'," as the Supreme Court has said, will have been completely frustrated.

For more than sixty-five years, the United States Supreme Court has held that communications between lawyer and client intended to further a crime or fraud are not protected by the attorney-client privilege. We agree with this holding. But this determination is, under Supreme Court law, to be made by a court, not unilaterally by the Executive Branch, an adversary to and custodian of an inmate seeking legal advice from a lawyer.

The American College of Trial Lawyers respectfully urges the Government to rescind the interim rule and not to promulgate it as a final rule.

Statement of the American Council of Chief Defenders, Washington, D.C.

The American Council of Chief Defenders (ACCD) is gravely concerned by the U.S. Department of Justice Rule permitting monitoring of attorney-client communications.

The new DOJ rule is not necessary to advance legitimate law enforcement efforts to secure public safety. Procedures and standards already exist which give law enforcement the ability to intercept communications under circumstances in which there is probable cause to believe a crime is taking, or is about to take place.

The lack of a requirement for judicial intervention strips the criminal justice process of one of the important ''checks and balances'' which ensure a fair system. Requiring a judge to authorize monitoring of such communications is a critical means by which our system protects against harmful and unnecessary law enforcement mistakes or excesses. Judicial review is a critical component of the right to a fair process that is the foundation upon which our justice system is built.

Monitoring attorney-client communications will deny individuals the right to a fair trial. The American public views access to counsel as an essential ingredient of a fair trial. The DOJ rule eradicates that right by precluding counsel, who are ethically bound to protect the privilege, from conversing with individuals whom they represent. Just as the doctor-patient privilege aids doctors in making accurate diagnoses, the attorney-client privilege is an essential aspect of the attorney's function.

Without honest communication and trust, attorneys are not equipped to advise clients, to test the sufficiency of the government's evidence, or to fight a wrongful conviction.

Communication with the chief executives of the Nation's indigent defense agencies would be a more effective way to address legitimate security concerns in attorney-client communications. To the extent that a concern underlying the rule is that attorneys may unknowingly assist individuals who are plotting terrorist acts, law enforcement officials and chief defenders should work together to identify the ways in which terrorists might seek to manipulate attorneys or use them as conduits for coded messages, and to train attorneys in appropriate preventive measures. To the extent that the concern is that attorneys may knowingly assist or support acts of mass murder, the suggestion is an affront to the public defense professionals whose careers are dedicated preserving the fundamental democratic values enshrined in our system of justice.

* * * * *

The ACCD is a leadership council of the National Legal Aid and Defender Association, consisting of chief executives of indigent defense systems throughout the United States and its territories. It is dedicated to securing fair justice systems by advocating for sound public policies and ensuring quality legal representation for people who are facing a loss of liberty or accused of a crime who cannot afford to hire attorneys.

STATEMENT OF PRINCIPLES

PRESIDENTIAL ORDER AUTHORIZING MILITARY TRIBUNALS

On November 13, President Bush signed a military order establishing a process of military tribunals for trials of any person other than an American citizen suspected of a terrorist-related offense, whether apprehended in the U.S. or abroad. The order violates the constitutional separation of powers, since the creation of military commissions has not been authorized by the Congress and is outside the President's constitutional powers.

The order strips away a variety of fundamental checks and balances on governmental power and the reliability and integrity of criminal judgments - safeguards which are present in other available adjudicative processes, whether the U.S. criminal justice system, military courts martial, or international courts. The procedures possible under the President's order create an unacceptable risk of miscarriage of justice and conviction and execution of the innocent. By its example, the order undermines the rule of law worldwide, and invites reciprocal treatment of U.S. nationals by hostile nations utilizing secret trials, a single entity as prosecutor, judge and jury, no judicial review, and summary executions.

The trial of individuals alleged to have played a major role in the attacks of September 11, at a time when the United States is engaged in open military conflict, presents legitimate security challenges, which must be accommodated in the narrowest possible manner consistent with well established safeguards guaranteed under the U.S. Constitution and international law, including:

Access to counsel of one's choosing, and a guarantee of the effective assistance of qualified counsel for defendants who cannot afford retained counsel, encompassing confidential communication with counsel, funding for necessary and reasonable expert and investigative services, and adequate time to prepare and present a defense;

An independent judicial officer presiding;

The right to be informed promptly of the charges, and to be released promptly if not charged or otherwise lawfully detained under established federal or international law;

The right to cross-examine witnesses, and to review and meaningfully test the reliability as well as the probative value of the government's evidence, subject to existing safeguards for specific sensitive information under CIPA or similar procedures, as well as a guarantee of access to exculpatory evidence;

Rights against self-incrimination and coerced confessions;

A presumption of innocence;

Proof beyond a reasonable doubt;

Unanimous judgment as to both conviction and sentencing; and

Judicial review.

Individuals apprehended in this country must, of course, continue to be tried in civilian courts. If Congress elects to authorize military commissions or to use an existing international tribunal for the trial of terrorism suspects apprehended abroad, the undersigned organizations respectfully recommend that the above principles of due process, at a minimum, be accorded.

Subscribed to by:

NATIONAL LEGAL AID AND DEFENDER ASSOCIATION
AMERICAN COUNCIL OF CHIEF DEFENDERS
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
FIRST AMENDMENT FOUNDATION
NATIONAL COMMITTEE AGAINST REPRESSIVE LEGISLATION
WORLD ORGANIZATION AGAINST TORTURE USA
THE MULTIRACIAL ACTIVIST AND ABOLITIONIST EXAMINER
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Statement of American Federation of Labor and Congress of Industrial Organizations, Executive Council, Washington, D.C.

AFL–CIO delegates convene in the wake of the most shocking and destructive acts of terrorism ever perpetrated on our soil. Our convention is graced by an exhibit portraying the names of 631 union members among the dead since Sept. 11 and images of the heroes of that day.

The AFL–CIO is firmly committed to bringing the perpetrators of these crimes and their patrons to justice, and supports the government's military campaign to defend our nation, and all civilized society, in a global coalition to hunt and eliminate mass murderers, their networks and their sanctuaries. Nothing less is warranted amidst grave and unprecedented circumstances where international cabals intent on sowing death, disruption and dread have access to sophisticated technology and ruthlessly exploit the inherent vulnerabilities of a democratic and open society.

But there is another front in America's struggle to protect and extend freedom and security: home. And here, our love of liberty and of country compels us also to speak forcefully in opposition to a range of measures the administration has taken, or reportedly is contemplating, that threaten civil liberties, breach constitutional rights and, with tragic irony, hand our adversaries a partial victory by degrading the essential guarantees upon which our nation is founded.

In October, at the administration's prodding and at the height of post-Sept. 11 anxiety, Congress enacted the so-called "USA PATRIOT Act," which affords an array of new and powerful toots to law enforcement applicable to circumstances well beyond "terrorism" by any definition. This law permits the indefinite detention of non-citizens on minor visa violations; expands government discretion to engage in covert telephone and Internet surveillance; permanently expands its authority to conduct searches; enables the departments of justice and State to brand groups as terrorist organizations and deport their noncitizen members; grants the Federal Bureau of Investigation broad access to business records about individuals; blurs a vital line between foreign intelligence operations and domestic law enforcement functions by enabling the Central Intelligence Agency to gather information from other agencies about American citizens and residents; and imposes excessive background check requirements on commercial trot!: drivers licensed to transport hazardous materials, applies vague standards and denies full protection for the driver's due process rights.

Vigilance to ensure that the Executive Branch applies these sobering new powers responsibly presents a significant challenge to law enforcement authorities, congressional oversight bodies, the judiciary and our citizens. But even before the administration implemented these new prerogatives, it launched a series of additional initiatives by executive fiat, outside of the legislative process, and without even congressional consultation or prior public notice and discussion. Each of these initiatives is disturbing in itself; collectively, they emit the air of authoritarianism.

The Justice Department has changed rules affecting federal inmates (dozens and non-citizens alike) by asserting authority to eavesdrop on attorney-client conversations upon a "reasonable suspicion" that an inmate may use such contacts to facilitate acts of "violence or terrorism." An inmate and his or her lawyer would be informed that the attorney-client privilege does not protect such conversations or their other contacts "not related to the seeking or providing of legal advice."

This directive converts the attorney-client privilege from an essential protection in our system of justice that governs the scope of disclosures during actual litigation under judicial supervision into a sword justifying government interference with the heart of the attorney-client relationship. Ostensible safeguards of notice and limited disclosure will not temper this new rule's profound chilling effect and its intrusive reach well beyond the detection of potential terrorism.

Meanwhile, since Sept. 11, the government has detained over 1,000 persons with little and arbitrary public disclosure of their identities, the charges against them and the purposes of this dragnet We do know that this selective enforcement of minor offenses and immigration status is largely predicated on ethnicity, a disturbing echo of the disgraceful treatment of American citizens of Japanese descent during World War II. In America, we do not "round up the usual suspects," yet the government acknowledges that it believes that at most a handful of those detained have any connection with the Sept, 11 atrocities.

The president also has issued an executive order decreeing that non-citizens he selects who are arrested in connection with "terrorism" within or outside our borders will be tried in non-public trials, before special new military tribunals, barred from access to courts, denied review of evidence used against them at the prosecutor's discretion, subject to evidence that does not meet even civil court requirements and exposed to conviction and sentence-including capital punishment—upon the decision of two-thirds of a panel composed of military officers who are subordinate to the government officials who select the defendants and oversee the prosecutors, and who alone can entertain an appeal.

This order betrays an unwarranted lack of faith in our nation's criminal justice system, which has ably and constitutionally served as the venue for trials of the 1993 World Trade Center bombers, Timothy McVeigh and Manuel Noriega, among many others of the same ilk. And the new tribunals fall well short of the standards of openness and due process that have governed the International Court of Justice at The Hague, the Nuremberg trials following World War 11 and even our usual, longstanding system of military justice. And the new order could reach not merely the captured leadership of recognized terrorist groups, but any non-citizen deemed connected with "terrorism," undefined; 20 million non-citizens dwell in our country today. Loose applications of such terms have provided purported justification for violations of the civil liberties of champions of workers throughout the world, from Martin Luther King Jr. to Nelson Mandela.

As our Convention begins, we also team that the Justice Department may-again unilaterally-modify longstanding restrictions on FBI surveillance of political and religious organizations that were imposed 25 years ago to end decades of violations of citizens' First and Fourth Amendment rights, and to prevent their recurrence. Such domestic spying could eventually sweep in unions and citizens organizations and threaten independent political and social activism. Even if existing policies merit review, there must be a deliberative process with congressional involvement and a full public airing and debate before any new policy is adopted.

Our history teaches that external and internal threats can prompt repression of citizens and abuses of power. We must show other countries that we can and will treat their nationals as we have always, rightly, insisted that they treat ours. And we cannot accept excessive secrecy and unaccountable power that deny Americans the ability to question the authority and evaluate the conduct of their government.

America will prevail, and impress our adversaries with the futility of their plans, only if we uphold our traditional liberties and standards of justice with the same decisiveness and vigor that we bring to our military efforts. The AFL–CIO urges the Administration to reconsider and relinquish hastily adopted policies that debase our constitutional traditions.

Statement of the American Immigration Lawyers Association, Washington, D.C.

OUR LIBERTY AND FREEDOMS TODAY

As we take steps to increase national security and mourn the loss of the thousands killed in the recent terrorist attacks, the American Immigration Lawyers Association (AILA) is deeply concerned about recent government actions. These actions threaten our fundamental Constitutional guarantees and protections that set our nation apart from others. While every step must be taken to protect the American public from further terrorist acts, those steps must not trample on the Constitution

and on those basic rights and protections which make American democracy so unique and precious and gives us needed legitimacy within our country and in the world.

The Department of Justice is engaged in a critically important law enforcement effort. AILA supports every effort to identify, prosecute and bring to justice the perpetrators of the heinous crimes of September 11, 2001. However, the arrest and continued detention of more than 1000 individuals in the wake of September 11 concerns us. Reliable reports of violations of due process failure to provide access to counsel, constant delays in hearings, failure to release in a timely fashion individuals for whom an immigration judge has set bond, hearings conducted in secret in the name of "protecting the public interest" for individuals who are only charged with technical immigration violations- are heightened by the failure of the Department of Justice to provide the most basic shred of information about the detainees. Who is being detained? What is the nature of the charges? How many detainees remain unrepresented by counsel? These and other questions remain unanswered two months after the initial arrests and despite repeated inquiries and the filing of formal FOIA requests. This silence is unacceptable.

The announcement by President Bush that military tribunals will be convened to try suspected non-citizen terrorists, both in the U.S. and abroad, is alarming and unprecedented in the absence of a Congressional declaration of war and, with no input from Congress, appears to be an end run around the legislative branch of government. The democratic institutions of a democracy have time and again proven themselves strong enough to prosecute and bring to justice drug traffickers, mafia kingpins, terrorists like Timothy McVeigh and those responsible for the 1993 World Trade Center and the Kenyan and Tanzanian Embassy bombings. Our institutions are strong enough to bring to justice any terrorists responsible for the heinous crimes of September 11. The American people have demonstrated in the weeks since September 11 that they have ample courage to serve on juries and to prosecute and judge such acts. In the international arena, the U.S. has long supported international tribunals to try war criminals such as Slobodan Milosovic and opposed the use of secret military tribunals as they have been used by repressive regimes around the world. We should lead by example and strengthen international institutions, not undermine them.

The interim regulations the Administration subsequently issued which provide for eavesdropping without warrant on protected attorney-client communication, and which also provide for automatic stays of immigration judge bond decisions, violate fundamental protections provided by the Constitution of the separation of powers, the independence of the judiciary and the right to counsel.

Finally, the announcement this week that 5,000 individuals have been identified for questioning (males between the ages of 18 and 33 who entered the U.S. after January 1, 2000 and who came from countries where terrorist acts were planned or committed) also is cause for concern. While this questioning may assist the Department of Justice to compile information critical to the current investigation, every care must be taken to assure that the questioning is voluntary, that individuals be afforded the opportunity to have counsel present if they desire, and that no aura of suspicion is cast which would instill fear and distrust within the very individuals and communities whose cooperation the Department of Justice seeks in its investigation. An over-wide net runs the danger of amounting to discriminatory profiling. Care must be taken to assure that the proper balance is maintained between legitimate law enforcement and overzealous sweeping fishing expeditions.

In the next months and years, our nation will face many challenges. We must stand vigilant and not compromise our freedoms. Doing so will damage our liberty here and our credibility in the world.

Statement of Amnesty International USA, New York, New York

HUMAN RIGHTS ORGANIZATION URGES REVOCATION OF EXECUTIVE ORDER PERMITTING MILITARY COMMISSIONS

(WASHINGTON, DC)—Amnesty International, the world's largest grassroots human rights organization, today urged Congressional leaders to preserve human rights and civil rights protections as law enforcement officials seek the perpetrators and accomplices of the September 11 attacks. The organization also announced that it has mobilized its worldwide membership to oppose the use of military commissions in response to the attacks in New York and Washington.

"Indefinite detention of alleged suspects, ethnic and racial profiling, and secret military trials are not acceptable law enforcement responses, even to events as reprehensible as the September 11 attacks," Curt Goering, Amnesty International USA's Senior Deputy Executive Director, said as the Senate Judiciary Committee convened hearings on the Bush Administration's law enforcement efforts. "Eroding fundamental human rights principles at home will damage US efforts to exert leadership abroad, perhaps irrevocably."

In an Urgent Action appeal sent Tuesday, Amnesty International asked its members worldwide to contact President Bush, Secretary of State Colin Powell and Attorney General John Ashcroft urging that the executive order permitting military commissions be revoked. The appeal noted that use of such commissions would undermine international cooperative efforts, citing Spain's refusal to extradite suspects to face military trials.

In a 26-page memo to Attorney General Ashcroft, also sent Tuesday, Amnesty International detailed a range of concerns about recent actions taken by the Department of Justice. "Amnesty International recognizes the government's obligation to take all necessary measures to investigate the crimes of September 11 and protect national security," wrote Susan Lee, Program Director, Americas, in a letter accompanying the memo. "However, we share the concerns expressed by many individuals and organizations that the government may be violating its equal obligation to ensure that any such measures include safeguards for the protection of the fundamental rights of those arrested or detained."

In addition to objecting to the proposal to use military commissions, Amnesty International raised a number of other concerns in the memo, including the duration of detention, detainees' adequate access to legal counsel and family, and the conditions of detention. Lack of information on those detained prompted the human rights organization to join in filing a Freedom of Information Act request with the Department of Justice to learn the names, locations and charges against the detainees.

The organization made a series of recommendations, including:

> Make public information on the total number of people arrested to date in connection with the September 11 investigation: dates and place of arrest; the number still detained and the reasons for the detention; length of time in detention; place of detention; and data on the race or ethnicity of those detained. Provide such information regularly on future arrests.
>
> Ensure that no one is held incommunicado while in custody.
>
> Publicly reaffirm the US government's unequivocal opposition to the use of torture, suggesting the US government enact a law making torture a federal crime.
>
> Ensure that INS standards for the treatment of immigration detainees and asylum seekers, introduced into some facilities earlier this year, are extended to all facilities housing such detainees and are strictly monitored and followed.

"It is precisely during challenging times such as these that governments must be especially scrupulous in their adherence to human rights principles," said Goering. "Otherwise, the very values worthy of protection themselves become casualties, diminishing all of society."

Statement of William F. Schulz, USA Executive Director, Amnesty International, Washington, D.C.

Amnesty International urges President Bush to rescind the executive order creating secret military commissions to try suspects in the September 11 attacks.

The trial of those responsible for these heinous attacks will represent one of the most important events in international justice since the Nuremberg Tribunal following World War II. Secret trials conducted with secret evidence may help sate the appetite of some who want revenge, but they will not guarantee justice. If our goal is ensuring justice and preventing similar attacks in the future—then we should do everything in our power to hold fair public trials that present the case against the accused to the victims, to the American people, and to the world.

Resorting to secret military tribunals that lack appropriate due process guarantees will only encourage others to question the legitimacy of the trials and the competency of the US justice system.

Justice can best be served through public trials in civilian courts that adhere to international standards and give the victims of these heinous crimes the opportunity to witness the proceedings and the results.

UNITED STATES OF AMERICA

MEMORANDUM TO THE US ATTORNEY GENERAL—AMNESTY INTERNATIONAL'S CONCERNS RELATING TO THE POST 11

SEPTEMBER INVESTIGATIONS

INTRODUCTION

More than 1,100 people, mainly non-US nationals, have been taken into custody in the USA during the investigations into the attacks on the World Trade Center and the Pentagon on 11 September 2001. Many of them have reportedly been held under new government powers to detain people for questioning for an extended period before being presented to a court. Very little public information has been made available to date regarding the details of these detentions and information on some cases has been sealed through court orders. It is unclear at present exactly how many people remain in custody, although it is believed that hundreds may still be detained. Sources have indicated that only a small number of these individuals are being held as "material witnesses" and it remains unclear as to whether any-one has yet been charged in connection with the 11 September attacks. Many of the detainees are reported to be held on federal, state or local criminal charges unrelated to the attacks, or are detained because of alleged immigration violations.

Amnesty International recognizes the government's obligation to take all necessary measures to investigate the crimes of 11 September and protect national security. However, the organization is concerned that the government may be violating its equal obligation to ensure that any such measures include safeguards for the protection of the fundamental rights of those arrested or detained. Under international law, even in states of emergencies, certain basic rights may not be suspended, including the right of every person not to be subjected to arbitrary detention, torture or other cruel, inhuman or degrading treatment or discrimination on the grounds of race, colour, sex, language, religion or social origin. Other rights which may not be suspended include the right of everyone charged with a criminal offence to be presumed innocent until proved guilty according to law, and certain fair trial rights under international humanitarian law, which must be respected even in times of armed conflict.[1]

Over 300 "terrorist" suspects are reported to have been detained in other countries since 11 September at the behest of the US authorities. Arnnesty International is urging the US Government to promote and protect international human rights standards in the investigation of these cases too. It is further calling on the US government to fully respect all relevant safeguards if it intends to seek the extradition of any of these individuals. In addition, the organization reiterates its opposition to the proposed military tribunals to try foreign nationals accused of links to "international terrorism".

The USA is a state party to various international human rights treaties—including the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) whose fundamental principles Amnesty International fears are threatened in the context of the investigations into the 11 September attacks. Yet it is precisely during challenging times such as these that governments must be scrupulous in their adherence to such principles. To do otherwise undermines rather than reinforces the search for justice.

1. SAFEGUARDS RELATING TO ARREST OR DETENTION

International standards provide that all,persons who are arrested or detained (with or without charge) should be informed immediately of the reasons for the detention and notified of their rights, including the right of prompt access to and assistance of a lawyer; the right to communicate and receive visits; the right to inform family members of the detention and place of confinement; and the right of foreign nationals to contact their embassy or an international organization. Anyone arrested or detained who does not adequately understand or speak the language used by the authorities, has the right to be notified in a language they understand what their rights are and how to exercise them and to be provided with an interpreter if nec-

[1] Set out in the Geneva Conventions of 1949

essary.[2] These rights are important safeguards against arbitrary deprivation of liberty and incommunicado detention. Incommunicado detention has been condemned by the US Government and non and intergovernmental organizations as a serious human rights violation that often leads to other abuses, including torture.

Although US law requires that a detainee be informed of the right to counsel immediately upon arrest, Amnesty International is concerned that some of those arrested after 11 September were denied prompt access to counsel and were unable to inform their families of their whereabouts. Some detainees are reported to have been denied access to counsel for up to a week—far longer than is considered acceptable under international standards, even in emergencies.[3] In some cases, families have reported difficulty finding out where, or even if, their relatives have been detained.

Detainees (some of whom were later released) have also reported being held for days without being informed why they were detained and without being questioned, contrary to international standards.[4] Several detainees report having been effectively cut off from the outside world for two weeks while their families searched for them. Others have reportedly been held for weeks after being cleared by the FBI of any criminal violations. Amnesty International has spoken to several lawyers who say they had difficulty in finding out why their clients were being held. The lack of information and secrecy surrounding detentions may prevent people from being able effectively to challenge their detention another important right under international law.[5]

Frequent transfers of detainees to different places of detention, sometimes to different US states, can also serve to perpetuate the secrecy surrounding detention and undermine the detainee's ability to receive assistance of legal counsel.[6] International standards provide that detained persons have the right not only to notify their family promptly of their arrest but also of any transfer and the place to which they have been transferred.[7]

Concern has also been raised that foreign nationals may not have been given an opportunity in all cases to seek the assistance of their embassy or a country representative on arrest, as provided under the Vienna Convention on Consular Relations, which the USA ratified without reservations in 1969. Although they may choose not to exercise this right, all foreign nationals must be informed of their right to contact their consulate immediately upon arrest. It is the responsibility of the Department of Justice to ensure this right is protected whether or not the detainee is in federal or local custody and, where requested, to arrange without delay for contacting their consulate.

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[2] These rights are contained, infer alia, under article 9 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the USA in 1992; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles), adopted by consensus by the United Nations (UN) General Assembly in 1988; and the Basic Principles on the Role of Lawyers, adopted by the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders.

[3] The Human Rights Committee (which monitors states' compliance with the ICCPR) has stressed that "all persons arrested must have immediate access to counsel". The Body of Principles states that access to a lawyer may be restricted in the most exceptional circumstances "to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority to maintain security or good order" but that even here, this should not be delayed beyond a few days. The UN Special Rapporteur on Torture has recommended that, as torture is most frequently practised during incommunicado detention ". . .incommunicado detention should be made illegal and persons held incommunicado should be released without delay. Legal provisions should ensure that detainees should be given access to legal counsel within 24 hours of detention."

[4] Article 9(2) of the ICCPR states that "Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him."

[5] Article 9(4) of the ICCPR states: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of the detention and order his release if the detention is unlawful."

[6] For example, the attorney retained in the case of three immigrants from Mauritania picked up in Ohio on immigration violations in late September still had not met with them two weeks later as they had been moved several times to jails in Indiana, Kentucky, Tennessee and Louisiana.

[7] Principle 16(1) of the Body of Principles states "Promptly after arrest and on each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody."

2. RIGHTS OF IMMIGRATION DETAINEES AND ASYLUM SEEKERS

Concern has been expressed that people held in the post- 11 September sweeps for immigration violations who in the USA have no right to government-assigned legal counsel—may be subject to summary removal proceedings without having the opportunity to defend themselves or obtain legal advice. A number of those arrested are reported to have agreed to voluntary departure soon after being taken into custody and it is unclear whether all had an opportunity to be legally represented.

The Immigration and Naturalization Service (INS) has issued guidelines which provide that INS detainees should be immediately informed of organizations able to give free legal assistance. However, Amnesty International is informed that these standards are not legally enforceable or consistently applied, particularly where such detainees are held in local jails. Immigration lawyers' groups say they fear many may be in detention without an effective opportunity to contact a lawyer or other representative. Some detainees arrested since 11 September report not being allowed to make phone calls for several days, or being moved to different locations, without being able to inform their families or lawyers.

Some of those detained may be asylum seekers, seeking protection from refoulement to a country where they are at risk of human rights violations, including torture. The USA has enacted legislation, in keeping with its obligations under the Convention against Torture (see below), which states that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture".[8]

Amnesty International urges that all asylum seekers have an opportunity to have their claims assessed in a fair and satisfactory procedure, as required under the 1951 Convention relating to the Status of Refugees (UN Refugee Convention). International standards provide that, as a general rule, asylum seekers should not be detained; those who are detained because of criminal violations or on security grounds should still have a full and fair hearing of their claim, and be able to see and challenge any evidence presented against them. No-one should be prevented from lodging an asylum application. Any determination to exclude an individual from refugee status on grounds recognized under the 1951 Convention should only be made after full consideration of the claim in a fair and satisfactory procedure.[9] A preliminary consideration that someone might fall under the provisions of the exclusion clauses should not hinder the full examination of the claim for asylum. No one should be forcibly removed without having had their individual need for protection assessed, with all the safeguards provided in human rights (including the right to be informed of the evidence, to rebut the evidence and to appeal against a decision to exclude).

Amnesty International also urges that the Department of Justice ensure that new, detailed INS standards for immigration detainees and asylum seekers introduced into some facilities earlier this year—which include better provision for attorney contact, contact with consular officials and visitation—are extended to all facilities, and rigorously applied.[10]

3. POWERS TO DETAIN NON-NATIONALS UNDER NEW "ANTI-TERRORIST" LEGISLATION: THE PATRIOT ACT

(1). Right to be brought promptly before a judicial or other authority

Amnesty International understands that many of the post-11 September detentions took place under an emergency directive issued by the Attorney General on 19 September. This extended the time a non-national could be held in Immigration or Naturalization Service (INS) custody without charge from 24 hours to 48 hours "or to an additional reasonable time, if necessary, under an emergency, or in other extraordinary circumstances."

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[8] United States Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture, adopted in October 1998, as part of the Foreign Affairs Reform and Restructuring Act.

[9] Under the Refugee Convention, "Acts of terrorism" may be recognized grounds for exclusion from refugee status when they constitute crimes against peace, war crimes, crimes against humanity, serious non-political crimes outside the country of refuge, or acts contrary to the purposes and principles of the United Nations (Article IF of the Convention).

[10] The standards were introduced in January 2001 at 18 INS-owned and operated detention centres and facilities operated under contract by Corrections Corporation of America and Wackenhut. They were due to extend to some of the largest jails housing INS detainees under contract in June 2001. However, there are many smaller facilities and local jails which continue to house INS detainees where the standards (which are due to be introduced gradually) are yet to be applied.

This has since been superceded by the USA Patriot Act, "anti-terrorist" legislation passed by Congress which became law on 26 October 2001.[11] Section 236(A) (a) of the Act provides for the mandatory detention of a non-US national based on the Attorney General's certification that he has "reasonable grounds to believe" that the individual is a "terrorist", or supporter of "terrorist activity" or "is engaged in any other activity that endangers the national security of the United States."[12] A person detained under this provision may be held for up to seven days without any charges, after which removal proceedings or charges must be instituted, or the detainee released.

While seven day detention without judicial supervision is not as open-ended as the emergency directive issued on 19 September, Amnesty International believes that it may be contrary to international standards which provide that all arrested or detained persons should be brought promptly before a judge or judicial authority.[13] Although no specific time limits are expressly contained under international standards, seven-day detention before someone is initially brought before a court exceeds what has been considered acceptable in cases reviewed by the Human Rights Committee as well as the European Court of Human Rights.[14]

Judicial review is an essential safeguard against arbitrary arrest or detention and to protect the well-being of those detained. Article 9(1) of the ICCPR provides that "Everyone has the right to liberty and security of the person. No one shall be subjected to arbitrary arrest or detention." To ensure freedom from arbitrary detention, Article 9 (4) further provides that anyone "who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." The Human Rights Committee has stated that Article 9(1) is applicable to all deprivations of liberty, including "immigration control."

Amnesty International urges that the seven day detention provision be subject to review. In the meantime, its application should be strictly monitored and anyone detained under this power should be informed of the specific grounds of the detention and be afforded prompt access to an attorney, relatives and consular representative if requested.

(2). Power to detain non-nationals indefinitely

Section 236 (A) (a) of the Patriot Act allows the Attorney General to continue to detain non-nationals certified as a danger to national security after removal proceedings have been initiated. Under the legislation, a non-national whose removal "is unlikely in the reasonably foreseeable future" may be detained indefinitely, if the Attorney General considers that release "will threaten the national security of the United States or the safety of the community or any person." People detained under this broad provision could include non-nationals who cannot be removed because they are stateless; whose country of origin will not accept them; or who are granted relief from deportation because they would face torture if returned to their country of origin.

The legislation authorizes the Attorney General to detain people under the above provisions on mere suspicion that they are a threat to national security. Although

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[11] Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act.

[12] Definitions of terrorism for which non-nationals can be detained or deported under the Act are extremely broad and include membership of, or any "material support" for, any foreign or domestic organization designated as a "terrorist organization" by the Secretary of State or any group that publicly endorses acts of terrorism; and membership or support for (including soliciting funds) any group not designated as "terrorist" but deemed to support terrorism in some way. In the latter cases, the onus on the non-national to prove that his or her assistance was not intended to further terrorism.

[13] Principle I 1(I) of the Body of Principles states: "A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority." This applies to all detainees, whether or not held on a criminal charge. Article 9(3) of the ICCPR states: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or release.."

[14] Members of the Human Rights Committee have questioned whether detention for 48 hours without being brought before a judge is not unreasonably long (Report of the HRC, vol 1 (A/45/40), 1990, para 333, Federal Republic of Germany); in a death penalty case, the Committee ruled that a delay of one week from the time of arrest before the detainee was brought before a judge was incompatible with Article 9(3) of the ICCPR: "anyone arrested or detained in a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power..." (McLawrence v Jamaica, UN Doc. CCPR/Ci60/D/702/1996). the European Court of Human Rights has ruled in a UK case that detaining a person for four days and six hours before bringing him before a judge was not prompt access (Brogan et al, United Kingdom, 29 November 1988, 145b Ser. A33 at 62).

the act provides for habeas corpus review of the detention[15] and six-monthly reviews by the Attorney General at which the detainee can submit evidence, it is unclear how much information the government will be required to produce in support of the certification that the non-national is a "terrorist" or supports "terrorism". In the past, the Attorney General has detained non-nationals facing deportation on the basis of "secret evidence" of alleged terrorist links not made available to the detainees or their attorneys. Amnesty International considers that no-one should be detained on the basis of evidence they are unable to review or challenge. Such a procedure lacks the essential guarantees under international law to protect people from arbitrary or wrongful deprivation of liberty.

Amnesty International raised its concerns about the use of secret evidence in a letter to the Attorney General in July 2000 about the case of Dr Mazen Al-Najjar. Dr Al-Najjar is a Muslim cleric and academic who was held in jail for three and a half years pending an appeal against a deportation order imposed for overstaying his student visa. He was denied bail on the basis of classified evidence introduced by the government that he was a threat to national security, which was reviewed in camera by a judge without either Dr AI-Najjar or his attorney being present. Dr Al-Najjar—who denies any involvement with terrorism—was given only a one-sentence summary of the "evidence". In May 2000 a US federal district judge ruled that the reliance on classified evidence to detain him breached his constitutional right to "confront and rebut that evidence" and to a "fundamentally fair hearing". He was freed in December 2000 after a further hearing at which a court found the evidence insufficient to justify detention.[16] The Department of Justice has lodged an appeal against this ruling, which was still pending in November.

On 24 November 2001, Dr Al-Najjar was again taken into custody after the I1'" Circuit Court of Appeals upheld his final deportation order. As he is a stateless Palestinian who has no country to return to, his case may become a test case under the new detention provisions, should he continue to be detained. Last June the US Supreme Court issued a landmark ruling stating that the indefinite detention of non-US nationals whose final order of removal had been entered, but whose deportation was not "reasonably foreseeable", was unconstitutional. The ruling applied to several thousand foreign nationals convicted of crimes in the USA who could not be deported because there was no country which would accept them. The ruling left open the possibility of the government continuing to detain non-nationals when limited to "specially dangerous individuals and subject to procedural protections".[17] The ruling led to the release under strict supervision of more than 300 foreign nationals who were not considered a danger to the community. However, the Department of Justice has recently published new regulations invoking "special circumstances" such as terrorism, national security, danger to the community or health reasons (including mental disorders or contagious diseases) to keep "deportable" foreign nationals in custody. These rules apply in addition to the provisions of the Patriot Act.

Amnesty International believes that states should not detain people who are considered to be a threat to national security unless they are charged with recognizable criminal offences promptly and tried without delay or action is being taken to extradite or deport within a reasonable period. Amnesty International opposes the indefinite detention of foreign nationals for whom there is no realistic possibility of deportation being effected. Such a measure has the same effect as a severe criminal sanction (deprivation of liberty) but without the due process standards and safeguards contained in the criminal justice system. Amnesty International considers that this violates fundamental human rights and that anyone detained in such circumstances should be charged with a recognizably criminal offence and brought to trial or released.

The legislation requires the Attorney General to report to Congress every six months on the number of non-US nationals certified as a suspected "terrorist" or national security risk; the grounds of the certification; the nationalities of the indi-

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[15] The Act provides that "in general" judicial review of any action or decision made under Section 236 (A), including judicial review of the merits of the Attorney General's certification, is available "exclusively in habeas corpus proceedings" (Section 236(A) (a) 7 (b)

[16] In the May 2000 ruling, the judge had ordered a new bail hearing, the first phase of which would be an open record hearing, after which the government would still be permitted to present classified information, but only on condition that a "meaningful summary" was provided to Al-Najjar and his attorney. The open record hearing was held before another judge in August and October 2000, after which the judge ruled that there was no evidence that Dr A(-Najjar was a threat to national security. Dr Al-Najjar was released in December after the same judge went on to consider the government's classified evidence, and concluded that it did not differ greatly from that presented during the open records proceeding and was again insufficient to constitute grounds for detention.

[17] Zadvydas v Davis et al., 000 U.S.99–7791 (2001).

viduals so certified; length of detention; number granted relief from removal; number removed; number no longer certified; and the number released from detention.

This clause is important in providing public scrutiny of how the expanded removal/detention provisions will be implemented. However, this should not prevent the government from providing information on arrests and detentions as they take place. Steps should be taken to avoid the secrecy surrounding the present detentions (see below).

While Amnesty International's comments in this document are limited to the due process aspects of the detention powers under the Patriot Act, there are also concerns about the expanded definitions of "terrorism" under the Act, which civil rights groups fear could be used against non-nationals on the basis of their political beliefs and associations, who have not engaged in or supported "terrorism" (see note 9, above). Amnesty International will be monitoring implementation of the act and will present further comments in due course.

4. CONDITIONS OF DETENTION—ILL-TREATMENT

Amnesty International is concerned that many of those detained during the 11 September sweeps are held in harsh conditions, some of which may violate international standards for humane treatment. There have also been allegations of physical and verbal abuse of detainees by guards, and failure to protect detainees from abuses by other inmates.

There has been concern for some years about the poor conditions under which immigration detainees are held in INS detention facilities or local jails. Although the INS promulgated new standards for the treatment of INS detainees earlier this year, as noted above, these standards are not universally applied (see section 2).[18] Amnesty International has received reports suggesting that immigration detainees arrested after 11 September are being subjected to more punitive conditions than before in some facilities. There are also reports that people of Muslim or Middle-Eastern origin are treated more harshly than other inmates. Reports include detainees being placed in solitary confinement and denied exercise; required to wear full restraints, including leg-irons, during visits; denied contact visits with families; given an inadequate diet; denied personal possessions and copies of books in Arabic, including the Quran.

Amnesty International is also concerned by reports that some people travelling to the USA since 11 September have been detained on arrival for questioning at US airports on security grounds and subjected to cruel, inhuman or degrading treatment, including being denied food for long periods and kept in shackles.

Examples of ill-treatment include:

- Hasnain Javed, a Pakistani student (held for three days in September for overstaying his visa) was allegedly beaten and had a tooth chipped by inmates who called him a "terrorist" while he was detained in jail in Wiggins, Mississippi. He reports that he tried to call for assistance through an intercom but guards failed to respond. Later that night he was allegedly stripped naked and again beaten by inmates; again guards failed to respond to his cries for help.
- A Palestinian man detained since 22 September in a Texas jail for a visa violation, is reported to be held in solitary confinement with only one hour of exercise a week (in a small enclosed yard). He is shackled during non-contact visits with his family; denied personal property and, unlike other inmates, denied access to TV.
- A Saudi Arabian man detained on an immigration violation in Denton County Jail, Texas, initially spent a week without a mattress, bedding, blanket or clock to tell him when to recite his Muslim prayers; his conditions improved only after an appeal by his attorney to the regional INS director. He was allowed to see his wife eight days after his arrest and was made to wear leg-irons during the second non-contact visit; he is still allowed far fewer visits than other inmates have with relatives. He has reportedly asked to remain in solitary confinement through fear for his safety if held with other inmates.
- Detainees awaiting deportation in Mecklenburg County Jail, North Carolina, are alleged to have been stripped naked and blasted with cold air by guards in early November; the wife of one man reported that only inmates of Middle Eastern descent were subjected to this treatment and when her

[18] As well as better access to counsel, the standards cover a range of conditions including improved visitation with family and friends; rights of detainees to exercise their religion free from harassment and to participate in group religious activities.

husband tried to complain of abuse during telephone calls, the calls were terminated by guards.

• Five Israelis arrested on 11 September in New York were held incommunicado for about a week, and were allegedly interrogated by police while blindfolded and in only their underwear.

• An elderly Maltese couple arriving in the USA in September for a vacation with their daughter (a US resident) were refused entry at Philadelphia airport, questioned extensively by INS officers and held overnight in a detention centre where they were allegedly denied all food and water, despite the woman being a diabetic. The husband (a 63-year old dermatologist with no criminal record) was kept in heavy wrist and foot chains until both were put on a plane home the next day.[19]

Some of the above would violate the prohibition of torture or other cruel, inhuman or degrading treatment under the Convention against Torture and the ICCPR. In addition, Article 10 of the ICCPR states that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". Some of the reported conditions fall short of specific provisions of the UN Standard Minimum Rules for the Treatment of Prisoners which stipulate, for example, that all prisoners and detainees should receive a minimum of one hour of outside exercise daily, and that restraints should be applied only when "strictly necessary" as a precaution against escape or to prevent damage or injury, and that "chains or irons shall not be used as restraints".

Amnesty International urges the Department of Justice to ensure that all prisoners and detainees are treated humanely in accordance with the above international standards, whether in local or federal facilities, or at airports. We urge the department to fully investigate all allegations of abuse of INS and other federal detainees held in local and federal facilities.

The recent standards promulgated for the treatment of immigration and asylum seekers should be extended to all facilities housing immigration detainees, including local and county jails. The INS should ensure that these are strictly monitored and adhered to.

5. LACK OF INFORMATION ABOUT DETENTIONS

Amnesty International shares the concern expressed by many commentators and human rights advocates regarding the unprecedented levels of secrecy surrounding the 11 September detentions. While some information may be privileged on security or privacy grounds, the extraordinary lack of data does not appear to be justified or in the public interest. Without such data, it is impossible to assess how far the rights of those detained are being protected; the true extent of any abuses reported; whether or not there has been any practice of incommunicado detention on a systematic level; how effectively the authorities are dealing with such concerns.

On 29 October, Amnesty International and a group of US human rights organizations made a joint formal request to the Department of Justice to provide detailed information under the Freedom of Information Act on the arrests and detentions, including the identities and nationalities of those detained; their current status and location; and whether they have legal representation. The letter also seeks information on "All policy directives or guidance issued to officials about making public statements or disclosures about these individuals" and on the identities of any courts giving orders to seal information in specific cases.

The letter asks for the information to be provided urgently, referring to the "growing number of reports which, if accurate, raise serious questions about deprivations of fundamental due process, including imprisonment without probable cause, interference with the right to counsel, and threats of serious bodily injury"—and states that "...the unprecedented secrecy surrounding the detentions of several hundred individuals, which has now lasted for several weeks, in itself raises questions about the detentions" and "prevents any democratic oversight of the government's response to the attacks".

Amnesty International calls on the Department of Justice to provide the information requested without delay.

6. DISCRIMINATION

Amnesty International welcomes the strong action taken by the Department of Justice to respond to attacks and acts of discrimination perpetrated against people perceived to be Muslim or of Middle-Eastern origin in the wake of 11 September.

[19] Information on these and other cases was obtained through contact with lawyers and relatives by Amnesty International and media reports.

We understand that the Civil Rights Division (CRD) of the Department of Justice, working with US Attorneys and the FBI, has opened more than 60 civil and criminal investigations into acts by private individuals committed in retaliation for 11 September, including killings, death-threats, assaults, and attacks on mosques and businesses.

The CRD has also set up a National Origin Working Group to combat "postterrorism discrimination" against targeted groups by receiving reports of "violations based on national origin, citizenship status and religion, including those related to housing, education, employment, access to government services, and law enforcement"; referring cases to the appropriate federal authorities; conducting outreach work with communities; and working to ensure the provision of effective services to victims of civil rights violations.

In welcoming these initiatives, we note that some concern has been expressed about the perceived, or potentially discriminatory effects of certain law enforcement measures, including the post-11 September detentions. It appears that many, if not most, of those detained in the 11 September investigations are Muslim men of South Asian or MiddleEastern origin. Amnesty International is aware that the security forces may be acting on a range of intelligence and other information when questioning suspects or making arrests. However, concern has been expressed that some people arrested in the 11 September investigations are being held in custody on relatively minor violations which would normally qualify for release on bail. As noted above, there are also complaints that some detainees who are Muslim or of Middle-Eastern origin are being treated more harshly than other inmates while in detention.

On 9 November 2001, the Attorney General issued a memorandum with instructions to federal prosecutors and state police anti-terrorist task forces to interview a further 5,000 named individuals in the USA on student, tourist or business visas. Although the names have not been released, sources have indicated that most people on the list are Middle-Eastern males aged between 18 and 33. Several state police chiefs have expressed concern about this directive on the ground that questioning immigrants who are not suspected of a crime -unless such interviews are strictly voluntary—may violate state laws and police guidelines which prohibit "racial profiling" (unfair treatment by law enforcement officials, including stops and searches, on the basis of race or ethnic origin).

The USA has ratified the UN Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 5 of which calls on States Parties to undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee to everyone the right to equality before the law. In its report to the UN Committee on the Elimination of Racial Discrimination in September 2000, the US Government stated that "Racial discrimination by public authorities is prohibited throughout the United States, and the principle of non-discrimination is central to government policy throughout the country." The US delegation also told the Committee during its consideration of the US report in August 2001 that the Bush administration was committed to eliminating the practice of racial profiling.[20]

Amnesty International believes it is essential that the US Government remains as fully committed to upholding these principles of non-discrimination in the present challenging climate. Amnesty International urges that all precautions are taken to ensure that people are not arrested or detained or otherwise treated unfairly on grounds of their ethnic origin, race or religion. Such practices would violate standards under both international and US law.[21]

Amnesty International believes it is necessary to ensure that the strongest safeguards against discrimination prevail in implementing the Patriot Act. As the legislation gives the government extraordinary detention powers which apply only to non-nationals, it is particularly important to ensure that immigrant communities are not unfairly targeted.

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[20] Introductory remarks of the US delegation to the Committee in Geneva on 3 August 2001, during the Committee's examination of the USA's initial report on how it was implementing the provisions of CERD.

[21] Article 5 of CERD calls on states to ". . .guarantee the right of everyone without distinction as to race, colour, or nationality or ethnic origin, to equality before the law", including "equal treatment before the tribunal and all other organs administering justice" and the "right to security of person and protection by the state against violence or bodily harm, whether inflicted by government officials or by any individual group or institution". Article 26 of the ICCPR states "All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Amnesty International is also concerned that the special military commissions allowed for under the Presidential Order of 13 November would also be discriminatory, in that they would apply only to non-US citizens who would be tried by a lesser standard of justice than US nationals. Amnesty International has called for this order to be revoked (see 11 below).

7. NEW RULE PERMITTING MONITORING OF INMATE CONVERSATIONS WITH LAWYERS

Amnesty International is deeply disturbed by a new interim rule introduced by the Department of Justice on 31 October 2001, which permits the Bureau of Prisons to monitor previously confidential written or verbal communications between attorneys and their imprisoned clients whenever the Attorney General certifies that "reasonable suspicion exists to believe" that an inmate may use such communication "to further or facilitate acts of terrorism". This rule applies to all federal prisoners, and to people "held as witnesses, detainees or otherwise" by INS agents or other federal authorities.

Although the Department of Justice has stated that procedural safeguards will protect the right to attorney-client confidentiality regarding legal advice,[22] this rule erodes a fundamental principle under international standards, which requires governments to ensure that all arrested, detained or imprisoned people have a right to communicate with an attorney in full confidentiality.[23] Amnesty International is concerned that such discretionary power concentrated in the hands of a few law enforcement officials, with no judicial oversight, is inherently open to abuse. Confidentiality is an essential component of the right to effective representation by counsel. Such monitoring, particularly in the case of witnesses, unconvicted and pre-trial detainees, could severely compromise the right of accused or detained persons to have adequate facilities to prepare a defence, as required under Article 14 of the ICCPR (which sets out fair trial guarantees). It also undermines the presumption of innocence guaranteed under Article 14. Prisoners may feel inhibited in discussing not only matters relating to their case but also in reporting any abuses they may be suffering, through fear of retaliation. Confidential mechanisms for communicating with the outside, particularly attorneys, are an important safeguard against abuse.

Amnesty International considers that there are already appropriate remedies under existing federal law in cases where it is suspected that attorney-client communications may be used to further criminal activities. These remedies include court-ordered monitoring of communications where necessary, and other measures which are subject to appropriate judicial review. Amnesty International believes that the new rule should be repealed or at the very least a court order should be required in each case before any monitoring takes place.

8. FEDERAL POLITICAL PRISONERS HELD INCOMMUNICADO FOLLOWING 11 SEPTEMBER: NEW RULE EXTENDING AUTHORITY TO DETAIN PRISONERS IN SEGREGATION

Amnesty International is concerned by reports that more than a dozen federal prisoners serving sentences in federal prisons for various politically motivated offences unconnected with the 11 September attacks were removed from the general prison population on or shortly after 11 September and placed in solitary confinement in high security units. Some were denied phone calls with attorneys while in segregation; several were also denied all visits and mail and were effectively held incommunicado for between 10 days and two weeks. None was informed of the reasons for their removal to the high security units or for the suspension of visits and phone calls.[24]

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[22] The rule "requires that privileged information not be retained by the government monitors and that, apart from disclosures necessary to thwart an imminent act of violence or terrorism, any disclosures to investigators or prosecutors must be approved by a federal judge".

[23] Principle 18(4) of the Body of Principles states: "Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official". Principle 8 of the Basic Principles on the Role of Lawyers states: "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within the sight, but not within the hearing, of law enforcement officials."

[24] Prisoners placed under such measures include Philip Berrigan, a 77-year-old peace activist serving a one-year and oneday prison sentence for damaging a military aircraft—he was reportedly taken from the prison's general population, denied visits and phone calls from his wife and placed in "incommunicado" segregation for 10 days; Antonio Comacho Negron, a Puerto Rican independence activist serving time for bank robbery, who was held incommunicado in a SHU unit for 21 days; Marilyn Buck, serving a 70-year sentence for crimes connected to the Black Liberation Army, who was taken from the general prison population and placed in segregation

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Since then the Bureau of Prisons has issued an administrative directive allowing the Director to extend the time in which prisoners may be placed under "special administrative measures" (including segregation in high security units) on security grounds for renewable one-year periods.[25] Amnesty International is concerned that this may mean people being placed in solitary confinement for lengthy periods—even indefinitely—without adequate safeguards or review. Bearing in mind that long-term isolation can amount to cruel, inhuman or degrading treatment, Amnesty International is seeking more information from the Bureau of Prisons regarding this procedure including the precise grounds on which such measures may be invoked; what safeguards exist to ensure due process rights; and the conditions under which such prisoners will be held.

9. INTERROGATION TECHNIQUES- THE SPECTRE OF TORTURE IS RAISED

Amnesty International is deeply concerned by media reports suggesting that US security forces may be considering using "pressure techniques" including the "truth serum" Sodium Pentothal in order to elicit information from detainees during interrogation. Such methods would violate human rights treaties to which the US is a party and would severely undermine the USA's standing in the international community.

The USA has ratified the ICCPR and the Convention against Torture which prohibit torture or other cruel, inhuman or degrading treatment in all circumstances, including times of national emergency.[26] In its report to the Committee against Torture[27] in October 1999, the US Government stressed that, although torture was not a distinct federal crime within US territory, existing federal and state laws already outlawed all acts falling within the definition of torture. The US made clear that:

> Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. Every act constituting torture under the Convention constitutes a criminal offense under the law of the United States. No official of the government, federal, state or local, civilian or military, is authorized to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate torture in any form. No exceptional circumstances may be invoked as a justification of torture. U.S. law contains no provision permitting otherwise prohibited acts of torture or other cruel, inhuman or degrading treatment or punishment to be employed on grounds of exigent circumstances (for example, during a "state of public emergency') or on orders from a superior officer or public authority, and the protective mechanisms of an independent judiciary are not subject to suspension.[28]

Any withdrawal from such a clear affirmation of US policy in this area would send a grave signal to the international community about the USA's commitment to the respect and promotion of human rights. Any acceptance of torture in the United States risks eroding respect for the rule of law elsewhere. Furthermore, were the US Government to sanction even "moderate physical pressure" on even a few detainees, it would almost inevitably lead to an expanded use, as Amnesty International has found in more than 40 years of documenting the use of torture.

The UN Committee against Torture has stated that the application of so called "moderate physical pressure" as an authorized mode of interrogation clearly

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part of which was "incommunicado"; Sundiata Acoli, in prison since 1973, placed in a SHU unit on 11 September where he remained for at least six weeks and was denied access to his attorney.

[25] The directive was published on 31 October 2001 as an "Interim rule with request for comments" to be implemented immediately.

[26] The Convention against Torture states: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture" (article 2 (2). The ICCPR similarly states that no derogation is permissible from Article 7, which prohibits torture or other cruel, inhuman or degrading treatment or punishment.

[27] The international body which monitors ratifying states' compliance with their obligations under the Convention against Torture.

[28] US Department of State Initial Report of the United States of America to the UN Committee against Torture, submitted to the Committee on October 15, 1999. The report also states: "While the constitutional and statutory law of the individual states in some cases offers more extensive or more specific protections, the protections of the right to life and liberty, personal freedom and physical integrity found in the Fourth, Fifth and Eighth Amendments to the United States Constitution provide a nationwide standard of treatment beneath which no governmental entity may fall. The constitutional nature of this protection means that it applies to the actions of officials throughout the United States at all levels of government; all individuals enjoy protection under the Constitution, regardless of nationality or citizenship." (AI emphasis)

breaches the Convention against Torture. It has ruled that even if a suspect is believed to have information about imminent attacks against the state, the following methods of interrogation may not be used as they violate the prohibition on torture and illtreatment: restraining in very painful conditions; hooding; playing of loud music; prolonged sleep deprivation; threats, including death threats; violent shaking; and using cold air to chill the detainee.[29]

Amnesty International opposes the use of Sodium Pentothal and other so-called "truth serum" drugs to interrogate suspects on the ground that this constitutes cruel, inhuman and degrading treatment and should therefore be prohibited as a method of eliciting information.[30] Such use would also constitute physical and psychological pressure outlawed under international standards on interrogations. Principle 21 of the Body of Principles states: "No detained person while being interrogated shall be subjected to violence, threats or methods of interrogation which impair his capacity or decision or his judgement." The InterAmerican Convention to Prevent and Punish Torture expressly defines torture as including "the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish."[31] "The use of such drugs in this context also constitutes a breach of medical ethics, in so far as medicine and medical expertise should never be used for any purpose other than evaluating, protecting, or improving the physical and mental health of prisoners and detainees.

Article 15 of the Convention against Torture obliges the state parties to "ensure that any statement which is established to have been made as the result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." Other international standards exclude not only statements extracted under torture, but also those elicited as a result of other cruel, inhuman or degrading treatment or punishment.

The Human Rights Committee has expanded the prohibition on the use of evidence obtained under duress, by stating that "the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."[32] The Committee has further stated that: "[t]he law should require that evidence provided by . . .any. . .form of compulsion is wholly unacceptable."[33]

The USA has taken some important steps to meet its obligations under the Convention against Torture. It has enacted legislation affirming US policy not to return any person to a country where there are substantial grounds for believing the person would be in danger of being subjected to torture, as required under Article 3 of the Convention. In 1994 it enacted a federal law extending US jurisdiction over any act of torture committed outside the USA by a US national or an alleged offender present in the USA regardless of nationality. It has also enacted the Torture Victims Protection Act, allowing both foreign nationals and US citizens to claim damages against any individual who engages in torture or extrajudicial killing under "actual or apparent authority or under color of law of any foreign nation".

Amnesty International calls on the Attorney General to make public assurances that no techniques involving torture or other cruel, inhuman or degrading treatment, will be invoked or introduced during interrogation of suspects. The US Government should make it clear that abuses including torture, cruel, inhuman or degrading treatment and other improper methods by any branch of US law enforcement will not be tolerated under any circumstances and will be prosecuted as a crime.

10. SUSPECTS ARRESTED IN OTHER COUNTRIES

Amnesty International believes that, when required, all states are obliged to cooperate in the detection, arrest, and prosecution of persons implicated in crimes, regardless of the nationality of the perpetrators or the victims. Such cooperation

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[29] UN Doc. CAT/C/SR.297, reporting on Israel's compliance with the Convention against Torture—the committee recommended that interrogations by Israeli security officers applying these methods "cease immediately".

[30] Use of drugs has been documented as a form of torture in a number of countries, including Chile and the former Soviet Union. Principle 6 of the Body of Principles states that "The term 'cruel, inhuman or degrading treatment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental..." Such use would also violate standards prohibiting compelled confessions.

[31] It has also been noted that under US case law confessions male under the influence of truth serums arc also not "voluntary" and are consequently inadmissible as evidence: see Human Rights Watch "The Legal Prohibition Against Torture', November 2001.

[32] Human Rights Committee General Comment 20, para 12.

[33] Human Rights Committee General Comment 13, para 14.

should, however, pay scrupulous respect to international human rights standards relating to arrest, detention, treatment, and trial. In this respect, Amnesty International urges the US Govemment to promote these standards at all times, particularly when its own agents are involved outside US territory.

The Washington Post reported on 22 November that "at the urging of the CIA, foreign intelligence services and police agencies in 50 countries have arrested and detained about 360 suspects with alleged connections to Osama bin Laden's al Qaeda network or other violent terrorist groups" since the 11 September attacks.

Just as the US Government may not send detainees to another country to be interrogated if there are substantial grounds for believing that the person would be at risk of torture or other cruel, inhuman or degrading treatment or punishment, it has an obligation also to oppose the use of such treatment against any of the detainees arrested at its behest in other countries. For example, the FBI and CIA are reported to have been given access to, and to the interrogation sessions of, "Abu Ahmed", an alleged senior member of al Qaeda arrested by the authorities in Saudi Arabia, a country where torture and ill-treatment continues to be reported. If US agents become aware of any use of such treatment against detainees to whom they have access, they must publicly denounce it.

The USA may seek to obtain the extradition to the United States of detainees held abroad. In such cases, it should respect foreign laws and the provisions of relevant extradition treaties, in particular in cases where the extradition of suspects is barred in the absence of guarantees that the death penalty will not be sought by the retentionist country, in this case the United States. Amnesty International is concerned by the USA's past record and official sanctioning of the forcible abduction, or other "irregular rendition" of criminal suspects from abroad.[34]

In this regard, Amnesty International has asked the Department of Justice for information on the current legal status and whereabouts of Jamil Qaseem Saeed Mohammed. Mohammed, a Yemeni national reportedly wanted in connection with the bombing of the US destroyer, the USS Cole, in Yemen in October 2000 is reported to have been handed over in secret to US agents at Karachi International Airport in Pakistan on 26 October 2001 and flown to an unknown destination. In telephone calls to the Department of Justice, Amnesty International has been unable to establish the accuracy of the reports or the whereabouts of Jamil Mohammed, and repeats its request for information in this memorandum if indeed he was or is in US custody.

11. PROPOSED TRIALS BY SPECIAL MILITARY COMMISSIONS

Amnesty International is deeply concerned by the Military Order signed by President George Bush on 13 November allowing for the trial by special military commissions of non-US citizens suspected of involvement in "international terrorism". It has called for the order to be revoked on the grounds that its proposals flout international fair trial standards.

The Military Order expressly bypasses established principles of law and evidence applied in the trials of people charged with criminal offences in US Courts and circumvents the fair trial protections provided for in US military courts under the USA's Uniform Code of Military Justice. Under the Military Order, conviction and sentence will be determined by a two-thirds majority of the members of the special military commission present at the time of the vote. Their decisions cannot be appealed to a higher court, and individuals cannot seek redress in any court anywhere in the world for any human rights violations that may occur during arrest, detention, or prosecution. In bypassing international fair trial standards, the Military Order contravenes US obligations under international law, specifically the International Covenant on Civil and Political Rights, ratified by the USA in 1992. Certain fundamental principles must be respected at all times, even in time of emergency, including the right of appeal.

Although the Military Order places the proposed military commissions under the jurisdiction of the Department of Defense, individuals currently under the jurisdiction of the Department of Justice fall within the scope of the Order. Amnesty International urges the Department of Justice to oppose the transfer of any suspect under its jurisdiction to the jurisdiction of the above military commissions. It has been reported that some officials in the US administration have raised the possibility of Zacarias Moussaoui, a French national of Moroccan origin arrested in Minneapolis on 17 August, being tried before the military tribunals. Amnesty International opposes his or any other trial before the proposed military commissions.

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[34] See No return to execution: The US death penalty as a barrier to extradition (Amnesty International Index: AMR 51/171/2001, November 2001).

A summary of Amnesty International's Recommendations

Amnesty International urges that the US Attorney General and the Department of Justice to:

- Make public information on the total number of people arrested to date in connection with the 11 September investigations; dates and place of arrest; the number still detained and the reasons for the detention; length of time in detention; place of detention; and data on the race or ethnicity of those detained. Provide such information regularly on future arrests.
- Ensure that no-one is held incommunicado in custody.
- Publicly reaffirm the US Government's unequivocal opposition to the use of torture.
- Ensure that no person in federal custody, including those held in local or country jails, is subjected to torture or other cruel, inhuman or degrading treatment, and that law enforcement officials will not use methods of interrogation that constitute torture or other treatment prohibited under international standards.
- Ensure that all cases of alleged ill-treatment are thoroughly and impartially investigated, with the results made public. Those responsible for abuses, including discriminatory treatment, should be brought to justice.
- Ensure that everyone arrested or detained is provided with their rights under international standards, as set out under Article 9 of the ICCPR and the Body of Principles, including being informed of the reasons for arrest and given prompt access to attorneys and relatives and consular officials or representatives of other organizations as requested.
- Closely monitor the detention provisions of The Patriot Act, and ensure that arrested or detained persons are brought promptly before a judge and be able to challenge the lawfulness of their detention.
- No-one should be detained on national security grounds unless charged with a recognizable criminal offence and tried without undue delay or action is being taken to deport within a reasonable period. There must be a realistic possibility of deportation being effected. No-one should be deported or returned to a country where they may face torture.
- Ensure that no-one is detained on the basis of evidence they are unable to review or challenge.
- Ensure that INS standards for the treatment of immigration detainees and asylum seekers, introduced into some facilities earlier this year, are extended to all facilities housing such detainees. The standards should be strictly monitored and adhered to.
- Ensure that asylum seekers are generally not detained. If they are detained on security grounds they must be allowed a full and fair hearing of their claim as provided under the 1951 Refugee Convention.
- Ensure that no-one is arrested, detained, or subjected to or subjected to unfair or harsh treatment, on the grounds of their ethnic origin, race, nationality or religion.
- Promote and protect international human rights standards in the context of international investigative measures in the wake of 11 September, and in particular to ensure that any US agents with access to detainees in other countries denounce any human rights violations committed during the investigations.
- Not resort to the circumvention of extradition protections in the case of any individual whose custody the USA seeks.
- Oppose the transfer of any individual from Department of Justice jurisdiction to the jurisdiction of the special military commissions proposed by recent executive order. Support revocation of the order.

Statement of William F. Schulz, Executive Director, Amnesty International USA, Washington, D.C.

In a November 27th press conference, Attorney General John Ashcroft challenged those who had expressed concern about the treatment of individuals detained since September 11 to provide specific information to substantiate allegations of civil and human rights abuses.

As the Attorney General was making this assertion, Amnesty International USA representatives were submitting a 26-page memorandum to him (attached) that provides such information. Since then, Amnesty International has continued to inves-

tigate and report on specific cases. Today, we release our most recent findings (also attached). Together, these documents detail how U.S. and local law enforcement officials have denied some detainees access to counsel; prevented them from seeing relatives; denied them medicine and food; held them in handcuffs and shackles for prolonged periods of time; and subjected them to beatings and other mistreatment.

As a nation that takes great pride in its stand for human rights and personal freedom, the United States has a responsibility to demonstrate to the world that its administration of justice can be both evenhanded and transparent. We should not fear the rule of law. We should not fear longstanding mechanisms that are designed to help us distinguish between the innocent and the guilty. We should not fear a court system designed to ensure due process and prevent cruel and inhumane treatment. We should not fear our Constitutional protections or our international human rights obligations.

On several occasions, President Bush has spoken forcefully against making judgments about individuals based on their race, religion, or appearance. Unfortunately, his Administration's current approach to justice risks creating a contradiction between his words and his actions. Transparency, not secrecy, represents the best mechanism by which we can demonstrate to the world that the values we seek to defend are also the values we practice. Anything less will only sustain the contention of those who would believe that American justice is neither fair nor obtainable.

Amnesty International is a worldwide grassroots movement that promotes and defends human rights. For additional information contact Alexandra Arriaga, Director of Government Relations, at 544-0200, ext. 235.

Statement of Amnesty International

SEPTEMBER 11 DETAINEES

Amnesty International has documented numerous cases in which those individuals detained in the aftermath of September 11 have been denied human rights. The following represent a sample of the most recent findings. The information on these and other cases is obtained through contact with lawyers and relatives, as well as through direct contacts with some detainees.

Hasnain Javed, a Pakistani student held for three days in September for overstaying his visa was allegedly beaten and had a tooth chipped by inmates who called him a "terrorist" while he was detained in jail in Wiggins, Mississippi. He reports that he tried to call for assistance through an intercom but guards failed to respond. Later that night he was allegedly stripped naked and again beaten by inmates; again guards failed to respond to his cries for help.

Mohammed Maddy, an Egyptian arrested on October 3, alleges that guards in the Metropolitan Detention Center (MDC) in New York City assaulted him. A magistrate ordered photographs to be taken of bruising to his arm, which he said was caused by the guards' ill-treatment of him. Federal authorities are investigating this case.

Osama Awadallah, a 21-year-old Jordanian student who was attending college near San Diego was arrested on September 21 as a material witness in the investigation regarding the September 11 attacks. He was moved to MDC in New York City where he alleges that guards insulted his faith, kept him from sleeping and "roughed him up." A court filing asserts that when Mr. Awadallah arrived in the Metropolitan Correctional Center on October 1, a guard shoved him against a wall while he was handcuffed, kicked his leg shackles and pulled him by the hair to make him face an American flag. The next day, the filing says, federal marshals, while escorting Mr. Awadallah to a court hearing, pinched his arms while his hands were cuffed behind his back and kicked his feet in an elevator. The court papers also say that the incident left black-and-blue marks on his arms and his left foot bleeding, and that two of Mr. Awadallah's lawyers observed a bruise on his arm when they met with him on October 4.

Ghassan Dahduli, a Palestinian-Jordanian was detained on September 22 in a Texas jail for a visa violation. He was held for two months in solitary confinement with only one hour of exercise a week in a small, enclosed yard. He was shackled during non-contact visits with his family; denied personal property and, unlike other inmates, denied access to TV. On November 28, he was deported to Jordan. He had agreed to Voluntary Departure to Jordan, as he was afraid he would be held indefinitely in jail in the USA, and was unable to support his family. Fearing for their future, his Jordanian wife and five children under 16 (all of whom are US citizens)

left the USA for Jordan three weeks ago (before Dahduli's deportation). Two INS agents including the investigator in the Dahduli case, accompanied to him to Jordan. His wife believes he was handed over to Jordanian security forced on arrival in Jordan—she was waiting for him at the airport but he did not appear. His whereabouts are unknown at this time. His US attorney believes that the INS investigator may have accompanied him to take part in an interrogation or that he may have been handed over to the Jordanian security forces for more "pressurized" interrogation. It is unclear if any assurances were sought to prevent his treatment, or whether the US has played a role in handing him over to security forces. Amnesty International sent a fax to the INS Dallas District Director seeking more information on what happened to him on arrival in Jordan, and clarification of role of the INS. There has been no response from INS as yet.

A Saudi Arabian man detained on an immigration violation in Denton County Jail, Texas, initially spent a week without a mattress, bedding, blanket or clock (necessary to recite his Muslim prayers); his conditions improved only after an appeal by his attorney to the regional INS director. He was allowed to see his wife eight days after his arrest and was made to wear leg-irons during the second non-contact visit; he is still allowed far fewer visits than other inmates have with relatives. He has reportedly asked to remain in solitary confinement through fear for his safety if held with other inmates. Although he has been given a final deportation, the INS is still holding him.

Detainees awaiting deportation in Mecklenburg County Jail, North Carolina, allege that guards forced them to strip naked and blasted them with cold air in early November. The wife of one man reported that only inmates of Middle Eastern descent were subjected to this treatment and that when her husband tried to complain of abuse during telephone calls, guards terminated the calls.

Five Israelis arrested on September 11 in New York were held incommunicado for about a week. Police allegedly subjected them to prolonged interrogations in which the detainees were kept blindfolded and in only their underwear.

An elderly Maltese couple arriving in the US in September for a vacation with their daughter (a US resident) was refused entry at Philadelphia airport, questioned extensively by INS officers and held overnight in a detention center where they were allegedly denied all food and water, despite the woman being a diabetic: The husband (a 63-year old dermatologist with no criminal record) was kept in heavy wrist and foot chains until both were put on a plane home the next day.

Four South Asian men Mohamed Khan (Pakistan), Najmul Hassan (Pakistan), Irfan Ahmed (Pakistan) and Ayazuddin Sheerazi (Indian national) were detained in Connecticut on November 24, and have not had access to their families since their arrest. When their attorney tried to visit them, officials would not confirm they were detained and their names did not appear on Immigration and Naturalization Service (INS) computerized lists. The attorney eventually gained access only after obtaining their alien numbers through another source. Two of the four have asylum claims pending.

Mazen Al-Najjar, a Muslim cleric, was arrested in November on a deportation order for overstaying his student visa. Despite having no criminal record, he is locked down for 23 hours a day in a small cell in solitary confinement in a maximum security prison -with a ban of all visits for his family for 30 days. Dr. Al-Najjar was previously detained in a US jail for more than three years on the basis of secret evidence, while appealing against the deportation order, but a federal judge ordered his release last December, after finding there were "no bona fide reasons to conclude that [he] is a threat to national security." Dr.Al Najjar is being held under powers conferred on the Attorney General under the Patriot Act to detain someone on mere suspicion of terrorist associations—even though this is the same evidence that a court ruled insufficient to justify detention last December. He his currently held in far worse conditions than before—with no prospect of release because, as a stateless Palestinian, he has no country to return to, he could remain behind bars indefinitely.

A Yemeni student arrested on a visa violation after several years in the US has reportedly agreed to be deported to Yemen—despite fearing he would be at risk there—after spending 45 days in solitary confinement in a high security unit.

NAACP poised to join ACLU in rights fight

Article by Cecil Angel, Detroit Free Press Staff Writer, December 3, 2001, Detroit, Michigan

NAACP POISED TO JOIN ACLU IN RIGHTS FIGHT

CHAIRMAN: ASHCROFT THREATENS LIBERTIES

The NAACP will stand side-by-side with the ACLU in opposing any threat to civil liberties posed by the U.S. Justice Department's response to terrorism, NAACP Chairman Julian Bond said Sunday in Bloomfield Township.

Bond was the keynote speaker at the American Civil Liberties Union Fund of Michigan's annual dinner, at Temple Beth El.

"The NAACP and the ACLU were created to fight for freedom and justice in a nation dedicated to those goals," Bond said. "We will continue this fight now with renewed determination. Each of us has a role to play as guardians of our nation's liberty."

Bond said the National Association for the Advancement of Colored People has been wary of U.S. Attorney General John Ashcroft because he stands against everything the NAACP has supported.

"He knows something about the Taliban, coming from as he does from that wing of American politics," Bond said. "Even before Sept. 11, he had moved the department to the far right, making it headquarters for the Federalist Society."

The society shares Ashcroft's hostility to civil and reproductive rights, religious liberty, environmental protection and privacy rights, Bond said.

Since the attacks on Sept. 11, Ashcroft has waged a relentless assault on civil liberties, Bond said.

In the past month, he has allowed the FBI to eavesdrop on privileged lawyer-client communications, ordered the interviews of thousands of young men of Middle Eastern heritage, and "advocated a Star Chamber system of secret military trials," Bond said.

This month, he's suggested a return to FBI tactics of illegal wiretaps and burglaries, Bond said.

"He has yet to learn that the protections of our Constitution are not a reward for good behavior," he said.

Anti-terrorism efforts are under scrutiny by the NAACP and by the ACLU—at the federal and state level.

Kary Moss, executive director of the Michigan chapter of the ACLU, said her organization is concerned about a proposed Michigan AntiTerrorism Act. She said the ACLU wants to make sure it doesn't infringe on civil liberties.

Before his dinner speech, Bond spoke about the threat to civil liberties. He cited the planned military trials and the roundup and detention of people "on God knows what charge."

"The assumption is that the president knows what's best for us," Bond said. "I don't believe he knows what's best for us."

Statement of Claudette Shwiry Hamad, Editor, Arab American Institute Foundation Report

APPENDIX

HATE-BASED INCIDENTS SEPTEMBER 11—OCTOBER 10, 2001

This report is a compilation of hate-based incidents that have occurred in the United States over the one-month period following the September 11 attacks on the World Trade Center Towers and the Pentagon.

The events described were compiled from print, broadcast and established Internet media sources and individual testimony. Although this report includes 326 incidents in 38 states, there undoubtedly have occurred many other episodes of discriminatory actions that have either not been reported for fear of further backlash, or not considered sufficiently newsworthy.

The Arab American Institute Foundation is grateful for the research efforts its staff, especially webmaster Melyssa Morey, consultant Patsy Thomasson, and the

American Arab Anti-Discrimination Committee (ADC) reports which are cited with source origination.

ARIZONA

Assaults

Phoenix. On Sept. 15th, Frank Silva Roque shot to death Balbir Singh Sodhi. Roque allegedly killed Sodhi as part of a multiple-incident shooting rampage that included shootings at a Lebanese-American clerk who escaped injury, at another gas station in Mesa, and at the home of an Afghan family. (Arizona Republic, 9/18)

Mesa. 49-Year-old Indian Sikh shot while standing outside his Chevron station. Family believes he had been killed because he looked 'Middle Eastern". Attack apparently part of multiple incident-shooting rampages. Gunman also shot at LebaneseAmerican clerk who escaped injury and fired upon home of Afghan family. (ADC, 9/15)

Threats

Phoenix. Anonymous callers told police they planned to attack Middle Eastern businesses. (Arizona Republic, 9/12)

Tempe. Bomb threat phoned into Islamic Cultural Center. (Arizona Republic, 9/12)

Discrimination

Phoenix. Three Arab men were refused readmission to their Sept. 25th United Airlines flight to Chicago after a female passenger allegedly raised her concern about them. (First plane evacuated allegedly for mechanical problems.) The three have filed a lawsuit. (Chicago Tribune, 10/4)

Phoenix. Arab American pilot pulled off line and told he cannot fly. Coworker allegedly reported pilot sympathetic to Palestinian cause. After background check, put back on and able to fly, but pilot concerned he may be terminated. (ADC, 9/19)I11*Scottsdale*. Bar briefly posted sign: "Arabs not welcome." Co-manager later removed it and admitted, "it was a stupid think to do." (Arizona Republic, 9/14)

CALIFORNIA

Assaults

Los Angeles. Palestinian-born salesman killed while making door-to-door rounds. Family called killing hate crime, but police say robbery was likely motive. (Agence France Presse, 10/9)

Los Angeles. On an evening walk close to his home, Sikh man wearing Pakistani dress attacked by four men who beat and punched him. Norwalk police filed report as robbery because attackers ripped his clothes and pulled his wallet. However, the Sikh claimed the attackers yelled, "terrorist" as they beat him. (ADC, 10/9)

San Diego. Two men on motorcycle pulled up next to Sikh woman stopped at red light, yanked open her door shouting, "This is what you get for what you've done to us!" Then, "I'm going to slash your throat!" The woman raised her elbows to protect her neck and hunched over. She was slashed in the head at least twice before the men, hearing a car approach, sped off. (San Diego Union-Tribune, 10/5)

Reedley. Abdo Ali Ahmed, Yemeni grocer shot to death in his shop over the weekend. Family members said the day before he was killed, death threat that included anti-Arab statements was found on windshield of Ahmed's car. It is being investigated as a hate crime. (Washington Post, 10/3)

Fresno. Arab American, Rien Said Ahmed, was shot and killed while at work. Witnesses saw four males speed from the store in white sedan. No money or merchandise was stolen. Ahmed had received threats since mid-September. (The Fresno Bee, 10/2)

Los Angeles. Thinking he was Iranian, two men bumped a Mexican immigrant's car, followed him to his home, broke in and beat him in front of his wife and daughter, shouting insults against Arabs. (Agence France Presse, 10/2)

Los Angeles. Driver got into argument with Iranian driver while on road. He allegedly yelled racial threats and waved gun at both Iranian driver and passenger, also Iranian. Driver charged with making criminal threat, violating civil rights and exhibiting firearm. (The Bulletin's Frontrunner, 10/1)

Industry. Two Arab customers in bar beaten by four bouncers. One of the customers had been arguing with bartender over bill. Bouncers attacked him, breaking his nose and arm, while calling him a terrorist. Victim's cousin put his hands up, indicating he did not want trouble, asked "Are you gonna beat me?" The bouncers turned on him, breaking his ribs and bruising his eye. (ADC, 9/30)

San Fernandes. A 26-year old Indian, said he was walking with a white Australian friend early the morning of Sept. 15th, when they were approached by a man who called him a "dirty Arab," and punched him and the friend. His friend was stabbed in the ensuing brawl and remains hospitalized in critical condition. (NY Times, 9/19)

Police investigating death of Sikh man as possible hate crime. His body was found floating in nearby canal two days after family reported him missing. (The Hotline, 9/19)

San Gabriel. Egyptian-American grocery storeowner shot to death in what authorities said was robbery, but family called hate crime. Owner shot after confrontation with two customers, who sped off in Honda driven by a third man. Money in cash register not taken. (Arizona Republic, 9/18; ADC, 9/15)

San Mateo. Three-year old Sikh child hit in the head by gasoline bomb thrown through window of her home. The bomb did not explode. (San Francisco Chronicle, 9/18)

San Gabriel. While grocery shopping, woman dressed in Muslim clothing attacked by another woman who beat her while yelling, "America is only for white people." Victim taken to emergency room. (Los Angeles Commission on Human Relations, 9/17)

Beverly Hills. Noticing Koran charm worn around neck of Muslim bagel shop customer, another female customer attacked her, saying, "Look what you people have done to my people." She lunged at the Muslim woman making derogatory comments but was restrained by two men. The victim called police; storeowner apologized to attacker and offered help. (www.hatewatch.org, 9/17)

Palmdale. Shots were fired into convenience store. (www.hatewatch.org, 9/17)

San Bernardino. Sixty (60)-year old Arab American businessman, victim of police brutality after Popeye's employee screamed as the businessman was leaving the restaurant, "He's an Arab, he's an Arab. Get him!" Her cries alerted police officer inside whom pursued the frightened customer in his squad car, allegedly yelling, "Get that f——Arab". When Arab American arrived home, he was followed by helicopter and squad cars that rammed his car. Officers shot at him point blank with rubber bullets; another officer broke his nose with his baton. Man was taken to hospital, then to jail, charged with abating the law and assault with deadly weapon (his car). Inmates are threatening man. (ADC, 9/14)

San Francisco. Australian software engineer stabbed in chest by someone who allegedly thought engineer's friend, Australian of Indian and Hispanic heritage, was Arab. Men said stabbing took place when they were passed by a group while crossing street. Scuffle started when engineer was punched or bumped by one of the men, who spewed racial epithets and said, "We don't like Arabs", then wounded engineer. (San Francisco Chronicle, 9/14)

Los Angeles. Young Persian woman exiting restaurant with friend followed by another woman, who asked if she is Arab before punching her in the eye. (Los Angeles Commission on Human Relations, 9/14)

Los Angeles. Arab American woman threatened with gun. (Sacramento Bee, 9/14)

Los Angeles. Syrian American convenience store owner shot at twice during week; two shots on 9/11 and four shots 9/13. (Los Angeles Times, 9/14)

Los Angeles. Two Spanish-speaking women harassed and one beaten by woman in doctor's office. Woman allegedly yelled, "You foreigners caused all this trouble" before attacking them. (Los Angeles Commission on Human Rights, 9/12)

Fremont. Sikh student verbally harassed and physically assaulted at his school. (San Jose Mercury News, 9/12)

San Francisco. Palestinian American teenager beaten. (San Francisco Chronicle, 9/11)

Vandalism

Anaheim. Pakistani restaurant gutted in blaze called suspicious by city officials. (Orange County Register, 9/28)

Los Angeles. Home of Pakistani family burned down after series of phone threats. (Family had moved to safer location before blaze. No injuries reported.) (ADC, 9/27)

Los Angeles. Car of Iranian family, parked in their driveway, attacked by man with baseball bat and hammer. (Los Angeles Times, 9/22)

Palo Alto. Tires of car belonging to Palestinian American slashed with knife or other sharp object. (ADC, 9/22)

San Jose. Fire officials reported there had been 14 suspicious fires since Sept. 11th. Two occurred 9/14 at homes of East Indian and Middle Eastern American families. (San Francisco Chronicle, 9/18)

West Sacramento. Sikh temple barricaded with tractor, truck and trailer that were padlocked, after refusing angry caller's order to lower its religious flag to half mast.

Perpetrator charged with felony vandalism and trespassing after he jumped into the temple's holy pool. (Los Angeles Weekly, 9/20)

Napa. Sikh American fast food restaurant manager found his car vandalized. (Contra Costa Times, 9/19)

San Jose. Afghan restaurant attacked with bottles and rocks. (San Jose Mercury News, 9/18)

Encino. Afghan/Persian restaurant destroyed in fire 9/17. (Los Angeles Times, 9/18)

San Diego. A cherry bomb exploded on the sidewalk outside the Islamic Center 9/16, forcing worshipers to evacuate the building during a prayer service. (Los Angeles Times, 9/18)

San Diego. Mosque struck by paintballs 9/14 and by gunfire during morning prayers 9/15. (Boston Globe, 9/14?)

Los Angeles. Pakistani Muslim returns to mall parking lot to find body of his car scratched in several places with "Nuke em". (www.hatewatch.org. 9/14)

Woodland Hills. Two students scrawled word "die in Persian Club's booth at Pierce College. (Sacramento Bee, 9/14)

San Francisco. Bag of blood thrown at immigration office that serves Arabs. Anonymous caller told paralegal he left package 'for your brother Osama bin Laden." (Salon.com, 9/13) Perpetrator booked on suspicion of destroying property, interfering with another's exercising civil rights and one act of terrorizing. Bail was set at $20,000; he was released 9/12 on own recognizance. (San Francisco Chronicle, 9/13)

San Francisco. A bag filled with blood was hurled at the door of a law office building in the Mission District 9/12 by someone who apparently mistook the building for an Islamic Community Center. The name of Osama bin Laden was scrawled on the bag. (Philadelphia Inquirer, 9/13)

Pacifica. Car with "Free Palestine" sticker vandalized. (San Francisco Chronicle, 9/13)

Yuba City. Hindu American awoke to find "USA" spray painted across hood of car and religious medallion that had hung from rearview mirror missing. (Sacramento Bee, 9/12)

Anaheim. Three teenagers hurled skateboard through window of Arab American owned market. Police caught perpetrators and their parents apologized. (AP, 9/12)

Threats

Huntington Beach. Man arrested for making a death threat against Iranian couple in their 70s. (Los Angeles Times, 9/25)

Palmdale. Five public high school students were sent home for their safety after note was found at school threatening World Trade Center attacks would be avenged 9/18 with "massacre" with their names listed beneath. (AP, 9/20)

Sign posted on freeway: "Kill All Arabs." (www.hatewatch.org, 9/17)

Moreno Valley. Man arrested on suspicion of making terrorist threats to radio station KHPY. Caller accused of leaving message on station's answering machine, threatening to damage tower. Police believe threat connected to station's Sunday morning program, "Islamic Perspective". (The Press Enterprise, 9/14)

San Diego. Caller to Middle Eastern grocery store asked if the owner sold rat poison, "I wish you do so I can poison you." (San Diego Union-Tribune, 9/14)

Los Angeles. Sign found in Hall of Records elevator, "Kill all towel heads." (Los Angeles Commission on Human Relations, 9/13)

San Jose. Islamic group received calls threatening lives of all Muslims. Another caller said, "You ruined the country and you will all die!" (www.hatewatch.or?, 9/11)

Harassment

University of So. California Muslim Public Affairs Council reported some students harassed on campus and some women have had their veils pulled off. (NBC–4 News, 9/14)

Discrimination/Profiling

Los Angeles. Egyptian American business owner accused by deliverywoman of 'terrorist threats' (also sexual battery and imprisonment) on 10/2. Although police insisted he was not being arrested (and therefore not read Miranda rights), was not allowed to go to station on own volition, was handcuffed in front of pregnant wife, employees and customers; at station was photographed and fingerprinted and questioned. Passed voluntary polygraph test, released 10/4 on $50,000 bail. Week of 10/14, computers and other equipment confiscated. On 10/22, judge granted prosecutors three-week continuance to find evidence of 'terrorist threat.' (AAI, 10/12, 10/24)

Stockton. Jordanian man, single father of two, fired from job at L3 Celerity systems in Cupertino. Said although week before attacks, weekly evaluation was posi-

tive, 'as usual' day after boss gave him negative review and forced him to report whereabouts every half hour. Jordanian lost job a week later in series of layoffs, though company kept technicians with less seniority. Has received no response to many job applications he has submitted since then. Is considering legal action. (Newhouse News, 10/17)

San Francisco. A teenage boy was denied entrance on a public bus due to his appearance. (San Francisco Chronicle, 9/25)

Los Angeles. Six passengers of Indian ethnicity brought to back of plane on flight from LAX to Washington Dulles. The pilot first questioned the men; FBI and INS agents arrived an hour later and interrogated passengers. Three passengers left plane because they were uncomfortable. (ADC, 9/26)

Fresno. Hairdresser stomps off; salon owner yells at Pakistani American client and orders him to leave immediately after he refused to answer hairdresser's questions about bin Laden and recent events. FBI agents went to man's home later that night and interrogated his wife. (ADC, 9/24)

COLORADO

Vandalism

Colorado Springs. "Terrorist on Board" spray painted during night on car belonging to Sikh American. "Terrorist" also painted on driveway. (AP, 9/18)

Threats

According to University of Colorado police, library pillars spray painted with "Nuke sand nigger", Arabs go home" and "Bomb Afghanistan". (Colorado Daily via uwire, 9/19)

Aurora. Muslim man heard eight shots fired outside of his home. Suspicious of stranger on sidewalk wearing a raincoat and ski mask seemingly keeping postmidnight vigil, he called police. (ADC, 9/15)

Colorado Springs. Four men entered mosque, cursed at a worker, and threatened to burn down the building. (Philadelphia Inquirer, 9/13, AP Online)

CONNECTICUT

Assaults

Bridgeport. Brazilian waiter attacked on street by eight men who taunted and accused him being Arab. Waiter's face badly bruised and arm broken. (Deutsche PresseAgentur, 9/13)

Vandalism

Bridgeport. Muslim arriving at mosque for afternoon prayer 9/17 found phone wires cut and threatening graffiti. (AP, 9/17)

Threats

Turban-wearing Sikh threatened by second-grade classmate, who said, "You better watch out - you're going to get beat up." She later explained to the principal, "He looks just like the guys they said did it on TV." (AP, 9/20)

Bristol. Man threatened to blow up Arab American-run Subway restaurant. (AP, 9/18)

DISTRICT OF COLUMBIA

Assaults

Two women wearing Muslim headdress spat at on subway near White House. (Plain Dealer, 9/14)

Vandalism

Rocks thrown against front door and windows of former mosque inhabited by Turkish family. Prior, guests leaving the home were approached by man asking questions about family. Before walking away, said his name was "Osama bin Laden." (ADC, 10/3)

Threats

Number of threats received by Arab American Institute, including death threat to president, bomb threats and hate mail at office.

Indian American stopped by car with four males who accused him of being terrorist and threatened, "we will bomb you." (IACFPA, 9/18)

Islamic Center received bomb threats; closed as result. (ADC, 9/13) Sikh American leaving work accosted by pedestrians yelling verbal expletives; threatening to 'get' him and bomb him in retaliation for 9/11 attacks. (IACFPA, 9/17)

Discrimination/Profiling

DC area. Department store employee subjected to hostile work environment. Alleges supervisor said government should restrict admission of Arabs and Muslims. 'better to prohibit them from living here because anyone of them can become a terrorist in waiting, even their children'. Supervisor is threatening to fire her (based on bad economy. Two other employees of Middle Eastern origin fired over past two weeks. (ADC, 9/28)

FLORIDA

Assaults

Punta Gorda. Gas station shot at by vandals. (ADC, 9/20)

Brooksville. A Muslim woman in a car was almost run off road by another driver. (St. Petersburg Times, 9/16)

Herando County. Mosque shot at and vandalized. (St. Petersburg Times, 9/14)

Sunrise. Islamic school principal, driving home with his sister and three children chased by men in Jeep. Jeep driver reached behind seat, yelling 'Where's my gun? Let me take care of them." Principal called 911; when Jeep driver saw cell phone, made abrupt uturn and sped off. (Sun Sentinel, 9/19)

Vandalism

Jacksonville. Fire that destroyed storage shed in rear of restaurant with Middle Eastern name being investigated as arson. (Florida Times-Union, 9/27)

Port Charlotte. Roadside planter, shrubs and plastic sign burned at mosque (second vandalism that week). (ADC, 9/19)

Temple Terrace. "Muslims F—-" found written on white door of family's garage 9/13. (St. Petersburg Times, 9/14)

St. Petersburg. Palestinian American man's brand new GMC truck found 9/12 with threatening note and splattered with paint. (St. Petersburg Times, 9/14)

Threats

Deerfield Beach. Ku Klux Klan cards placed under windshield wiper of Egyptian man's car. (Sun Sentinel, 9/19)

Discrimination/Profiling

Miami. Palestinian American student in care of legal guardian while father out of country was taken out of school by guardian concerned that father could not return, and was going to send him to relatives out of area. When father advised that he could come back, she tried to reenroll student, but assistant principal rejected admission. Boy finally enrolled; first day back, was badly beaten by classmate urged on by father. Student now in night school; feels his presence is too provocative. (AAI, 10/5)

Tampa. Manager of airport hotel service terminated. Although half the workforce was laid off for lack of business, he was the only manager to lose his job. (ADC, 10/1)

Fort Lauderdale. Scottish/Lithuanian wife of Egyptian American forced to disembark a Southwest Airlines flight while bags and documents were once again checked. Her checked bags were removed from plane and flight took off without her. Apparently, flags were raised because she had traveled to Florida with husband; he returned to California (although also pulled off American Airlines flight, airline handled situation discreetly and held plane while checking his 'story'), she was to fly to Connecticut to visit family. (AAI, 10/8)

Tampa. Egyptian American prevented from boarding United Airlines flight to Cairo. As he was entering plane, was called back to ticket counter and informed that pilot refused to allow him on flight. Ground crew was kind, put him on later flight to make connection to Cairo. (Pittsburgh Post-Gazette, 9/21; AAI 10/10) Florida (cont.)

Orlando. Two Pakistani businessmen forced to disembark US Airways plane. Takeoff delayed 45 minutes until security officers and US Airways representatives arrived. They requested the men leave because the captain did not feel comfortable with them aboard. (ADC, 9/17)

GEORGIA

Assaults

Atlanta. Four men tried to stab a Sudanese man after telling him, "You killed our people in New York. We want to kill you tonight." (Atlanta Journal Constitution, 9/13)

Gwinnett. Following illegal U-turn, Arab American motorist pulled over by police sergeant in patrol car. Motorist alleges sergeant approached car while holding gun;

ordered motorist out, threatened him, called him "bin Laden supporter" then searched his car. (ADC, 10/4)

Threats

Atlanta. On Arab American woman's answering machine: "We know where you are and we can get you." (ADC, 9/14)

Discrimination/Profiling

Savannah. Authorities boarded AirTrans flight to Atlanta and took away passenger. Airport officials told Savannah Morning News passenger's name similar to that of one on FBI watch list. After questioning, passenger was cleared and allowed to depart on later flight. (ADC, 9/18)

ILLINOIS

Assaults

Evanston. Chicago taxi driver and college student, Mustapha Zemkour (who was assumed to be of Arab descent) was injured Monday when two meninclude a Cook County corrections officer-chased him on motorcycles, then allegedly hit him in the face and yelled, "This is what you get, you mass murderer." (Chicago Tribune, 9/18)

Orland Park. Motorist drove alongside Arab family of four, screamed obscenities about the Sept. 11th events and began swerving as if to hit the family's vehicle. They were able to pull off to side road, but reluctant to report motorist's license plate number in fear of further harassment. (ADC, 9/16)

Chicago. Man attacked gas station attendant he thought was of Arab descent with blunt end of 2-foot machete. Attacker arrested and charged with hate crime. (Chicago Tribune, 9/13)

Chicago. Firebomb tossed at Arab American community center. (AP, 9/13)

Palos Hills. Two Muslim students beaten at Moraine Valley College. Two Arab boys assaulted attackers in defense of the girls. (NIAMC)

Vandalism

Chicago. Assyrian church set on fire; estimate $200,000 damage. Fire being investigated as arson. (Chicago Tribune, 9/24)

Chicago. Reports of vandalism. (Chicago Tribune, 9/13)

Chicago. Arab American living above his place of business awakened by smoke coming from first floor. Fire was ignited by something thrown into building. Fire department called; police and FBI investigating as possible hate crime. (ADC, 9/13)

Threats

Chicago. Several bomb threats reported. (Chicago Tribune, 9/13)

Chicago. Man entered Arab American-owned grocery, approached owner with bag in his hands, claimed to have bomb and threatened to "blow up this store like you Arabs blew up the World Trade Center." Man arrested and charged with hate crime, assault and disorderly conduct. (ADC, 9/13)

Chicago. High school crowd chanted threats at passing cars with occupants who appeared Arab. (AP Worldstream, 9/13)

Chicago. While closing office of Arab American Action Network, three members threatened by man driving by: "We're going to make sure you guys are going to get yours!" (AP Online, 9/12)

Harassment

Chicago. Crowd of young people shouted anti-Arab insults at Bridgeview Mosque. (Chicago Tribune, 9/13)

Discrimination/Profiling

Chicago. Palestinian American medical technician told coworkers not comfortable and terminated from position. He had been suspended without pay after joking about image of Palestinians celebrating after 9/11 attacks. (ADC, 9/19)

INDIANA

Assaults

Fort Wayne. Two men attacked, robbed and cut the penis of an Indian man, calling him an Arab and saying, "to be an American you must be circumcised." (MSNBC.com 10/1)

Gary. Assault rifle fired more than 21 shots into Yemen native Hassan Awdah's gas station, 9/12. Awdah shielded by thick glass; gunman also shot through wall behind which Awdah crouched. No one was injured. Investigation turned over to FBI (CNN.com, 9/19)

Palos Hills. Two Muslim female students beaten at Moraine Valley College. Two Arab male students assaulted offenders in defense of the women. (ADC, 9/11)

Discrimination/Profiling

Indiana couple, husband from Pakistan, claims that captain of Delta Flight matched their last names, Malik, to list of possible security threats and delayed flight until they could be searched. (Evansville Courier Press, 10/12)

IOWA

Vandalism

Des Moines. Bottles were thrown and windows smashed at Bosnian bar and restaurant, 9/28. Assailants, wielding BB gun, hammers and bat, assaulted a woman in parking lot behind bar. Witnesses said assailants shouted obscene remarks about Bosnians and Muslims. Police have disputed these claims and believe incident was run-of-the-mill bar fight that stemmed from earlier conflict among customers. (Des Moines Register, 10/6)

Evansville. Local man rammed his car at 80 miles per hour into Islamic Center. (Washington Post, 9/14)

KANSAS

Assaults

Topeka. Muslim student was attacked at Washburn University. (MSNBC.Com, 10/9)

Threats

Kansas City. Phone calls urging retaliation against Arabs and Muslims led to closing of Palestinian-American restaurant and two Islamic schools. (Kansas City Star, 9/13)

KENTUCKY

Assaults

Islamic Meeting Places vandalized and one Indian student attacked because he was believed to be an Arab. (AAI, 9/13)

Harassment

Harrods Hill. Neighborhood sign: "Arabs are Murderers." Man refused neighborhood association's request to take it down. Two Arab Americans live in neighborhood. (ADC, 9/14)

Discrimination/Profiling On Sept. 21st, in Northern Kentucky, outside Cincinnati, federal agents took the computers and personal papers of more than two dozen Muslims. On Sept. 22nd, said they had found nothing of concern. (Cincinnati Enquirer 9/24).

LOUISIANA

Vandalism

Parish of St. Bernard. Islamic school and a number of businesses have been repeatedly vandalized. (Times-Picayune 9/18)

New Orleans. Muslim-owned convenience store vandalized. (ADC, 9/14) Louisiana (cont.)

New Orleans. Windows of mosque shot at with BB gun and neighboring Islamic school windows shattered by rocks. Two people arrested. (ADC, 9/13)

Harassment

Jefferson Parish. Schools were closed after classmates taunted students of Middle Eastern origin. (Washington Post, 9/15)

MARYLAND

Attacks

Belmont. Eyewitness reported Greek convenience store owners, believed to be Arab, attacked. Police contacted. (ADC, 9/29)

Baltimore. Sikh-American pizza deliveryman threatened in parking lot of restaurant. Police responded but made no arrests. Attacker returned later that day, spraying the Sikh with pepper spray. Coworkers tried to restrain, but were also sprayed. Police and ambulance arrived; Sikh filed complaint 9/29, but was arrested

10/4 on charges of second degree assault (attacker alleged Sikh threatened to kill him). (ADC, 10/4?)

Vandalism

Resident found two nails underneath tires of both his and wife's cars. His antenna also bent and toothpicks broken in keyhole of his mailbox. (ADC, 10/6)

Arab American woman reported excrement covering door handle of her car and long scratch on its side. (ADC, 9/22)

Germantown. Rear window of minivan smashed while parked in front of Arab American home. Family targeted twice previously: while out driving, firecracker thrown in front of car. Sixteen (16) year-old daughter attacked on Montgomery College campus by group of young adults. (ADC, 9/28, 9/21, 9/12)

Rockville. Rug company owned by Palestinian set on fire. Owner reported threatening phone calls 9/ 11. (ADC, 9/ 11)

Two adjoining buildings owned by a Palestinian burned to ground. (Miami Herald, 9/13)

Burtonsville. Home damaged with graffiti; auto pushed out of driveway and hit; causing approximately $5,000 in damages to the car. (AAI)

Threats

Baltimore. Daughter of AAI president received threatening phone calls in dorm room at college. (AAI,

Harassment

Gaithersburg. When Arab American construction worker reported constant threats and hostility received at work, supervisor responded "Well, don't you think they have a right to be angry?" Coworker acted as if he would attack with metal pipe. (ADC, 10/2)

MASSACHUSETTS

Attacks

Holden. Police arrested and charged man with assault and battery to intimidate for race or religion, simple assault, two counts of assault and battery on a police officer, destruction of property and driving to endanger. Assailant was stopped at traffic light when he saw Middle Eastern looking van driver. He got out of his car, pulled driver out of his van, punched and yelled at him, striking several times before victim fought back. He then assaulted two police officers and destroyed property in police booking room. (Boston Herald/AP, 10/1)

Fairhaven. Arab American attempting to obtain restraining against neighbors. Father hit with baseball bat, ending up in emergency room; tires of son's car slashed; followed and harassed with racial slurs, such as "hey you f———Arab terrorist, you bombed the World Trade Center." (ADC, 9/19)

Boston. 20-year-old Saudi Arabian Boston University student attacked 9/16, by group of men as he left a Back Bay nightclub. Student suffered two knife wounds in his arm and third puncture to his back. (Boston Herald, 9/18)

Boston. FBI agents, mistaking her fiance's last name with that of Mohammed Atta, dragged veiled Saudi woman down corridor of Westin Copley Place Hotel, handcuffed and beat her leaving a 6" scratch across her face. She had accompanied her family on numerous visits to Boston for father's medical treatment. Media reports of incident did not refer to error or include public apology by FBI. (Boston Globe, 9/16)

Vandalism

Laurel. Car belonging to Indian immigrant spray painted with "Terrorist murderer"; tires slashed and windshield shattered. Police investigating as hate crime. (ADC, 9/19)

Fall River. Plastic bottle containing chemical hurled at Mobil gas station managed by Pakistani man. No one was hurt. (Boston Herald, 9/14)

Everett. Softballs inscribed with pro-American slogans including "God bless America" and ' Freedom for all," thrown through window of cafe owned by a Greek American. Owner believes assailants were aiming for nearby Middle Eastern cafe, and missed target. (Boston Globe, 9/13)

Weymouth. Fire set at gas station owned by Lebanese man (police believe a man and a woman doused a pump with gas and set it on fire before running away). (Boston Globe, 9/13)

Plymouth. Pizza shop owned by Iraqi American badly damaged by fire. The owner had been receiving threatening calls prior to fire and bullet left at front door. (Boston Herald, 9/13)

Quincy. Two Middle Eastern markets vandalized. (Boston Globe 9/13)

Somerset. Three teenagers set fire to store they believed to be Arab owned (in fact owned by Indian American). Teens arrested and told police they wanted to "get back at the Arabic people for what they did to New York." (Boston Globe, 9/12)

Harassment

Cambridge. Muslim Harvard University graduate student wearing hijab verbally and physically harassed on way to worship by four white males who tried to take off her hijab and reportedly said, "What are you doing here? Go home to your own country" (Harvard University Wire, 10/1)

Discrimination

Boston. On 10/8, Pakistani consultant with U.S. work visa pulled off United flight to Washington, DC area. Airline officials had identified him as security risk because his name is similar to one on FBI list of suspected terrorists. By time he was cleared by officials, plane had already departed. (Wall Street Journal, 10/23)

Boston. Indian-American flying to Los Angeles asked to disembark plane by United Airlines flight attendants who explained that passenger not comfortable with him on board. United put him on another flight, departing four hours later. (NPR, Weekend All Things Considered, 9/17)

Boston Logan Airport. Various media report passengers pulled off three separate flights. Suspicions of flight crews determined to be unwarranted in each instance. (Los Angeles Times, 9/16)

Boston area. Students of Tufts University Egyptian professor walked out of class after he entered classroom. (NIAMC)

MICHIGAN

Assaults

Lincoln Park. Forty-five (45) year-old Yemeni-American Ali A1 Mansoop shot 12 times in back and killed, 9/13. Attacker, former boyfriend of Mansoop's girlfriend, broke into their home, saying "I'm going to kill you for what happened in New York and DC". Attacker made full confession to police. (ADC, 9/21, WDIV Detroit, ClickonDetroit.Com 9/21)

Fair Haven. Windows of Mazen Mislmanion's family service station were shot at 9/ 13 . (AP, 9/ 14)

Vandalism

Detroit Metro Airport. Two Arab Americans claim tickets they had placed with personal items in basket to pass through x-ray missing. Fear they were confiscated by security. (ADC, 10/2)

East Lansing. Home of mosque caretaker shot at. Police providing protection. (ADC, 9/27)

Detroit. Arab American-owned store destroyed by arson. Fire investigators found gasoline inside store; molotov cocktail, intact and unlit, outside building (Detroit News, 9/23)

Detroit. Windows of Muslim Students Assoc. office at Wayne State University broken by vandals. (Detroit News, 9/13)

Threats

Dearborn. Six bomb threats called in to major businesses. (Detroit Free Press, 9/ 13)

Dearborn. Super Greenland supermarket owner reported two men in car yelled threats and racial slurs at Arab American customers. (Detroit News, 9/13)

Harassment

Dearborn. Female customer at gas station insulted by man driving by who yelled, "Get out of America. Get out of America." (ADC, 9/12)

Discrimination

Detroit. Ahmed Esa, a Yemeni American fired from 16-year welding job; told by boss to "go home, you are Arabic, you are Muslim. Go home, pray to your leader, go to your mosque and pray. I don't want to see your face." Esa is suing. (Detroit Free Press, 10/2)

Midland. Despite good record with company, Arab American truck driver suspended by branch manager for 'safety reasons'. When asked if suspension had anything to do with the attacks or his religion, manager responded affirmatively. (ADC, 10/2)

Detroit Int'l. Airport. Avis Rent-A-Car employee of Lebanese origin terminated after being questioned by FBI for taking two pictures of Osama bin Laden from person distributing them at airport shouting 'this is the terrorist'. (ADC, 9/26)

Detroit Int'l. Airport. Yemeni American man, waiting for aunt's flight to arrive from Yemen, publicly searched by U.S. marshals. Officers stopped when satisfied man was 'clear'. (ADC, 9/25)

Detroit Airport. Federal Express employee asked if he is of Arab origin by Fedex Security Chief. Employee later suspended without pay, then called and asked to report back to work. (ADC, 9/19)

MINNESOTA

Assaults

Eagen. Indian American woman followed out of grocery store by three high school age boys. One pushed her against her car; another punched her in stomach and elbowed her in the back. As they left, said "This is what you people deserve." (Minneapolis Star Tribune, 10/2)

Threats

Minneapolis. Palestinian-born businessman found mutilated squirrel and threatening note in his mailbox. He had also received hate mail at his office. (ADC, 10/1)

Discrimination/Profiling

Four Arab-American men were removed from a Northwest jet and questioned by law enforcement after passengers allegedly refused to fly with them. (AP, 9/21)

Minneapolis-St. Paul Int'l. Airport. Three Iraqi natives prevented from boarding Northwest flight to Salt Lake City because some of the passengers and crew were upset at their presence. NW officials said they regretted incident but bound by FAA rules. (ADC, 9/20)

MISSOURI

Threats

St. Louis. Clerks in 7-11 store flooded with telephoned threats after caller to local radio station alleged they were celebrating 9/11 attacks. After making purchase, Red Cross worker threatened to shoot them if that was true. (St. Louis Post Dispatch, 9/14)

Forest Park. Palestinian-American owner of a market contacted police after someone entered store and threatened him. (St. Louis Dispatch, 9/13)

St. Louis. Mosque received telephone threats. (St. Louis Dispatch, 9/13)

MONTANA

Discrimination/Profiling

Highway Patrol officers pulled over caravan of "Arab-appearing" people with MA license plates after 911 call reported group of 15-20 people with olive skin driving 5 cars and talking to one another on walkie-talkies. When they were pulled over, it was learned that they were Puerto Ricans on way to start a church in Oregon. (Missoulian, 9/14)

NEVADA

Discrimination/Profiling

Palestinian American officer at Dept. of Corrections filed complaint with EEOC about hostile comments coworkers made about Arabs in the U.S. (ADC, 9/14)

NEW JERSEY

Assaults

Teaneck. Man hanging U.S. flag on his car approached by woman who asked if he was "Arab". When he responded "Yes, why", she replied "Because I was in the department store buying a rope to hang myself before you kill me." The man ignored her remark and continued hanging his flag with his back turned when she assaulted him with her fist and keys. He slapped her in the face, and she left. (ADC, 9/19)

Muslim attendant at a service station punched in face by a motorist. (AP State and Local Wire, 9/13)

Vandalism

Molotov cocktail thrown at a Hindu temple. (AP State and Local Wire, 9/13)

Garbage and stones thrown at car owned by Sikh. (AP Worldstream, 9/13)

Two businesses owned by Indians were spray-painted with the words "Leave Now [expletive]." (Philadelphia Inquirer, 9/13)

Portuguese American wife of Syrian reported car vandalized. (ADC, 9/22) (ADC, 9/22)

Collingswood. Vandals spray painted "leave town' on walls of two Indian-owned businesses. (www.hatewatch.org, 9/12)

Threats

*West Babylon.*Man arrested and charged with possessing homemade metal pipe bomb and other explosive material. He showed pipe bomb to friends, saying he 'planned to use the bomb to get an Arab". Friends took the pipe bomb and called police. (Bergen County Record, 9/17)

Carload of people drove by Arab neighborhood yelling "We're going to bomb you when you sleep!" (AP State and Local Wire, 9/13)

Harassment

Turkish woman wearing Islamic head scarf verbally abused by woman who leaned out of her car and cursed at her. (AP State and Local Wire, 9/13)

Discrimination/Profiling

A number of Pakistani immigrants reporting detainment and harsh treatment at the hands of FBI agents. (Washington Post, 10/3).

NEW YORK

Assaults

Bronx. Yemeni man working at newsstand hit on head with bottle by three men who dragged him to street, allegedly yelling, "You Arabs get out of my neighborhood. We hate Arabs! This is a war!" (Daily News, 9/30)

Manhattan. Two drivers assaulted and suffered minor injuries. (New York Times, 9/24)

Long Island. Police charge man with bias crime after he assaulted gas station attendant whose ethnic background he questioned. (New York Post, 9/19)

Buffalo. On 9/16, Arab-American man assaulted by teenage employee at the Tops Market on Broadway. Police charged Brian K. Marshall, 18, with second degree assault as a hate crime and aggravated harassment after the victim told police Marshall pushed a steel restroom door with both hands into his head. The victim, who briefly lost consciousness, said Marshall called him an "Arab terrorist," and that when he left the restroom, several employees and his alleged assailant laughed at him and refused to offer him aid. (Buffalo News 9/18)

Stony Brook. Shots fired at home of Indian-American Stanford University graduate. (San Jose Mercury News, 9/18)

Albany. Two college students hit in face, apparently because of their Middle Eastern heritage. (New York Times, 9/15)

New York. Intoxicated 75-year old man tried to run over Pakistani woman in parking lot of shopping mall; followed her into a store and threatened to kill her for "destroying my country." (AP Worldstream, 9/13)

Staten Island. Arab American soccer player for College men's team nearly run down by car. (Daily News, 9/13)

Suffolk County. Man arrested for allegedly making anti-Arab threat and pointing pistol at gas station employee. (San Francisco Chronicle, 9/13)

Manhattan. Sikh man pounced on by three white men yelling "terrorist." (New York Times, 9/12)

Ronkonkoma. Man arrested after waving pellet gun and shouting ethnic slurs at gas station attendant. (Newsday, 9/12)

Ardsley. When Arab American deli owner responded affirmatively to customer's asking if he was Arab, customer cursed and yelled at him. As deli owner attempted to escort him out of store, customer sprayed him with pepper spray. (ADC, 9/11)

Richmond Hills. Indian American attacked with baseball bat; hospitalized with severe injuries. (IACFPA, 9/18)

Vandalism

Bronx. Over past two weeks two medallion taxis belonging to Muslim drivers set on fire. (New York Times 9/24)

Bensonhurst. Nine parked livery cars and taxis vandalized. (60 to 75 percent of the city's medallion-cab drivers are of Arab, South Asian or North African descent.) (New York Times 9/24)

Buffalo. On 9/22, passing bicyclist smashed two windows of Arab-run convenience store. (Buffalo News 9/24) New York (cont.)

Manhattan. Six to eight men harassed and threw rocks at 36 year old Arab American. (New York Post, 9/19)

Manhattan. Stones thrown through windshields of cabs in Central Park, apparently targeting dark-skinned drivers. (Time, 9/18)

Washington Heights. Thirty-five (35) year-old man complained to police that a man spit in his face and made anti-Arab remarks. (Daily News, 9/17)

Manhattan. When Muslim American reported to two patrol officers that he was spat upon and harassed, the officers allegedly responded "(your) people should have known about this before ... (you) deserve everything (you) get." (ADC, 9/17)

Brooklyn. Motorist blocked path of cab driver that appeared to be of Middle Eastern descent. Motorist pounded on car shouting, "Get out of the car, Arab. You are going to die, you Muslim." (Daily News, 9/14)

Nesconset. Grocery owned by Pakistani American target of apparent arson. (Newsday, 9/ 11)

Threats

Manhattan. Staples employee harassed Arab American customer about his accent and threatened to cut his throat. Police were called and report filed. (ADC, 10/1)

Rochester. Contractor received daily threats and verbal assaults by coworkers since 9/1 l; include "Let's kill all the Arabs we find here"; "We're going to kill you and send you back where you belong" .... (ADC, 10/1)

North Patchogue. Sign on fire department vehicle, driven by senior NPFD official: "Let's kill all the ragtops and turbanheads. Let God sort it out." (ADC, 9/26)

Manhattan. Message on television station answering machine: "F———Arabs, I know where you live and I'm going to murder you. . . get out of my f————country." (ADC, 9/23)

Bronx. Threatening, expletive filled messages including "you better watch your back, Muslim" left on Muslim Center voice mail throughout week. (ADC, 9/19)

Queens. Jordanian newsstand worker reported man threatened to kill him. (Daily News, 9/17)

Brooklyn. Arab American grocer subjected to racial slurs and threats after grocer attempted to pay delivery bill. The grocer was then told to call main office where manager made racist remarks. Incident reported to police. (ADC, 9/13)

Brooklyn. Woman picking up son from school threatened by 'older Caucasian man'. (CAIR, 9/ 11) New York (cont.)

Hicksville. Sikh man chased him as- he fled home. (Newsday, 9/11)

Vandalism

Queens. Anti-religious graffiti scrawled on sides of Bangladeshi newspaper office. (New York Post, 9/19)

Manhattan. Threatening letters sent to upper east side residents who may be of Arab descent. (New York Post, 9/19)

Buffalo. Vehicle belonging to Arab American torched. Police and fire officials investigating. (Buffalo News, 9/17)

New York City. "Don't support terrorists" spray painted on awning of Afghanistan-owned 'Chickens 'R Us' restaurant. (Daily News, 9/17)

Brooklyn. Palestinian American head of Arab American Family Service Center received several threatening calls, one saying, "you should all die for what you've done to my country." (XINHUA, 9/12)

Harassment

Manhattan. Priority mail package containing dried pig's ear and remarks of bin Laden delivered to Afghan Mission. (New York Post, 9/19)

Discrimination/Profiling

Manhattan. Permanent resident from Moroccan received no mail for some time since 9/11. When mail finally delivered, believes did not get all bank and credit card statements; contacted credit card companies to cancel account and issue new card with different address. Fears retribution if files complaint; is considering moving. (AAI, 10/10)

Manhattan. Man detained in New York. After 20 days, authorities would still not allow family to see him; did allow lawyer visit. Hearings scheduled three times; cancelled three times by FBI. (AAI, 10/10)

Rochester. Turkish man contacted EEOC after expected job offer was rescinded. Was told by company, "We decided we don' need you here." (ADC, 9/28)

Manhattan. Pakistani American computer analyst for Henry Electronics on one week assignment at NY Transit Authority. NYTA supervisor saw picture of man's wife with WTC buildings in background on laptop and said, "Oh boy, you're in real

trouble." Short while later, supervisor told Pakistani he did not want him to work there; he was then also terminated from Henry Electronics. (ADC, 9/21)

Island Park. Muslim woman fired from part-time job at laundry. Had been there three years; boss said he didn't know she was Muslim. Although the woman claims he is afraid of her and she is 'loved' by the customers; he alleged they threatened to boycott store after hearing her say, "America had it coming" while watching destruction of World Trade Center on television. (Newhouse News, 10/17)

NORTH CAROLINA

Assaults

Greensboro. University of North Carolina Lebanese student attacked and taunted by two men who told him to "Go home, terrorist." They hit him with their fists, twisted his arm and broke his glasses. (MSNBC.Com 9/19)

Vandalism

Charlotte. On 9/25, Arab American-run restaurant

Charlotte. On 9/25, Persian rug store vandalized with anti-Arab epithets, swastika, and the letters KKK. (Charlotte Observer,)

Charlotte. Windows broken and containers filled with gasoline left at Persian rug store. Police investigating whether attack is hate crime. (AP, 9/18)

OHIO

Threats

Outside Cleveland. Two men posing as salesmen asked Arab American businessman if he was from Afghanistan, threatening to kick him if he was. The men were arrested. (ADC, 10/3)

Vandalism

Cortland. Fire set to hedge outside Indian American-owned gas station. (www.hatewatch.org; 9/19)

Suburban Cleveland. Guru Gobind Singh Sikh Temple attacked with lit bottles of gasoline. (New York Times, 9/18)

On 9/17 a 29-year-old man smashed his car through the entrance of an unoccupied Ohio mosque at 80 mph., landing in a fountain. (Chicago Tribune, 9/18)

Cleveland. Ford Mustang driven through entrance of Ohio's largest mosque. Mosque unoccupied at time; only driver injured. (Estimated damages: $100,000) (AP, 9/13)

Discrimination/Profiling

Cleveland Int'l. Airport. Pakistani American reported that hours after passing intense security, he was singled out by police officers who scanned his bag twice with x-ray machine just before he was to board his flight. (ADC, 9/22)

OKLAHOMA

Assaults

Tulsa. Police investigated attack on food store employee jumped by three people while leaving his apartment. He was knocked down, eyes covered and beaten. The men further threatened to "cut you like you cut our people." (Tulsa World,9/14)

Tulsa. Police classified beating of Pakistani native by three men outside of service station as hate crime. Victim hospitalized. (Tulsa World, 9/11)

Threats

Waurika. Fire broke out on roof of truck stop owned by Sikh after caller repeatedly threatened he wants to "kill all you Muslims" and "kill everyone up there who's not white." Closed circuit videotape showed man in pickup threw something onto roof before fire. (Fort Worth Star Telegram, 10/2)

Harassment

Oklahoma City. Motorists made obscene gestures outside Islamic Society building. (AP Worldstream, 9/13)

OREGON

Assaults

Eugene. California woman arrested after attempting to pull turban off head of Sikh man she believed he was an Islamic extremist.

Vandalism

Vancouver. Muslim family new to neighborhood reported to Sheriff's office that 'murder' had been spray painted on their driveway. (Oregonian, 9/15)

Portland. While shopping at Target, tires of Pakistani man's car slashed. Police investigating as possible hate crime. (Oregonian, 9/19)

Gladstone. Woman reported racial slur against Arabs painted on street in front of her house. (Oregonian, 9/12)

Threats

Eugene. 33-year-old man arrested after making threatening phone call to Islamic Cultural Center. (New York Times, 9/18)

Portland. Customers threatened to blow up store and homeland of Iraqi convenience store clerk. In fear, the clerk closed store early. (Oregonian, 9/14)

PENNSYLVANIA

Assaults

Philadelphia. Off-duty police officer pulled gun on Pakistani convenience store owner. (Philadelphia Daily News, 9/13)

Philadelphia. Foreign-looking taxi drivers threatened. (Philadelphia Daily News, 9/13)

Philadelphia. Muslim cab driver reported to police passenger broke his arm when he eached back to receive fare. (Plain Dealer, 9/13)

Meadville. Female high school student of Middle Eastern descent attacked by man with knife, who yelled at her, "You're not an American. You don't belong here!" He was arrested and is currently in jail. (Pittsburgh Post Gazette, 9/18)

Threats

Threats made to Muslim and Arab students. (Morning Call, 9/15)

Harassment

Allentown. Harassing voice mail and e-mail that caused the Allentown mosque to cancel its services this week. (Morning Call, 9/15)

Lehigh Valley. Muslim Association leaders reported prank telephone call and a carload of people shouted derogatory words at congregation members leaving the mosque. (Morning Call, 9/15)

Exeter. Ten pigs' heads left outside mosque. (Press Association, 9/13)

Discrimination/Profiling

Philadelphia. Mentally and physically disabled Lebanese American girl mistreated at school; officials 'unyielding'. Father hired lawyer to file complaint against school system. AAl providing resources. (AAI, 10/10)

Philadelphia. Arab American teacher at Christian school told by principal that he was being replaced and they do not want him to return. When teacher asked for reason, principal stated "...because you're Arab." (ADC, 9/13)

RHODE ISLAND

Assaults

On 9/16, pregnant Muslim woman wearing shawl was using payphone when car pulled up behind her and someone in the car threw rock, hitting her foot. She turned to see what was happening when the passenger, a young woman of around 20, threw another rock and missed. (ADC, 9/16)

State fire investigators detonated explosive device left at gas station owned by Lebanese Americans. Police investigating as possible hate crime. (Providence Journal Bulletin, 9/18)

Three teenagers arrested for throwing molotov cocktail on roof of convenience store. Told police they wanted to "get those Arabs for what they did to us." (AAI, 9/13)

Vandalism

Pawtucket. Anti-Arab epithet spray-painted on garage door of gasoline station owned by a Lebanese-American. (Providence Journal, 9/18)

Cranston. Pakistani-owned convenience store vandalized. (MSNBC.Com, 9/14)

Discrimination/Profiling

Providence. Police forced Sikh telecommunications consultant and ten others off Amtrak train and questioned them for two hours. Consultant charged with possession of concealed weapon: three-inch knife traditionally carried by Sikh men. (ABC, CNN)

SOUTH CAROLINA

Vandalism

Charleston. Vandals broke window of minivan belonging o man of Middle Eastern descent. (Post and Courier, 9/15)

TENNESSEE

Assaults

Memphis. Muslim woman badly beaten on way to worship. (Dallas Morning News, 9/16)

Threats

Waverly. Two Arab American clinicians received threatening phone calls telling them to "go home and get out of our country"; their daughter in Atlanta also received threatening calls. (ADC, 9/12)

TEXAS

Assaults

Iraqi man shot in leg after struggle with assailant, described as African-American, greeted man in Arabic and then pulled out a gun. Police are investigating as possible hate crime. (MSNBC.Com, 9/26)

Houston. Man of Middle Eastern ancestry wounded by gunman. Attacker approached victim as he was getting out of his car, asked for cigarette, then held handgun to victim's head, cursed and accused him of having blown up the country and killing his family and friends. Victim grabbed gun and was shot in left hip. Attacker fled scene on foot. (AP, 9/21)

North Texas. Shots were fired at Pakistani home. No one was injured. (MSNBC.Com, 9/24)

Fort Worth. While visiting Botanic Gardens, two Ethiopian men were stabbed by white man who apparently approached them and, without saying a word, stabbed each one before fleeing. The two men were hospitalized. (Fort Worth Star Telegram, 9/22)

Dallas. Pakistani grocer in shot and killed 9/15. (LA Times, 9/18)

San Antonio. Three bullets struck Sahara Grocery. (ADC, 9/11)

San Antonio. Shiraz Iranian Restaurant attacked. (ADC, 9/11)

Vandalism

Austin. Carpet store owned by Palestinian American destroyed by fire. (American Statesman, 9/23)

Carrollton. Window at Islamic Center of broken by slingshot. (LA Times, 9/18)

Houston. Auto mechanic shop owned by Pakistani torched in early morning fire. No one was injured. Son of owner received threats a few days prior. Federal law enforcement agents and Houston Fire Department arson unit investigating. (Houston Chronicle, 9/17)

Austin. Incendiary devices thrown onto roof of Nation of Islam mosque. (ADC, 9/17)

Irving. Six bullets shattered windows of Islamic Center. (AP Worldstream, 9/13)

Denton. Islamic Society fire bombed. (Dallas Morning News, 9/13)

Professor of Middle Eastern language and cultures at University of Texas spat on by passerby. (ADC, 9/11)

Threats

North Texas. Two death threats prompted Pakistani-American to shut down his gas station. (AP, 10/9)

Austin. Arab American realtor received phone threats, ordering him to "leave this country or else!" (ADC, 9/13)

Harassment

San Antonio. Two Muslim girls verbally abused in high school. (ADC, 9/11)

Discrimination/Profiling

Houston. Palestinian anesthesiologist at Baylor College of Medicine was assisting three physicians during surgery, when one began to complain about Islam and Palestinians. When the anesthesiologist told him he is Palestinian, an argument ensued, and the physician ordered him out of the operating room. Physician's behavior reported to in-charge nurse and hospital vice president by nurse and doctor who were present. (ADC, 9/26)

San Antonio. Ashraf Khan, a 32-year-old Pakistani businessman, removed from Delta Airlines flight after the flight crew said they did not feel comfortable with him aboard. (Los Angeles Times, 9/20; St. Petersburg Times, 9/17)

Palestinian woman sent home by boss, who said he didn't know if she would be celebrating death of Americans in the office. (ADC, 9/12)

UTAH

Vandalism

Salt Lake City. 31-year-old man doused Pakistani-owned Curry in a Hurry restaurant with gasoline and ignited it, 9/13. (Associated Press, 9/27; Salt Lake Tribune, 9/13)

VIRGINIA

Assaults

Roanoke. Arab American family suffered series of incidents: mother blocked from entering her apartment by group of young men; fist-sized rocks thrown through twoyear old daughter's open bedroom window; their two cars scratched and dented; mother again prevented from entering and hit with baseball; rocks again thrown through windows almost hitting daughter. (ADC, 9/30)

Falls Church. Muslim hit in head with baseball bat near Dar Al Hijra mosque. (ADC, 9/28)

Fairfax County. On 9/23, white male pulled to stop light ahead of Middle Eastern person, got out of vehicle and approached Middle Easterner with hammer, yelling, "You guys blew up the Trade Center. You m——— f———", and spit on victim's hood. (Fairfax County Police Report, 10/10)

Fairfax. On 9/19, teenagers playing basketball harassed; one hit in stomach and face. (Washington Post 9/21; Fairfax County Police Report, 10/10)

Alexandria. Afghan American approached by passerby who asked his ethnicity. When Afghan replied affirmatively, passerby screamed, "I'm going to kill you" before assaulting him. (CBS, 9/16)

Falls Church. On 9/14, Afghan American assaulted after verbal altercation in a parking lot. (Washington Post 9/18)

Fairfax County. On 9/11, intoxicated man entered Chinese restaurant, punched patron in back of head; yelled at staff about being foreigners, should not be in this country and referred attacks. (Fairfax County Police Report, 10/10)

Fairfax County. On 9/11, man asked woman where she was from, said 'I'm gonna show you where I'm from', returned with gun, stated he wouldn't be afraid to use it, pointed it at woman and told her to go back to her country. (Fairfax County Police Report, 10/10)

Vandalism

Fairfax County. On 9/30, mailbox smashed; drive-byes yelled 'why are you here; go back to where you came from." (Fairfax County Police Report, 10/10)

Springfield. On 9/29, vehicle parked at mall, 'keyed' with "F—- Palestine Terrorists" and strewn with garbage and U.S. postage stamp. (Fairfax County Police Report, 10/10)

Home of Vietnamese woman and husband of Arab origin and found epithets written in yard. (AA1, 10/10)

Fairfax. Large swastika burned into lawn of Middle Eastern family's home. (ADC, 9/28)

Fairfax County. On 9/28, vehicle rammed by driver who said 'go back to your country you foreigner." (Fairfax County Police Report, 10/10)

Fairfax County. On 9/16, Pakistani-owned store trashed by suspects making statements, "You are terrorists. You support Osama bin Laden. This is our country, not yours." (Fairfax County Police Report, 10/10)

Fairfax County. "F———Arab" scratched on vehicle hood and headlights broken, 9/16. (Fairfax County Police Report, 10/10)

Fairfax County. Graffiti in boys' restroom at Oakton High School, 9/14: "Towel Heads got 2 Options 1) Go F———- Home 2) Hit the Curb." (Fairfax County Police Report, 10/10)

Officials at two mosques reported vandalism and threatening calls. (Washington Post, 9/13)

1Old Town Alexandria. Islamic bookstore vandalized. Owner fond two bricks on premises with notes that said, "You come to this country and kill. You must die as well." And "Arab murderers." (Washington Post, 9/13)

Fairfax County. On 9/13 student found note, stating "Die you stupid halfPakistani...Burn in Hell Die!" (Fairfax County Police Report, 10/10)

Fairfax County. Sign indicating site as future home of Muslim society vandalized and attempt made to set it on fire, 9/14. "F—- the Arabs" written on sign. (Fairfax County Police Report, 10/10)

Fairfax County. "F—- Arabs written on door of home. (Fairfax County Police Report, 10/10)

Fairfax County. Anti-Arab and anti-Jewish statements spray painted on walking tunnels, 9/13. (Fairfax County Police Report, 10/10)

Fairfax County. "F—- Islam" and "F—- Arabs spray painted on property, 9/12. (Fairfax County Police Report, 10/10)

Threats

Resident reported threatening phone call. Caller first mocked his name, asked to speak with wife, and then said, "You're all going to die." (ADC 10/3)

Fairfax County. Madina Afghan Kabob restaurant received threatening phone calls 9/14 warning family to go back to Afghanistan or they would be killed. (Fairfax County Police Report, 10/10)

Fairfax County. On 9/23, note found on windshield: "Muslim children are hell bound"; on daughter's bike: "Muslims must die!" (Fairfax County Police Report, 10/10)

Fairfax County. Washington Islamic Academy received letter, 9/18, stating all Muslims should be shot and killed and are evil; on 9/12, received nasty phone calls; people driving by yelling and making obscene gestures. (Fairfax County Police Report, 10/10)

James County. Woman arrested for threatening to bomb mosque. Coworker contacted police after woman emailed her ". . .I am making plans to bomb the mosque in Hampton." (Daily Press, 9/13)

Hampton. Police investigating phone threat received by Islamic Center and mosque. Male voice threatened "prepare to die." (Daily Press, 9/13)

Harassment

Fairfax County. Arab female stopped at traffic light 9/22, white male in another vehicle yelled "You are not wanted here you animals! Go blow up another building." (Fairfax County Police Report, 10/10)

Charlottesville. Arab American physician verbally assaulted by neighbor. (ADC, 19/17)

Sterling. Members of Islamic community arriving at Red Cross Center to donate blood found hallway painted with "Die pigs." And 'Muslims Burn Forever." (XINHUA, 9/12)

Fairfax County. On 9/11, several white males in front of K-Mart asking people to sign petition to support America, displayed banner with anti-Islamic sentiments, shouted at people who appeared to be of Middle Eastern descent. (Fairfax County Police Report, 10/10)

Manassas. Hate messages left on answering machine of mosque (AP Worldstream, 9/13)

Discrimination/Profiling

Ashburn. Egyptian American fired from Wal-Mart. Called into office at store and questioned by FBI in early October. Coworkers uncomfortable working with him. FBI and Wal-Mart would not comment. (Newhouse News, 10/17)

Woodbridge. Three-year old boy of half-Arab origin dismissed from day care. Mother enrolled him in another center, to receive call from assistant director withdrawing admission after having conversation with former director. Mother alleges decision based on ethnicity; not, as director stated, discipline problem. (ADC, 10/2)

Falls Church. Egyptian American and coworker fired from tax revenue office after reporting anti-Arab slur made by their boss to an attorney and city manager. Apparently, after hearing news that suspect connected with 9/11 attacks had been detained, the boss allegedly joked, "Did he have a rag on his head?" In termination letters to the two men, the boss claimed they had "challenged my integrity, impeding my authority to operate this office. Your action is harassment and a breach of trust in our relationship." (ADC, 9/24)

Manassas. Although their children often played in front of their homes, neighbors contacted Social Services when Algerian children were seen outside unsupervised. (ADC, 9/24)

Dulles. United Airlines flight to London delayed four hours after Saudi pilot sought to fly in cockpit. United pilot refused and returned to gate. Saudi pilot and two other men detained and questioned by FBI and INS for three hours. FBI field office spokesman said 'their story check out. . .they were sent on their way." (Pittsburgh Post Gazette9/21)

K-Mart closing manager demoted to hourly-basis employee. Employee suspects demotion because of his national origin and 9/11 attacks; does job well and never been written up. (ADC, 9/17)

WASHINGTON

Assaults

Snohomish. Man indicted by a federal grand jury on hate-crime charges for allegedly pouring gasoline over a man's vehicle and then firing a handgun at two people leaving the Idriss Mosque on 9/13. (Seattle Times, 9/27)

SeaTac. Sikh taxi driver assaulted by man he picked up at bar. Suspect asked driver if he was a terrorist. Then he choked the cabby, punched him in the face, pulled out part of his beard and knocked the turban off his head. (MSNBC.Com, 9/15)

Seattle. Three white men attacked a Somali woman with a knife 9/16 in a grocery parking lot. (Seattle Times, 9/14)

Seattle. 53-year-old man charged with first-degree assault and attempted arson after dousing car at Islamic Idriss Mosque with gasoline. When confronted by car owner, he tried to fire at him, 'squeezing a shot into the ground'. The man then drove his own car into a telephone pole. (Seattle Post Intelligencer, 9/13)

Snohomish. Man accused of spitting at Middle Eastern woman picking up her children at elementary school, arrested. (Seattle Times, 9/14)

Prison fights broke out over Muslim slurs. (AP Worldstream, 9/13)

Seattle. Suspect arrested for suspicion of malicious harassment. Allegedly threatened to burn down mosque and walked into mosque wearing his shoes. When asked to leave, pushed mosque leader in chest. (Seattle Post-Intelligencer, 9/11)

Vandalism

Lynwood. Dar Alarqam Mosque defaced with black paint. The mosque also received a flood of hate calls. (MSNBC.Com 9/24)

Tacoma. A small arson fire damaged synagogue Sunday in what police termed a hate crime. (Seattle Post-Intelligencer, 9/24);

Edmonds. Iranian-owned grocery vandalized. (Seattle Times, 9/18) A Kenmore man is in jail awaiting charges for allegedly pouring gasoline on a Northgate mosque and firing a gun when employees there tried to stop him. (Seattle Times, 9/18)

Threats

Vancouver. Man arrested after leaving messages on local Islamic school's voice mail; mosques, other schools and cultural centers threatening to blow them up in retaliation for Sept. 11 attacks. (Vancouver Sun, 10/5)

Seattle. Man charged with malicious harassment for threatening to burn down mosque. (Seattle Times, 9/18)

Seattle. Two men threatened East African home improvement store employee. (AAI, 9/16)

Seattle. Man stormed into mosque, threatening to burn it down. (Seattle Times, 9/ 16)

Spokane. Threats made at two gas stations owned by Arab Americans. (The Hotline, 9/13)

Seattle. Sign hung from footbridge: "Death to all Palestinians." Sign later removed (Seattle Post Intelligencer, 9/11)

Seattle. Police report local mosques received not only abusive calls but also several death threats, including 'we will kill you like sheep'. (Seattle Post Intelligencer, 9/ 11)

Taxicab dispatcher received calls threatening company to "tell your Muslim drivers not to drive today", among other threats. (Seattle Times,9/11)

Discrimination/Profiling

Seattle. 12 year American Airlines employee escorted off AA flight to Dallas with another passenger of Arab origin. They were informed "pilot does not feel safe with you guys on board and we have notified the FBI to come here and question you." Interrogation and background check performed by three Seattle police officers, after which they were permitted to board a later AA flight to Dallas. Apologetic stewardess later informed them that pilot of second flight was asked by FBI agent if he feels comfortable flying with "two Middle Eastern men." (ADC, 9/26)

WISCONSIN

Threats

Beloit. On 9/29, Jordanian man reported that threat to blow up his store if he did not leave the country in 24 hours. Forty-four-year-old man arrested and charged with conveying 'false bomb threat,' making threatening phone call and probation violations. All charges filed as hate crimes. (MSNBC.Com, 10/9)

WYOMING

Threats

Laramie. American-born Muslim woman and her children chased from Wal Mart by angry shoppers yelling for her "to go back to her country." (Associated Press, 9/11)

Article by Ali Ayub, Washington Post Company, December 3, 2001, Washington, DC

WHOSE SACRIFICE?

American citizens are willing to sacrifice civil liberties in the fight against terrorism [front page, Nov. 29], but which Americans are doing the sacrificing?

Since Sept. 11 the FBI has interviewed me at work and at home because my name is similar not to that of one of the hijackers, but to an individual arrested with suspected links to the terrorists.

The FBI has contacted my broker, my neighbors and my friends to learn more about me. I was purchasing an apartment, but when I needed to give my down payment at closing I was informed by my bank that my accounts were frozen. No one informed me nor could anyone help me resolve the problem. Only an angry settlement attorney was able to unfreeze the funds.

A month passed, and all seemed normal. Then I found out again that I did not have access to transfer funds from my accounts without government approval.

I am a federal employee. I have not been charged with a crime. I do not support terrorism, and I was willing to help the law enforcement agencies. It was my duty as an American to answer all the questions asked of me.

But as time goes by and I have to get "clearance" every time I want to make a bank transfer, I feel victimized. Every time I travel and receive the extra security checks because of my name it makes me trust my government less. What scares me even more is that I am an American citizen, and that is why I am not in jail. If I were not a citizen I could be one of the hundreds of detainees, or I could be in sitting in front of a secret military court only because the crime I am guilty of is that my name is Ali Ayub and not Joe Smith.

BAR ASSOCIATION OF SAN FRANCISCO
SAN FRANCISCO, CA 94104–1826
November 28, 2001

Dear Senator Leahy, Senator Feinstein and Other Members of the Judiciary Committee:

The Bar Association of San Francisco (BASF), one of the largest metropolitan bars in the nation with some 9,500 members, strongly supports the present effort by the United States to eradicate international terrorism. We see that effort as part of our nation's continuing commitment to the rule of law and to the proton of human rights around the world. It is thus critical that our war on terrorism. be conducted in accordance with the United States Constitution at home and with international legal norms abroad. We hate a special leadership role in influencing and upholding the legal customs that nations follow in times of crisis. Our country's fair treatment of those accused of wrongdoing, however heinous, has been and must remain a mainstay of its human rights policy, for only rigid adherence by the United States to standards of due process can render credible our insistence that individuals throughout the world be protected from governmental abuse. If we do not uphold these standards, we put at risk the moral authority that we will surely need in order to bring the current crisis to a swift and successful conclusion.

For this reason, we are gravely concerned by the issuance on November 13th of the President's Military Order on "Me Detention, Treatment, and Trial of Certain Non-Citizens In The War Against Terrorism," ("The Order ") While the intended reach of that order remains uncertain, it clearly attempts to constrict by executive decree the protections of the Fourth, Fifth and Sixth Amendments now available to foreign nationals taken into custody on American soil. The Order pests the unlimited detention without trial or access to courts or counsel of foreign nationals, including those who are longtime legal residents of the United Sues or who have otherwise entered and remained hem in accordance with the law. (Sec. 3) It further permits that such nationals be tried and subjected to life imprisonment or death in proceedings before military commissions at which "the of law and the rules of evidence generally recognized principles in the trial of criminal cases in the United States district courts" would not apply, (Sec. 1 (f)).

The "principles of law" which "it is not practicable to apply in military commissions" include constitutional guarantees to trial by jury, to be defended by counsel of the defendant's choice, to confront adverse witnesses and evidence, to be convicted only on proof beyond a reasonable doubt and a unanimous jury verdict, to a public proceeding, and to be free from the *ex post facto* application of laws. (Compare Sec. 4). The Order declares that those whom the President determines shall be subject to its application art; barred from seeking any form of judicial review or remedy. (Sec. 7(b)(2)). In a separate rule-making proceeding, the Attorney General is seeking authorization to Surveil communications presently protected by the attorney-client privilege.

BASF opposes these limitations on constitutional rights as imposed by the Order. The federal courts have proven fully capable of administering justice in cases involving international terrorism. Pointedly, federal courts in New York have recently twice efficiently and with full regard for due process conducted. trials of those accused of acts of terror on American soil. Free of improper lawyer behavior, governed by strong judges, the traditional vehicle of due process—juries following sound rules of evidence and law-rendered verdicts of guilty in these cases. Appellate review by Article Three judges will assure the accuracy and fairness of those judgments.

Furthermore, the Order presents serious obstacles to the cooperation with our allies in the war on terrorism that will be required for success in that struggle. Only last week, Spain announced that it would not extradite to the United States eight suspected members of Al Qaida accused of involvement in the horrific crimes of September 11th absent assurances that these defendants would be tried in civilian tribunals. Spain's abhorrence of military tribunals wielding the power of the death penalty, arising from its own experience with dictatorship prior to 1973, is shared by all members of the Council of Europe, including France, Germany, England, and Italy, all of whom are presently assisting in the hunt for those responsible for the death of thousands in New York, Washington, and Pennsylvania. The United States cannot afford to divorce itself from these close friends, many of whom modeled their own due process standards on those contained in our Bib of Rights.

Historic analogy to the Lincoln Assassination trial and the prosecution of invading saboteurs during World War II is inappropriate. Both occurred under constitutionally mandated Declarations of War by Congress, which specifically authorized military commissions to try those accused of war crimes. In approving the military

trial of the German saboteurs, *In re Quiren*[1] limited its holding to those enemy belligerents who pass "our military and naval lines and defenses. . .in civilian dress" armed with explosives, intending the don of war industries and supplies or military installations.[2] The Supreme Court found that a military trial was permissible in these circumstances only because a trial by jury would not have been available to one accused of such a war crime when the Constitution was enacted, and that the Fifth and Sixth Amendments were not intended to require "that offenses against the law of war not friable by jury at common law be tried only in the civil courts."[3] In so ruling, the high court emphasized "the duty which rests on the courts, in time of war as well as time of peace, to preserve unimpaired the constitutional safeguards of civil liberty. . . ."[4]

As evidenced by the wartime interment of loyal Japanese-American citizens, the imposition of severe limitations of our personal liberty in the name of national security is a practice our nation will likely regret. It must not occur again. Not since the battle between the forces of democracy and Nazism has the role of the United. States as the preeminent champion of individual liberty and due process been so prominent. Our victory over terrorism, when it comes as it surely wily must be accompanied by our adherence to those principles of due process which serve as the benchmark of liberty for peoples around the world.

The Bar Association of San Francisco urges the Judiciary Committee to carefully scrutinize the President's order of November 13th and the proposed administrative regulation on attorney-client communications to ensure that our constitutional protections remain intact. We ask the Congress to affirm its confidence in the Bill of Rights, as well as the federal judiciary, federal prosecutors, the dedicated Americans who serve as criminal defense lawyers, and a jury system that is esteemed by all who have watched it function so effectively for generations.

Sincerely,

DOUGLAS R, YOUNG
President

ANGELA BRADSTREET
President-Elect

BAXLEY, DILLARD, DAUPHIN & MCKNIGHT
ATTORNEYS AT LAW
BIRMINGHAM, ALABAMA 35233
December 10, 2001

Hon. Jeff Sessions
United States Senator
493 Russell Building
Washington, D.C. 20510

Dear Senator Sessions:

I am, doubtlessly, one of your few constituents who has read the entire trial transcript of the Nuremberg Trials, In this vein, and as a result of my experience as both a prosecutor and as defense counsel, including appearing before military tribunals, I am writing now to address concern. expressed by sonic members of the press, and a few in the Congress, relative to the utilization of military tribunals to determine the innocence, guilt, punishment or release of those who have been Charged with crimes arising from the events of September 11, 2001, which are continuing today.

In my opinion, the security of this country can be best preserved by supporting and implementing the proposals of President Hush in this regard. I have faith that the men and women who would serve on theses tribunals can afford any person accused complete justice, impartiality and fairness in the adjudication of guilt or innocence. Many Americans are unaware that at Nuremberg a number of those who were charged with war crimes were acquitted, and that some were convicted of some charges made against them, but acquitted of others. I recognize, of course, that (lie President's proposals differ from the procedures at Nuremberg. Nevertheless, I have endeavored to familiarize myself with the President's proposals arid with objections to them which have appeared iii the media. I consider myself sensitive to all legiti-

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[1] 317 U.S. 1 (1942)
[2] *Id*, at 38–39
[3] *Id*., at 40.
[4] *Id*., at 19.

mate arguments made i11 support of civil rights and liberties, but after considering all the arguments -pro and con—I continue to strongly support the President's proposals, and to endorse them during this crisis.

lease take these views into consideration as you consider the most appropriate action to take regarding prosecutions arising from the; events of September 11, 2001, which are continuing events, and which threaten the security (four country. If I can be of any assistance to you in connection with decisions touching upon these issues in the United States Senate, or elsewhere, it will be an honor and a privilege for me to share my time and the benefit of my experience with you.

Respectfully yours,

BILL BAXLEY

UNITED STATES SENATE
WASHINGTON, DC 20510
November 2, 2001

Dear Colleague:

Attached please find a copy of *Jihad in America*, a PBS documentary first aired nationwide in 1995. This documentary was produced by investigative reporter Steven Emerson after the first bombing of the World Trade Towers in 1993. The documentary explores the ideological and fundraising network that sustains and supports terrorist activities in the United States. In light of the September 11th tragedies, we strongly recommend this video to our colleagues.

This documentary was made in close cooperation-with noted counter-terrorism authorities from the Federal Bureau of investigation (FBI); the U.S. State Department and the Central Intelligence Agency (CIA). The hidden camera footage of key conferences and rallies is particularly revealing. The film includes footage of Islamic extremists in New York, Boston, New Jersey, Texas, California, Florida and Kansas, detailing their hatred and violent intentions toward Americans, including Christians, moderate Muslims and Jews in the United States. The interviews and taped speeches allow these extremists to state their chilling intentions in their own words.

The film, then and now, has brought the attention of law enforcement authorities to the network of Islamic extremists in the United States that promotes a culture of hatred, arranges for training in bomb-making and target practice, raises funds for militant groups in the Middle East, and in some cases, supports terrorist attacks on U.S. soil.

The documentary makes clear, and we would like to reiterate; that the majority of Muslims in the United States do not support terrorist activities, and that Islam as a faith condemns such acts of terrorism. It is made clear that the Islamic extremists who promote and carry out their form of Jihad, are as great a threat to moderate Muslims as they are to Christians, Jews and all American citizens.

Again, we urge every Member of the Senate to view the PBS documentary to help us understand the scope of. the threat and what needs to be done to protect U.S. citizens.

Sincerely,

SAM BROWNBACK

RON WYDEN

Statement of Kathleen Clark, Professor of Law, Washington University in St. Louis

PRESIDENT BUSH'S ORDER ON MILITARY TRIALS OF NON-CITIZENS:

BEYOND HIS CONSTITUTIONAL OR STATUTORY AUTHORITY

First of all, I would like to thank Chairman Leahy for the opportunity to provide this testimony. I am a law professor at Washington University in St. Louis, and have previously taught at the University of Michigan and Cornell law schools. I teach courses on national security law as well as legal and government ethics.

As you know, earlier this month, President Bush signed an order authorizing the creation of military tribunals to try non-citizens alleged to be involved in inter-

national terrorism against the United States or the al Qaida network.[1] These military tribunals are troubling in many respects, particularly in their denial of basic due process protections for defendants, and the resulting possibility of wrongful convictions. Rather than focusing on the issue of civil liberties—which other witnesses will address—my testimony will limit itself to the issue of whether the President even has the authority to create a military court with such broad jurisdiction to try all cases of international terrorism against the United States. As the following paragraphs will show, under the Constitution and statutory law, the President lacks the authority unilaterally to create this kind of military tribunal.

Trials by military tribunals, like trials by civilian courts, involve the exercise of judicial power.[2] The Constitution vests the judicial power "in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."[3] A military tribunal, like other tribunals, must be authorized by the Constitution or by Congress. Congress has established military tribunals (courts-martial),[4] but has limited their jurisdiction, primarily to offenses committed by members of the armed forces.[5]

In ex parte Milligan, the Supreme Court overturned a conviction of a civilian by a military tribunal because the tribunal was not authorized by Congress or the Constitutions.[6] The civilian, Lamdin P. Milligan, was arrested in Indiana during the Civil War, and charged with conspiring to seize munitions, liberate prisoners of war, and communicating with the enemy.[7] After a military tribunal convicted Milligan and sentenced him to death, the Supreme Court reviewed his habeas petition. The Court found that neither the Constitution nor any statute authorized a military trial of a civilian where the civil courts were in operation.[8] The Court also rejected the government's argument that the military trial was justified under "the 'laws and usages of war.'"[9] The Court held that even such a crisis as the Civil War did not justify a military trial for a citizen not connected with the armed forces, as long as the civilian courts were in operation.[10]

President Bush's Order purports to find authority in several sources: the President's constitutional authority as Commander in Chief of the Armed Forces,[11] the Joint Resolution Authorizing the Use of Military Force,[12] and two provisions of the Uniform Code of Military Justice.[13] None of these authorize the creation of this type of military tribunal.

First, the President's power as Commander in Chief of the Armed Forces does not authorize him to create military tribunals to try non-citizens for crimes that can be tried in civilian courts. As the Supreme Court explained in ex parte Milligan, military tribunals for non-military personnel "cannot [be] justif[ied] on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is 'no unwritten criminal code to which resort can be had as a source of jurisdiction.'"[14]

Second, the Joint Resolution authorizes the President to use "force against those nations, organizations, or persons" that were involved in the terrorist attacks on September 11th in order "to prevent future actions of international terrorism against the United States" by them.[15] Thus, Congress provided statutory authorization for

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[1] 66 Fed. Reg. 57831 (2001).

[2] "Every trial involves the exercise of judicial power." Ex parte Milligan, 71 U.S. 2, 209 (1866).

[3] U.S. Constitution, art. II, § 1.

[4] See 10 U.S.C. §§ 816 et seq.

[5] 10 U.S.C. § 802 (listing persons subject to the Uniform Code of Military Justice). See also Edmund M. Morgan, *Court-Martial Jurisdiction Over Non-Military Persons Under the Articles of War*, 4 Minn. L. Rev. 79 (1920).

[6] 71 U.S. 2 (1866).

[7] 71 U.S. at 5.

[8] Id. at 210 ("One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress.").

[9] Id. at 210.

[10] Id. at 209 ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.").

[11] U.S. Constitution, art. II, § 2.

[12] Pub. L. 107–40 (Sept. 18, 2001).

[13] 10 U.S.C. §§ 821, 836.

[14] 71 U.S. at 210.

[15] Pub. L. 107–40 § 2(a) states:

[T]he President is authorized to all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order

Continued

the President's recent actions sending troops to Afghanistan, calling up the reserves, and deploying National Guard troops at airports. The Resolution is absolutely silent about any kind of military tribunal. It says nothing about the proper means of bringing to justice those involved in the September 11th terrorist attacks or other acts of terrorism.

The President's order also cites two sections of the Uniform Code of Military Justice, Sections 821 and 836 of Title 10, U.S. Code. But these sections do not authorize these secret military tribunals. Section 821 does not of itself authorize any military commission, but simply clarifies that if such a commission is otherwise authorized "by statute or by the law of war," then the existence of the courts-martial does not deprive military commissions of jurisdiction.[16] Section 836 simply delegates to the President the authority to prescribe rules of evidence and procedure for courts-martial and military tribunals.[17] Thus, if Congress had authorized a special military tribunal for international terrorists, Section 836 would authorize the President to create the rules for such a tribunal. But 836 does not itself authorize such a tribunal.

The Executive Branch may be relying on a World War II case, ex pane Quirin, involving eight Nazi saboteurs who secretly entered the United States in order to destroy industrial and transportation infrastructure.[18] But the comparison is inapt for several reasons. First, the statutory context could not be more starkly different. When the executive branch sought to try these Nazi saboteurs, it could point to statutes that specifically authorized trial by military commission of anyone who aided the enemy and of spies during wartime.[19] Those statutes, Articles 81 and 82 of the Articles of War, were repealed in 1956 when Congress adopted the Uniform Code of Military Justice.[20]

Today, by contrast, the executive branch can point only to statutes by which Congress has authorized terrorists to be tried in the regular federal courts. In recent years, Congress has regularly expanded federal criminal court jurisdiction to cover more terrorist offenses. For example, the Omnibus Diplomatic Security and Antiterrorism Act of 1986 ensured that the federal criminal courts would have extraterritorial jurisdiction over terrorist acts abroad against U.S. nationals.[21] The Antiterrorism and Effective Death Penalty Act of 1996 created a new offense for

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to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

[16] 10 U.S.C. § 810.

In ex parte Quinn, 317 U.S. 1 (1942), Justice Stone asserted that Section 810's predecessor, Article 15 of the Articles of War, explicitly authorized military tribunals for violations of the law of war. 317 U.S. at 10–11. While there was other statutory authority for the military tribunal in Quinn, it is unlikely that Article 15 actually had the meaning that Justice Stone attributed to it.

But completely apart from the proper interpretation of Section 810's predecessor, an examination of the current Section 810 makes clear it does not provide independent statutory authority for military commissions. Section 810 states in full:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. § 810 (emphasis added).

[17] 10 U.S.C. § 836 states in full:

(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.

[18] 317 U.S. 1 (1942).

[19] 317 U.S. at 10 ("Articles 81 and 82 authorize trial, either by court martial or military commission, of those charged with relieving, harboring or corresponding with the enemy and those charged with spying.").

10 U.S.C. §§ 1553, 1554 (Articles 81 & 82 of the Articles of War, repealed by Pub. L. 84–1028 (1956)). 10 U.S.C. § 1553 provided:

Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, mondy, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court martial or military commission may direct.

10 U.S. C. § 1554 provided:

Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court martial or by a military commission, and shall, on conviction thereof, suffer death.

[20] Pub. L. 84–1028 (1956).

[21] Pub. L. 99–399, § 1202, creating 18 U.S.C. § 2331.

acts of terrorism transcending national boundaries.[22] The USA PATRIOT Act of 2001 further expands federal criminal prohibitions on terrorism.[23]

In addition, Congress had made a formal declaration of war by the time that President Roosevelt created the Quirin military commission.[24] Congress's declaration authorized a general war and provided Roosevelt with the full panoply of wartime powers available to a president. By contrast, currently Congress has authorized only a limited war against those who planned or aided the terrorist attacks on September 11. In a limited war, where Congress authorizes specific types of military action, the executive branch must confine its actions to those specifically authorized by Congress.[25]

It is also important to note the difference in scope between President Roosevelt's order creating the military commission for the Nazi saboteurs, and President Bush's order. While President Roosevelt had robust statutory authority to create a wide-ranging set of military tribunals for saboteurs and spies, he chose to create a single tribunal to deal with the eight specified saboteurs who were already in custody. On the other hand, President Bush, lacking any statutory authority, is attempting to create military commissions for unnamed and unnumbered defendants accused not just of particular crimes for which Congress has authorized military tribunals, or even for crimes against the law of war, but for any international terrorism against the United States. International terrorism against the United States does not necessarily constitute a violation of the law of war. Thus, President Bush's order goes beyond the outer reaches of his constitutional authority. While the Roosevelt order in Quinn had a strong statutory basis, the Bush order on military commissions goes beyond his authority as President.

Finally, I draw your attention to these words from the Supreme Court's decision in ex pane Milligan, which can serve as an important guide in these difficult times:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. . . .[T]he government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence. . . .[26]

In this time of uncertainty and fear, it is as important as ever for Congress to ensure that the executive branch abides by the constitutional limits on its authority.

Statement of The Federalist Society

NATIONAL SECURITY WHITE PAPERS

THE WAR ON TERRORISM: LAW ENFORCEMENT OR NATIONAL SECURITY?

[The Federalist Society takes no position on particular legal or policy issues. The views expressed herein are those of the authors alone]

George Terwilliger—White & Case, Washington, D.C. served as Deputy Attorney General in the Bush I Administration.
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Robert Parker—Paul Weiss Rifkind Wharton & Garrison, Washington, D.C.

The horrific events of September 11th were immediately labeled "acts of terrorism," but as events unfolded, they were quickly revealed as "acts of war." The anthrax attacks that followed were surely acts of terrorism, but not necessarily acts

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[22] Pub. L. 104–132, § 702, creating 18 U.S.C. § 2332b.

[23] Pub. L. 107–56, §§ 802, 803, 805, 808, amending 18 U.S.C. §§ 2331, 2339, 2339A, 233913.

[24] Proclamation 2561 (July 2, 1942), 7 Fed. Reg. 5101 (1942); Appointment of a Military Commission (July 2, 1942), 7 Fed. Reg. 5103 (1942).

[25] See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (striking down President Truman's Executive Order taking possession of steel mills during the Korean War because Congress had refused to grant the President this authority). See also *Little* v. *Barreme*, 6 U.S. 170 (1804).

[26] 71 U.S. at 120–21.

of war by a foreign belligerent. As of this writing, investigators have been pursuing the possibility that the anthrax attacks are acts of domestic terrorism with no organizational links to those who engaged in the acts of war on September 11th.

Federal officials face the unprecedented situation of having to respond immediately to crisis events that are both war and crimes. This new paradigm of warfare has blurred the previously more-or-less clear line between national defense and law enforcement. And the idea of national defense is changing to encompass a broader range of threats than historically posed by a warring nation-state.

Historically, "war" has been only between states. ("Every contention by force between two nations, in external matters, under the authority of their respective governments.")[1] Except for civil wars, acts of individuals and groups not qualifying as states have been deemed crimes either against the law of a particular state or violators of the "law of nations," e.g. piracy (much terrorism has been state-sponsored).[2] This country's initial legal response to terrorism in the 1980s was a law enforcement approach which extended the jurisdiction of the United States to criminal acts against Americans abroad.[3]

The realization, however, that non-state and clandestinely state sponsored groups now have the ability and willingness to employ means of mass destruction has dictated the recognition that states no longer have a monopoly on war. Therefore, it has become appropriate to use war powers against foreign terrorist organizations. Using those war powers against foreign terrorists operating within the United States calls for an understanding of when actions of force or terrorism by non-state groups should be treated pursuant to national security powers, rather than within the domain of law enforcement.[4]

The use of national security powers against groups of foreign belligerents found within the United States raises dangers which could result from militarizing the homeland.[5] Nevertheless, as the Framers intended, the Constitution both gives the federal government all the powers necessary to defend the country,[6] and also limits the possibilities for abuse of those powers through separation of powers and federalism.[7] It is understandable that the initial response to the unprecedented attacks within the U.S. by foreign forces on September 11th emphasized centralized command and control. As we adjust to the new reality, an effective national security strategy requires a range of responses based on recognizing the relationship between:

1) national security powers and law enforcement powers;
2) the rights of citizens and non-citizens; and
3) centralized and decentralized defenses.

I. INTERNATIONAL TERRORISM IS A MATTER OF NATIONAL SECURITY, RATHER THAN MERELY CRIMINAL LAW ENFORCEMENT

Debate about particular anti-terrorism measures often rests on an incomplete understanding of the constitutional principles involved as well as on an over-judicialization of political and policy issues. Our national leaders have a constitutional responsibility to secure the country from foreign threats, and the Framers of our Constitution often referred to this obligation during the Philadelphia convention, in *The Federalist* Papers, and elsewhere. Indeed, the Preamble to the Constitution makes this very point when it states that the Constitution was ordained and established to "insure domestic tranquility" and "provide for the common Defence." In other words, we must not only account for the traditional rights that *citizens* enjoy, but also the broad national security power that the Constitution grants to the government to take action against *unlawful belligerents* acting on U.S. soil. Resolution of the significant constitutional questions raised by measures to address the current terrorist threat thus requires a clear understanding of both the powers that the Constitution grants to the government when national security is at stake, and the circumstances in which the exercise of those powers do and do not infringe our civil liberties. This is consistent with how the Framers viewed our Constitutional system-namely, that structural issues are inextricably intertwined with questions relating to the protection of freedom. It is axiomatic that the federal government

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[1] *Bas* v. *Ting*, 4 U.S. (4 Dall.) 37, 40 (1800) see (opinion of Washington, J.).
[2] For statutes on piracy, see 18 U.S.C. § 1651–1661.
[3] See "Diplomatic Security and Antiterrorism Act of 1986," Pub. L. N. 99–399, 100 Stat. 853.
[4] For discussion of whether a formal declaration of war by Congress is required, an issue beyond the scope of this paper, see generally *Bas* v. *Tingy*, 4 U.S. 37 (4 Dall.) (1800) (opinion of Washington, J.); The Prize *Cases*, 67 U.S. (2 Black) 365 (1862).
[5] See Federalist No. 8.
[6] See Federalist Nos. 23–24.
[7] See Federalist No. 51.

has all the constitutional power necessary to defend the nation, whether the threat comes from foreign attack or from the breakdown of internal order. As Alexander Hamilton wrote in Federalist No. 23, the powers of the federal government to provide for the common defense are complete.

> These powers ought to exist without limitation: *Because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defense.

This "truth," according to Hamilton,

> rests upon axioms as simple as they are universal. The means ought to be proportioned to the end; the persons, from whose agency the attainment of any end is expected, ought to possess the means by which, it is to be attained.[8]

The Supreme Court has confirmed Hamilton's view that the Constitution confers on the federal government an "independent substantive power" with respect to national security, and specifically with respect to the "persons or property of [an] enemy found, at the time, within the territory" of the United States.[9] Providing for the security of one's country is an inherent feature of national sovereignty, and the Constitution expresses or confirms that fairly obvious point by vesting in a President the general Executive power under Article Two.[10]

In previous wars, except the Civil War, a fairly discernable line has existed between external defense and internal police. Thus, the Supreme Court has distinguished "between the powers of the federal government in respect to foreign or external affairs and those in respect of domestic or internal affairs."[11] This same division has passed a law that limited presidential use of military forces for domestic law enforcement to situations in which ordering means of law enforcement could not restore order.[12] During the Civil War and Reconstruction, Congress expanded the internal use of military forces. In 1878, after the domestic crisis had passed, Congress enacted the "Posse Comitatus Act,"[13] which prohibits the use of the military (expressly, just the Army and Air Force) to execute the laws of the United States, the states or the territories, except as specifically provided.[14]

The federal government does have law enforcement powers, but those powers have limits. In particular, the federal government has no general police power.[15] Congress must find the source for enacting criminal law either in particular enumerated powers or in the means necessary to implement those powers.[16]

In matters of national security, on the other hand, the powers of the federal government are broader. The Constitution grants to the Executive and Legislative Branches, as the preamble announces, specific powers to "insure domestic Tranquility and provide for the common Defence." Most notable and relevant for present purposes is the power of the Congress under Article I, section 8 to declare war, but also its power to "define and punish. . .Offenses against the Law of Nations" and to "make Rules concerning Captures on Land and Water." Likewise, the role of the President, under Article II, section 2, as the "Commander in Chief of the Army and the Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States" reflects the Constitution's grant of authority to the Executive Branch to address threats to national security independent of the President's separate role as chief magistrate and prosecutor of criminal laws.

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[8] Federalist No. 23.

[9] *Brown* v. *United States*, 12 U.S. [8 Cranch] 110, 125–126 (1814).

[10] *See United States* v. *Curtis-Wright Export Corp.*, 299 U.S. 304, 315–19 (1936).

[11] Curtiss-Wright Export Corp., 299 U.S. at 315.

[12] Brian L. Porto, Annotation, Construction And Application Of Posse Comitatus Act (18 U.S. C.A. § 1385), And Similar Predecessor Provisions, Restricting Use Of United States Army And Air Force To Execute Laws, 141 A. L. R. Fed. 271 (1997). Use of troops domestically for purposes other than law enforcement would be a different matter. For that issue, see the briefing paper prepared by Paul Stevens that appears on our website, http://www.fed—soc.org

[13] "Posse Comitatus" means "power of the country."

[14] 18 U.S.C. § 1385.

[15] See *United States* v. *Morrison*, 120 S. Ct. 1740, 1754 (quoting *United States* v. *Lopez*, 514 U.S. 549, 566 (1995) ("[t]he Constitution withhold[s] from Congress a plenary police power").

[16] See *McCulloch* v. *Maryland*. U.S. (4 Wheat.) 316 (1819).

This constitutional authority to provide for the national defense and to protect national security in the face of enemy attack extends not only to the conduct of war by traditional military means, but also to the treatment of individuals who prosecute the attack on the enemy's behalf. "An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." [17]

The authority that the Constitution confers on the federal government to prosecute the enemy by all appropriate means applies to the enemy found at home as well as those encountered abroad.[18] *Quirin* concerned a group of saboteurs who were landed by German U-boats on U.S. beaches during World War II. Their assignment from the German military authorities was to destroy military targets and war-production facilities on the U.S. home front. All of the saboteurs were Germans except one, Haupt, who claimed to be a naturalized U.S. citizen. After capture by the FBI, the belligerents were placed in military custody. Pursuant to an Executive order, they were tried by a military commission, which found them all guilty and sentenced them to death. They then filed petitions for writs of habeas corpus, challenging the authority of the military tribunal, and the tribunal's denial to them during its proceedings of the Constitutional rights specified in Article III and the Fifth and Sixth Amendments.

The Supreme Court upheld the military commission's authority. The Court concluded that the President, as Commander-in-Chief, has the power to enforce all laws relating to the conduct of war, "and to carry into effect. . .all laws defining and punishing offenses against the law of nations including those which pertain to the conduct of war." [19] This power, the Court held, includes the authority "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." [20]

The Court likewise rejected the would-be saboteurs' claim to the traditional constitutional rights enjoyed by an accused in the criminal justice system. The Court concluded, first, that the saboteurs were not criminal defendants, but rather were *unlawful belligerents* accused of violating the laws of war. "[A]n enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, is familiar examples of belligerents who are generally deemed. . .to be offenders against the law of war subject to trial and punishment by military tribunals." [21]

The Court next rejected the unlawful combatants' claim that, having been captured by FBI agents on U.S. soil, they enjoyed constitutional rights under Article III and the Fifth and Sixth Amendments. "We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury." [22]

Finally, the Court in *Quirin* readily rejected Haupt's claim of constitutional rights by virtue of his purported U.S. citizenship. U.S. citizenship, the Court held, "does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." [23] By virtue of his allegiance to a foreign enemy and his taking up arms on behalf of that enemy, therefore, Haupt was subject to military punishment, rather than criminal justice.

This distinction between an unlawful belligerent and a traitorous civilian is well-grounded in constitutional precedent, and can be viewed as the definitive boundary between the government's national security power and its law enforcement author-

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[17] *In re Yamashita*, 327 U.S. 1, 9 (1946); accord *Johnson* v. *Eisentrager*, 339 U.S. 763, 774–75 (1950) ("Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed throughout our history, essential to war–time security"); *Miller* v. *United States*, 78 U.S. (11 Wall.) 268, 305 (1870) ("Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may legitimately be prosecuted. It therefore includes the right to seize and confiscate all property of an enemy and to dispose of it at the will of the captor").

[18] *Ex Parte Quirin*, 317 U.S. 1 (1942).

[19] *Id.* at 26.

[20] *Id.* at 28–29.

[21] *Quirin*, 317 U.S. at 30–31.

[22] *Id.* at 45; *see also Yamashita*, 327 U.S. at 23 (rejecting a Fifth Amendment challenge to the introduction of hearsay evidence in a prosecution before a military commission; "[T]he commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts. . . .From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require[.])"

[23] *Quirin*, 317 U.S. at 37.

ity. In *Ex Parte Milligan*,[24] the Court considered the conviction by a military tribunal of a U.S. citizen, resident in Indiana, who was accused of conspiring to aid the cause of the Confederacy, then at war with the United States. The Court unanimously overturned the conviction. Although the Court divided on the question of the tribunal's authority,[25] it concluded that "no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in no wise connected with the military service."[26] The Court in *Quirin* thus recognized that Milligan presented a different case, and raised different constitutional questions, than did the case before it.[27] We can draw from *Quirin* and Milligan, therefore, a clear distinction between a belligerent who threatens the national security at the service of a foreign enemy, and a civilian whose crime—although it may involve aiding and abetting an enemy in time of war—is subject to the jurisdiction of traditional law enforcement (rather than military) authority. The latter, but not the former, thus enjoys the constitutional protections of an accused, though fraudulent acquisition of citizenship would not afford a belligerent these constitutional protections (a point that is further discussed in the next section).[28]

The assessment of anti-terrorist measures, both those already enacted and those considered for future implementation, should not be examined exclusively through the lens of the government's traditional law enforcement powers. To the extent that anti-terrorist measures are directed at protecting our nation's security from those in the active service of our enemies, then the government may exercise a constitutional authority that is separate from and independent of its law enforcement powers. The exercise of that authority is not an infringement on the constitutional rights of civilians under Article III or the Fifth and Sixth Amendments, but a vindication of the citizens' collective grant of the powers of defense to the national government.

II. MEANINGFUL DISTINCTIONS EXIST BETWEEN CITIZENS AND NON-CITIZENS IN THE LAW OF THE CONSTITUTION

A. Citizens at Home Enjoy the Broadest Constitutional Protections Against the Federal Government

An American citizen or national is entitled as a constituent of the American polity to the protective restrictions the Constitution imposes on the United States government. Law enforcement accordingly is held to requirements of reasonableness and probable cause in performing searches and seizures against United States nationals.[29]

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[24] 71 U.S. (4 Wall.) 2 (1866).

[25] The majority refused to consider the scope of the military tribunal's authority in this context, although the minority readily acknowledged the authority of such a tribunal that is "exercised in time of invasion or insurrection within the limits of the United States. . .when the public danger requires its exercise." 71 U.S. at 121 (majority) & 142 (opinion of Taney, C.J. and Wayne, Swayne and Miller, J).).

[26] *Ex Parte Milligan*, 71 U.S. at 121–22.

[27] See *Quirin*, 317 U.S. at 45. (Milligan involved a citizen who "was not an enemy belligerent. . .subject to the penalties imposed upon *unlawful belligerents*. . . .[Milligan was not] a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as. . .martial law might be constitutionally established").

[28] The courts have also made clear that they stand ready to patrol the boundary between the exercise of legitimate national security powers directed to *unlawful belligerents* and the illegitimate use of that authority when directed at citizen civilians. In *Quirin*, and on two occasions since *Quirin*, the Supreme Court has recognized its authority to consider habeas corpus petitions filed by enemy aliens who claim they are wrongly held in military custody. In *Yamashita*, the Court held that Congress "has not withdrawn, and the Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus." 327 U.S. at 9. In *Johnson* v. *Eisentrager*, the Court pointed out that, despite its rulings in *Quirin* and *Yamashita* upholding the authority of the military commissions, in each case the petitioners had the benefit of a hearing at which an Article III court considered their applications and provided them with an opportunity to present reasons for their release from military jurisdiction. 339 U.S. at 780–81.

[29] *Reid* v. *Covert*, 354 U.S. 1 (1957); *Best* v. *United States*, 184 F.2d 131,138 (1st Cir. 1950), *cert. denied*, 340 U.S. 939 (1951); *Berlin Democratic Club* v. *Rumsfeld*, 410 F. Supp. 144, 157, (D.D.C. 1976)("There is no question, of course, that the Constitution applies to actions by the United States officials taken against American citizens overseas.").

At the international borders or their functional equivalents, Executive power to stop and search both citizens and aliens is plenary.[30] "It is undoubtedly within the power of the Federal Government to exclude aliens from the country."[31] The plenary power stems from the interest of national self-protection is available not only at the formal border crossing, but also at functional equivalents such as international airports, or crossroads within a 'reasonable' distance from the border.[32]

The United States Government must also follow established procedures and afford constitutional due process when trying (civilian) U.S. citizens abroad. Yet even this rule need not be absolute. For instance, in occupied military zones the particular application of the War Power may be constitutionally permitted.[33] More recently, a District Court has ruled that the al-Qaeda terrorist network qualifies as a "foreign power" so as to permit the Foreign Intelligence Exception to the Fourth Amendment warrant requirement and allow the overseas search of an American working for that foreign power.[34]

Moreover, foreign governments are not bound by the Constitution unless there is an active collaboration with United States agencies. Acts of a foreign government within its own territory against United States citizens are not subject to the limitations of the Constitution.[35] Accordingly, United States officials and agencies are free to accept and make use of any truly independent assistance or information offered by other nations without regard to the methods or sources by which it was obtained.

B. Non-Citizens Enjoy Lesser Protections Under the Constitution

When operations focus on aliens abroad, the legal constraint under the Constitution is the least certain. The citizenship status of the person significantlyaffects the obligations and restrictions of the United States actors towards individuals overseas. In contrast to the alien lawfully resident in the United States, "there are different expectations of treatment than when a non-resident alien is simply affected by United States officials abroad. In the former instances, the United States has the power to, or has in fact imposed the framework of its government process on the non-resident alien. . . .[But when the alien] is harmed in his own country, he cannot and should not expect entitlement to the advantage of a United States court."[36] The "purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory."[37]

The Supreme Court has similarly "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States."[38] In times of war, domestic application of the Fifth Amendment to , nonresident aliens is not presumed: "Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security. . . .The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a 'declared war' exists."[39]

The controlling precedent concerning the Fourth Amendment's application to aliens outside the United States is *United States* v. *Verdugo-Urquidez*.[40] *Verdugo-Urquidez* was indicted on drug charges under United States law, when he was a Mexican citizen residing in Mexico. Mexican police officers delivered *Verdugo-Urquidez* to the United States border, where he was arrested and charged. Agents of the U.S. Drug Enforcement Administration (DEA), with the permission and assistance of the Mexican federal police, conducted searches of *Verdugo-Urquidez*'s two

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[30] *United States* v. *Montoya de Hernandez*, 473 U.S. 532, 537 (1985)("since the founding of our Republic, Congress has the Executive plenary authority to conduct searches and seizures at the border, without probable cause or warrant.")

[31] *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973) (citing *Chae Chan Png* v. *United States*, 130 U.S. 581, 603–04).

[32] *Id.* at 272–73

[33] *Best*, 184 F.2d at 140–41 (warrantless search by U.S. Army upheld in Occupation Zone of postwar Austria).

[34] *United States* v. *Bin Laden*, 126 F. Supp. 2d 264 (S.D.N.Y. 2000) (Applying Fourth Amendment to overseas search of American citizen, declining to apply exclusionary rule).

[35] *Rumsfeld*, 410 F. Supp. at 154 ("The fourth amendment does apply to actions of foreign officials if United States officials participated in those actions so to convert them into joint ventures between the Untied States and the foreign officials") (citations omitted); *see also Stonehill* v. *United States*, 405 F.2d 738, 743–44 (9th Cir. 1968).

[36] *Rumsfeld*, 410 F. Supp. at 152.

[37] *Verdugo-Urquidez*, 494 U.S. at 266.

[38] *Id.* at 269; see *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950).

[39] *Eisentrager*, 339 U.S. at 774–75.

[40] 494 U.S. 259 (1992).

houses in Mexico, obtaining documents evidencing *Verdugo-Urquidez*'s drug smuggling.

On *Verdugo-Urquidez*'s motion to suppress the documents, the District Court ruled the Fourth Amendment applied to the searches conducted in Mexico, and that the DEA agents had no cause to conduct those searches without a warrant.[41] The Court of Appeals for the Ninth Circuit affirmed, ruling that the searches were subject to the Fourth Amendment, and therefore unlawful without a warrant or exigent circumstances.[42]

The Supreme Court reversed, holding that the Fourth Amendment does not apply to the search and seizure of a nonresident alien's property outside of the United States.[43] Both the majority opinion and the dissent recognized that the Fourth Amendment applied to protect American citizens, without regard to territorial restriction.[44] While other provisions of the Bill of Rights, such as the Fifth or Sixth Amendments, establish procedural trial rights which inure to a person who becomes a criminal defendant in United States custody, the Fourth Amendment's restrictions on search and seizure protect a right of "the people" as opposed to any person or any accused. A search and seizure can violate these restrictions prior to, or even absent, a trial or conviction.[45] It therefore made no difference to a Fourth Amendment analysis, despite the dissent's protest to the contrary, whether *Verdugo-Urquidez* was within or without the United States, or in custody, at the time the agents searched the Mexican properties. A judicial warrant would have had null effect outside the United States.[46] But a requirement to obtain a warrant, implied by application of the Fourth Amendment, would have pernicious effect on United States operations overseas, including, the Court feared, military operations.[47] The Supreme Court accordingly reversed the two lower courts' opinions.

The Supreme Court dissent noted that "non-law enforcement activities, not directed against enemy aliens in wartime but nevertheless implicating national security"[48] should not suffer impairment under the Fourth Amendment. "Many situations involving sensitive operations abroad likely would involve exigent circumstances" and thus not need a warrant.[49] Thus both the dissent and the majority in *Verdugo-Urquidez* leave open the possibility that intelligence collection and operations overseas can proceed without constitutional burden, on the significant, if unstated, assumption that the intent remains unchanged throughout the investigation to collect information solely for intelligence purposes. But the dissent's analysis seems necessarily to rely on the continued dichotomy between intelligence and law enforcement in distinguishing the Fourth Amendment's applicability to either function. In today's world, where the line between crime and war has been blurred by mass murder of civilians in attacks upon nations by *unlawful belligerents*, the dichotomy between gathering "intelligence" in support of national defense and obtaining evidence in support of law enforcement is less clear than the dissent might have supposed.

Similar considerations govern seizures, as well as searches, of aliens abroad. Since the Nineteenth Century it has been held that United States courts may exercise personal jurisdiction over any one properly charged and present before that court, regardless of how he found his way to that court. "[D]ue process of law is satisfied when one present in court is convicted of crime after having been fairly apprized [sic] of the charges against him and after a fair trial in accordance with constitutional procedural safeguards."[50] The defendant can legally be tried even after plain abduction brought him to the court, whether across interstate lines,[51] or across international borders.[52] The Supreme Court most recently affirmed this principle in *United States* v. *Alvarez-Machain*.[53] While the international application of this principle is subject to the strictures of any given extradition treaty between the United States and the alien's nation of citizenship, under customary international law prac-

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[41] 494 U.S. at 263.
[42] *United States* v. *Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988).
[43] 494 U.S. at 274.
[44] 494 U.S. at 283 n.7, 291 n.11.
[45] *Id.* at 264; *Id.* at 278 (Kennedy, J., concurring).
[46] *Id.* at 274; *Id.* at 279 (Stevens, J., concurring).
[47] *Id.* at 273. This reasoning also militates against application of constitutional due process protections and other Bill of Rights provisions to aliens who are abroad.
[48] *Id.* at 292.
[49] 49. *Id.*
[50] *United States* v. *Alvarez-Machain*, 504 U.S. 655, 661 (1992) (citing to *Frisbie* v. *Collins*, 342 U.S. 519 (1952).
[51] *Frisbie* v. *Collins*, 342 U.S. 519.
[52] *Ker* v. *Illinois*, 119 U.S. 436 (1886).
[53] 504 U.S. 655 (1992).

tice, any individual rights under an extradition treaty are solely derivative of the nation's rights. Any government must specifically object in accordance with the terms of the extradition treaty, for only governments can invoke such treaties, and the rights under them can be and frequently are waived.[54]

This does not mean that aliens would be devoid of all legal protection or safeguard. The Court in *Verdugo-Urquidez* left the door open to constitutional claims by aliens in this country.[55] In addition, where the Constitution and federal statutes are otherwise silent, aliens may resort to relevant international agreements such extradition treaties, treaties of friendship, commerce and navigation, tax treaties, and mutual legal assistance treaties, to the extent they are self-executing.

In conclusion, under *Verdugo-Urquidez*, the Fourth Amendment does not operate to protect individuals; rather it operates to protect "the class of persons who are part of a national community or who have otherwise developed sufficient connection with the country to be considered part of that community."[56] The farther an individual is removed from the "community," the less claim he has to constitutional protection.[57] Accordingly, it would be reasonable to conclude that an unlawful belligerent—even within the United States (and certainly outside the United States)—has by taking up arms against the United States so far removed himself from the national community as to forfeit Fourth Amendment rights.

C. Citizenship Procured by Fraud is Void Ab Initio and Provides No Safe Harbor

"[A]dmission to the United States [is] a privilege and [an alien] has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."[58] Congress and the Executive have clear legal powers to exclude terrorists, to remove them if they get inside our borders, and to revoke their citizenship if that citizenship was based on fraud.

Other aspects of this paper make clear that the Constitution confers ample powers on the President and Congress to defend the nation from international terrorists on U.S. soil. This portion addresses why aliens who obtain their immigration status by fraud should be deemed without lawful status and, therefore, not entitled to the full panoply of constitutional protections accorded to United States citizens.

Terrorists frequently rely on deception and outright fraud to obtain the immigration status that allows them to enter or remain in the U.S. Ramzi Yousef, widely regarded as the mastermind behind the first World Trade Center bombing in February 1993, had been in official custody the previous September when he landed without a visa at JFK Airport.[59] After being only "briefly detained," he was released and "granted asylum pending a hearing."[60] Mir Amal Kasi, convicted of murdering two CIA employees outside the agency's headquarters in Langley, Virginia, got his visa based on false statements.[61]

In responding to the immediate threats posed by international terrorism, the wise words of Justice Robert Jackson are particularly fitting: "[T]he underlying consideration is the power of our system of government to defend itself, and changing strategy of attack by infiltration may be met with changed tactics of defense."[62]

Preventing abuse of immigration laws that are intended to welcome lawful visitors and emigres and exclude terrorists is one important step in the war against international terrorism. Congress has made clear that aliens seeking entry or citizenship must tell the truth. An alien who lies to obtain citizenship or favorable immigration status does not deserve to remain in this country. Thus, Congress has provided that a resident alien convicted of fraud on a visa application is deportable.[63] Falsely claiming to be a citizen likewise renders a person deportable.[64] And Congress has specifically directed the Executive to revoke the citizenship of any nat-

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[54] 504 U.S. at 667.

[55] 394 U.S. at 270–71

[56] 494 U.S. 265

[57] *Compare Bridges* v. *Wilson*, 326 U.S. 135 (1945) (resident alien has first amendment rights) with *U.S. ex. Rel. Turner* v. *Williams*, 194 U.S. 229 (1904) (excludable alien does not have First Amendment rights).

[58] *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982).

[59] Laurie Mylroie, "The World Trade Center Bomb: Who is Ramzi Yousef? And Why it Matters," 42 Nat'l Int. 3 (1995).

[60] *Id.*

[61] Ed Timms, "Critics Say Visa System Was Help to Hijackers," Dallas Morning News, Sep. 15, 2001, at 25A.

[62] *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 223 (1953) (Jackson, J., dissenting).

[63] 8 U.S.C. at § 1227(a)(3)(C).

[64] *Id.* at § 1227(a)(3)(D).

uralized citizen who procures citizenship by "concealment of a material fact or by willful misrepresentation."[65]

These rules are obviously fair. But what constitutional protection should be accorded an alien who has procured his presence in the United States through fraud or other unlawful act? The law generally denies the benefit of a transaction to one who procured that transaction by fraud.[66] Moreover, fraudulently obtaining immigration status or citizenship is no garden-variety fraud. It undermines the social compact, the foundation of our legal system, by falsely claiming to have entered it. Even the most ardent civil libertarian would agree that the law cannot be permitted to reward deceit and fraud. An alien who lies and cheats to enter this country simply does not deserve the same legal protections as do the millions of immigrants and visitors who obtained their status lawfully. Alien terrorists and suspected terrorists who claim constitutional protections against searches, detention and other anti-terror measures should first have their immigration status examined. If that status was obtained by fraud, misrepresentation or other unlawful means, then it should be deemed void ab initio. Such an alien should be treated under the law as if he never was lawfully admitted to the United States—because in a very real sense he was not.

Supreme Court decisions construing congressional mandates in this area leave no doubt that the Executive possesses ample powers to limit the rights of aliens who obtain citizenship or immigration status through fraud. Generally, the power to exclude aliens—including foreign terrorists and their supporters—falls well within the power of Congress and the Executive.[67] Because the power to exclude is "a fundamental sovereign attribute,"[68] aliens initially seeking entry into this country lack even the right to due process.[69]

What process is due an alien who enters this country or obtains citizenship through fraud? Such a person should have no greater claim to procedural protections than an alien paroled into the United States pending a hearing on the issue of admissibility.[70] Such an alien ought to be "regarded as stopped at the boundary line and kept there unless and until her right to enter should be declared."[71]

When a naturalized citizen has committed fraud to obtain citizenship the Court has been similarly deferential to Congress, hewing to the rule of "strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship."[72] In Fedorenko it held that federal courts "lack equitable discretion to refrain from entering a judgment of denaturalization against a naturalized citizen whose citizenship was procured illegally or by willful misrepresentation of material facts."[73] Indeed, the Court has gone out of its way to reject "lower court efforts to moderate or otherwise avoid the statutory mandate of Congress in denaturalization proceedings."[74] A naturalized citizen subject to a denaturalization proceeding is entitled to due process. "[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."[75] Similar due process requirements apply to deportation proceedings,[76] although what process is due may vary with the circumstances.[77]

An alien who procures citizenship or immigration status through fraud presents a special circumstance, for which the narrowest range of due process protections ought to apply. Fair procedures should be designed for the limited purpose of determining whether an alien accused of committing fraud actually did so. An affirmative determination would cause the alien to revert by operation of law to his former nonstatus; he would then not enjoy the full array of constitutional protections extended to citizens and those with lawfully obtained immigration status. Defrauding the

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[65] *Id.* at § 1451(x).
[66] Cf. Restatement (Second) of Torts § 549, cmt. g (1976).
[67] *See, e.g., Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953).
[68] *Id.*
[69] *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application. . . .").
[70] Cf. *Leng May Ma* v. *Barber*, 357 U.S. 185, 187–88 (1958).
[71] *Kaplan* v. *Tod*, 267 U.S. 228, 230 (1925) (Holmes, J.).
[72] *Fedorenko* v. *United States*, 449 U.S. 490, 506 (1981).
[73] *Id.* at 517.
[74] *Id.*
[75] *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).
[76] *See Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896).
[77] See *Landon* v. *Plasencia*, 459 U.S. 21, 32–34 (1982).

country in order to enter it makes an alien indistinguishable from those paroled aliens who have "gained no foothold in the United States."[78]

Treating aliens who procure immigration status or citizenship through fraud as if they were excludable aliens would have important implications for the war on international terrorism.

First, this "entry fiction" supports Congress's recent grant of authority to detain terrorists and terrorist suspects. Under the USA PATRIOT Act,[79] the Attorney General must detain any alien certified as a suspected terrorist.[80] The Attorney General may make this certification if he has "reasonable grounds to believe,"[81] that an alien has committed specified forbidden acts associated with terrorism. To be sure, certain administrative and judicial safeguards apply. The Act requires the Attorney General to begin removal proceedings, charge the alien with a crime, or release the alien within "seven days after the commencement of such detention."[82] If an alien is held solely because he is certified by the Attorney General under the Act and his removal is "unlikely in the foreseeable future,"[83] the Attorney General is authorized to continue detaining him for six-month intervals "only if the release of the alien will threaten the national security of the United States or the safety of the community or any person."[84] Furthermore, the Act directs the Attorney General to review the certification of an alien as a suspected terrorist every six months.[85] The alien may submit a written request for reconsideration every six months, and such a request for reconsideration may include "documents or other evidence in support of that request."[86] Judicial review is available only in habeas corpus proceedings,[87] and the only Court of Appeals authorized to hear appeals under the Act is the D.C. Circuit.[88] Congress has deemed these procedural safeguards to be all the process due to suspected alien terrorists. For those of that group who procured their immigration status or citizenship through fraud, this may be more process than is constitutionally required.

Second, regarding those who obtain immigration status or citizenship as excludable aliens can enhance the government's power to investigate terrorist cells in this country. The Fourth Amendment, which protects "the people" from "unreasonable searches and seizures," has been given a narrower compass when applied to aliens than to citizens. As the Supreme Court has noted,"'the people' seems to have been a term of art employed in select parts of the Constitution."[89] In particular, the Court found that the language "suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[90] Given this interpretation, the Court held that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."[91]

Verdugo supports the proposition that an alien who procures citizenship or immigration status through fraud is not entitled to Fourth Amendment rights. A person who lies to gain entry to our nation should not be deemed to have established "substantial connections with this country."[92] To suggest the contrary is inconsistent with common sense and the judicial respect for the congressional determination that aliens who lie to gain entry or citizenship should be removed. No one, simply by dint of arriving at our shores and remaining undetected for a period of time precisely because of his fraud, should be rewarded by enjoying the same rights as those who come here lawfully. Treating immigration cheats differently is consistent with the principle that immigration law in general consists of rules that "would be unacceptable if applied to citizens."[93]

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[78] *See Kaplan* v. *Tod*, at 267 U.S. at 230.
[79] P.L. 107–56 (Oct. 26, 2001),
[80] *Id.* at § 412(x)(1).
[81] *Id.* at § 412(x)(3),
[82] *Id.* at § 412(x)(5).
[83] *Id.* at § 412(x)(6),
[84] *Id.*
[85] *Id.* at § 412(x)(7).
[86] *Id.*
[87] *Id.* at § 412(b)(1),
[88] *Id.* at § 412(b)(3).
[89] *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).
[90] *Id.*
[91] *Id.* at 271.
[92] *Id.* (emphasis added)
[93] *Matthews* v. *Diaz*, 426 U.S. 67, 79–80 (1976).

It is axiomatic that a contract is void ab initio where there is "fraud in the execution,"[94] meaning that one party misrepresents an agreement's "essential terms."[95] An alien who falsely claims the right to enter the United States to study, perhaps at a flight school, and then commits terrorist acts misrepresents the "essential terms" of the agreement between him and this country. It follows that the agreement to let him enter is vo*Id.* He had no constitutional rights before entry. Should the law be construed to give him the benefit of his fraudulent bargain by extending him constitutional protections anyway?

III. NOT ALL FORMS OF CENTRALIZATION INCREASE SECURITY; DECENTRALIZATION CAN PROTECT BOTH SECURITY AND LIBERTY

As horrific as the events of September 11th were, the damage to the United States was not catastrophic. The unprecedented loss of life and property was actually crippling only within limited geographic areas. Certainly, the resulting economic damages have been felt nationwide, as measured in the decline of stock prices, employment rates, airline passenger traffic, consumer confidence, and corporate profits. These economic damages have been driven by fear of uncertainty and vulnerability. As tremendous and widespread as these damages have been, the enemy nevertheless has not inflicted physical damage on our far-flung defense or production capabilities. Indeed, the decentralization of people, production capabilities, and defenses across a large land mass minimizes the potential for physical damages from terrorism.

Fear, more so than physical damages, is the threat. This fear is prompted by localized concentration of populations and nationwide interconnectedness. Populations concentrate in cities, buildings, subways, stadiums, and aircraft and dispersed populations are interconnected through the mail system, water supplies, the food supply, the blood supply, and the financial system. Terrorism and the fear it generates have renewed interest in the quarantine, curfew, and the martial law powers of the states. Along with the powers of the federal government, these local powers remain an important feature of the federal system for responding to new forms of violence and threats to public health, as well as the fear of both.

Although more centralized than a century ago, the United States is still not a centralized state like France. Moreover, as long as the constitutional structure remains intact, it cannot become a completely centralized state. Efficiency experts may think that fifty states represent much wasteful duplication of governmental services. Security experts, on the other hand, can appreciate the value of so much redundancy. With fifty states, each having its own government, its own law enforcement, its own emergency response resources, the federal system as designed by the Framers gives priority to security and liberty over efficiency.[96]

A. Security and Liberty Need Not Be in Conflict

Debate over the recently enacted USA PATRIOT Act[97] was typically framed in libertarian terms as a contest between liberty and security. It has been difficult for many Americans (especially lawyers) to understand that security and liberty can be hand-maidens. Liberty and security naturally conflict in a centralized state; they need not and should not in a decentralized state such as the United States. When the Framers created a strong Executive, they faced the charge that the President's powers—said to be equal to those of a king—posed a threat to liberty. They responded that an energetic Executive is essential to the defense of the people's liberty,[98] a view which has been confirmed by history and the opinion of the American people. Presidents have never been more esteemed by the American people than when, acting as Commander-in-Chief, they defend individual liberty by defending the nation's security.

The President's powers as Commander-in-Chief, standing alone, do not authorize him to take action within the United States.[99] Acting under Congress' war powers,

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[94] *Hetchkop* v. *Woodlawn at Grassmere, Inc.*, 116 F.3d 28, 32 (2d Cir. 1997).

[95] Restatement (Second) of Contracts § 163, cmt. a (1981).

[96] . . . .the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate governments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.

Federalist No. 51 (emphasis added).

[97] *USA PATRIOT Act* of 2001, Pub. L. No.107–56.

[98] *See Federalist* No. 70.

[99] *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (holding President Truman's order to seize steel plants in support of the Korean Conflict an unconstitutional violation of separation of powers, not justified by his powers as Commander-in-Chief).

[100 the President can exercise considerably more power domestically that he could otherwise.[101] The great danger, of course, is that military actions executed domestically pursuant to the war powers—whether or not constitutional—can inflict injustice on American citizens that otherwise would not be sanctioned.[102]

Preserving both liberty and security rather than sacrificing one or the other requires wise and, therefore, non-panicked policy. Fortunately, the constitutional structure imposes restraints on the process, even when issues are not justiciable. As the recent enactment of the USA PATRIOT Act reflects, the legislative process is so constituted that it slows legislation and forces compromises in order to reach consensus. Although adopted relatively quickly following the terrorist attacks, some of the Act's important provisions had been the subject of discussion for some time.[103] As the Chairman of the National Commission on Terrorism observed in presenting the report of the Commission to the Senate Foreign Relations Committee on June 15, 2000, fifteen months before the terrorist attacks of September 11th, the lack of well-considered policy threatens civil liberties: "Our view is that in the event of a catastrophic event such as we are talking about, where you have tens of thousands of people dead, the pressures will be very great on the President and the leadership of this country to impinge on civil liberties unless they have done some contingency planning and thought it through ahead of time. . . ."[104]

B. The Limits of Centralization and Security

Since the attacks of September 11th, the knee—jerk reaction on the part of many has been towards greater centralized control. Underlying this reaction is the mistaken assumption that greater centralization would have prevented the attacks. The argument in favor of centralization ignores the consequences of concentration of power, which can be to escalate the damages if an attack is not prevented. Suppose the United States were as completely centralized as France, with all powers concentrated in one city like Paris. If in addition to being the political capital, Washington, D.C. was also the most populous city, the financial nerve center, and the single transportation hub, it would be the equivalent of Paris. In that situation, the combined attacks of September 11th would have been far more destructive to the country because the target would have been more centralized and concentrated. The physical and psychological damages would have been greater to the rest of the country precisely because of a greater dependence on the centralized target.

Even if centralization per se were desirable, it must be recognized that the best security possible cannot immunize the country from terrorist attacks any more than security measures can eliminate crime. Charles Schnabolk, a well-known security consultant has consulted on terrorism threats to the World Trade Center over the years.[105] A year ago, Schnabolk identified the greatest terrorist threat to the World Trade Center as "Someone flying a plane into the buildings. Someone blowing up the PATH tubes from New Jersey and water coming in from the Hudson River."[106] After the events of September 11th, he said, "Everyone wants to believe that we can protect ourselves from terrorism—and we can't." The problem is the classic security problem: protecting certain targets may only divert criminal attacks to less protected targets. As Schnabolt has said, the purpose of electronic security systems "is to get the criminal to go next door to the building that does not have them."[107]

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[100] *See* n. 3, Part I.

[101] *See Woods* v. *Miller Co.*, 333 U.S. 138 (1948) (upholding national rent controls under the war power even though the Housing and Rent Act of 1947 was adopted after the "cessation of hostilities" (although technically a state of war still existed) in World War II).

[102] *See Korematsu* v. *United States*, 323 U.S. 214 (1944) (upholding a conviction for violating a military order during World War II which imposed curfews, detention in relocation centers, and exclusion from certain areas on the West Coast on Japanese Americans.)

[103] *See USA PATRIOT Act* of 2001, Pub. L. No. 107–56, §§ 206, 207 compared to Countering the Changing Threat of International Terrorism: Report of The National Commission on Terrorism: Hearing Before the S. Comm. on Foreign Relations, 106th Cong. 8 (2000) (discussing the Foreign Intelligence Surveillance Act of 1978) and *USA PATRIOT Act* of 2001, Pub. L. No. 107–56, § 416 compared to Countering the Changing Threat of International Terrorism: Report of The National Commission on Terrorism: Hearing Before the S. Comm. on Foreign Relations, 106th Cong. 22 (2000) (Discussing foreign student monitoring provisions). The report of The National Commission on Terrorism, released in June, 2000, can be accessed through the U.S. Government Printing Office Website at: www.gpo.gov

[104] Testimony of Paul Bremer, Hearing Before the Committee on Foreign Relations, United States Senate; 106 Cong. 2d Sess., June 15, 2000, www.access.gpo.gov/congress/senate at 5 (Emphasis added).

[105] Richard Reeves, *Security in the Homeland—A Tough Job, Universal Press Syndicate*, Oct. 12, 2001.

[106] *Id.*

[107] *Id.*

Among many potential targets of terrorism, some are unique, e.g., the White House, the Capitol, and the Supreme Court Building. Anything which is unique, i.e., one of a kind, represents a form of centralization. The greater the centralization or concentration of wealth and/or power, the greater the level of security required. Thus the White House, the Capitol, and the Supreme Court get greater security than post offices, not solely because high-level officials may be "more important" than postal workers, but because there is only one Capitol, one White House, and one Supreme Court, whereas there are many post offices. The relationship between concentration/centralization and the need for security spreads across all levels of society. Even though there are many banks and armored trucks, they need more security than most residences because they are less numerous and contain more money than individual residences. "That's where the money is!" as Willy Sutton, the bank robber said when asked why he robbed banks. With greater centralization or accumulation of money and/or power and the need for greater security, comes the potential for greater damages if the security is breached.

This is not to argue against every response that involves some greater centralization. Rather, it is to argue that centralization per se is not wise policy. Thus, the Congress has debated whether airport security should be completely federalized/centralized by making security personnel federal employees or whether instead security should be governed by federal standards but administered by private contractors. The argument against making the security personnel federal employees is that degree of centralization actually undermines security.

C. Centralized Coordination; Decentralized Execution

Centralized coordination differs from centralized control. The federal government certainly has centralized control over the nation's defenses. Under Article Two, Section 2 of the Constitution, the President commands not only the military services, but also "the militia of the several States, when called into actual Serves of the United States." The federal government, however, does not and can not control all the many resources which contribute to the nation's defense, such as the emergency medical response services. Nevertheless, federal agencies such as the Department of Health and Human Services serve as central points of data collection and dissemination which, when performing well, provide centralized coordination.

In June, 2001, a simulated terrorism exercise, called "Dark Winter," played out the consequences of the intentional release of the deadly smallpox virus in several cities. Governor Frank Keating, who took the role of a governor, testified about the lessons learned from this simulation.[108] Governor Keating said the first lesson was "that in virtually every possible terrorism scenario, first responders will be the local."[109] The central problem preventing their working as a team was communication.[110] The final conclusion and strongest lesson was simply this: "Resist the urge to federalize everything."[111]

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[108] Frank Keating, Gov. of Oklahoma, Testimony Before the 107th Congress House Committee on Government Reform; Subcommittee on National Security, Veterans Affairs, and International Relations (July 23, 2001).

[109] *Id.* Local government and law enforcement agencies were the ones with the power to impose and enforce quarantines, curfews and states of martial law, to disseminate information through local media and to collate and forward epidemiological data to federal agencies such as the Centers for Disease Control in Atlanta. Local law enforcement would be the ones to discover, preserve and secure any available crime scenes of evidence.

[110] *Id.* The one central problem which emerged in Oklahoma City was that of communications. From the initial response effort through the final body recovery, it was noted that the many different radio frequencies and institutional policies in play all too often left many participants in the effort in the dark concerning vital decisions that should have been shared universally. This was remedied in part—but only in part—by the creation of a unified command center which invited key representatives from all of the agencies involved to frequent information briefings and discussions on tactics. The rapid and accurate flow of information—both internally among government agencies and externally to the public—is absolutely essential.

[111] *Id.* Perhaps the strongest lesson from Oklahoma City—and perhaps the most worrisome outcome from the Dark Winter exercise—concerns the almost instinctive urge common to officials of federal agencies and the military to open the federal umbrella over any and all functions or activities. Simply put, the federal government all too often acts like the 500 pound gorilla.

In Dark Winter, we encountered this tendency as soon as state National Guard units were activated in response to the bio-terrorist attack. The function of those units—imposing curfews and quarantines and keeping public peace—were exclusively local in nature. Still, many of the participants sought to call the Guard into federal service immediately. I want to thank Senator Nunn, who played the role of the President in the exercise, for resisting this temptation and deciding not to federalize the Guard. (Emphasis added).

D. Concentrating on "Core Competencies"

In the current war, the great difficulty lies in distinguishing what should and should not be federalized or centralized. As many American businesses have decided, it is good policy for corporations to concentrate on their "core competencies," i.e., do only what they do best. Indeed, that just happens to be the organizational design of the Constitution, giving powers to the federal government that only it could do well. As illustrated by the following observations, devolving or shedding extraneous responsibilities from the center allows national security forces and federal law enforcement to concentrate on their primary responsibilities.

1. *The Military:* The federal government has the ultimate responsibility for defending the nation from foreign attack and domestic civil disorder. Against foreign attack, the military stands at the forefront; in matters of domestic order, the military is the last resort. Recently, however, the specter of militarizing law enforcement has been raised when the Chairman of the Senate Armed Services Committee asked whether the Posse Comitatus Act,[112] which generally prohibits the use of the military for law enforcement purposes, should be repealed.[113]

As discussed in Part I, foreign terrorists inside this country should be pursued under the war powers, not under law enforcement powers. If law enforcement agents are involved, they act in assisting national security actions, not law enforcement actions. That is just the converse of the situation addressed by the Posse Comitatus Act, which generally prohibits the use of the military to assist law enforcement. Thus the presence inside the country of foreign terrorists in no way implicates the Posse Comitatus Act. More importantly, militarizing law enforcement diffuses the military's mission and endangers the citizens' liberty.[114]

2. *The FBI:* The well—known difficulties of the FBI are at least in part due to expecting the Bureau to do too many things. If the Bureau has lost its focus, Congress must share much of the blame. Congress has imposed on the FBI wide-ranging responsibilities which result from too much federal criminal legislation that overlaps state criminal jurisdiction. Any resources the FBI devotes to crimes that are essentially state matters are resources that cannot be devoted to truly federal matters. Meanwhile, the FBI's responsibilities for domestic intelligence cannot be performed by the state law enforcement.

Moreover, the more the FBI is involved in ordinary, local crime the greater concern arises that the Bureau is directing its surveillance capabilities at ordinary citizens. To the extent that the Bureau is focused on intelligence related to foreign threats, its surveillance powers generate less concern about the potential for the abuse. There has been at least one report, however, that the FBI is preparing to increase its surveillance capability potentially over all citizens by imposing a centralized routing system on the Internet.[115] In addition to the civil liberties concerns, such a centralizing of communication actually undermines the defense to terrorism, as discussed below.

3. *Communication Infrastructure:* Decentralized communication received a big boost from the September 11th attacks. The use of wireless telephones on hijacked aircraft and in the Twin Towers demonstrated their intelligence and emergency response value. Since September 11th, the military has shown great interest in already available technology which can provide secure communications based on the peer-to-peer concept of Napster.[116] That same communication structure can fill the "com-

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[112] 18 U.S.C. §1385.

[113] See Hearing on the Department of Defense's Role in Homeland Security: S. Armed Services Comm., 107th Cong. 4 (2001) (Chairman of the Armed Services Committee Sen. Carl Levin raised the issue with Thomas White, Secretary of the Army: "Another overarching issue: Should the Posse Comitatus Act be revised or repealed?" at 4).

[114] *See Federalist* No. 8. The perpetual menacings of danger oblige the government to be always prepared to repel it—its armies must be numerous enough for instant defence. The continual necessity for their services enhances the importance of the soldier, and proportionably degrades the condition of the citizen. The military state becomes elevated above the civil. The inhabitants of the territories, often the theatre of war, are unavoidably subjected to frequent infringements of their rights, which serve to weaken their sense of those rights; and by degrees, the people are brought to consider the soldiery not only as their protectors, but as their superiors. The transition from this disposition to that of considering them as masters, is neither remote, nor difficult:(sic) But it is very difficult to prevail upon a people under such impressions, to make a bold, or effectual resistance, to usurpations, supported by military power.

[115] Fox News reported and apparently overstated plans by the FBI supposedly involving a plan to change the architecture of the Internet, centralizing it by "rout[ing] traffic through central servers that it would [allow it] to monitor e-mail more easily." See www.foxnews.com/story/0,2933,37203,00.html

[116] *See* Leslie Walker, "Uncle Sam Wants Napster!," *The Washington Post*, Nov. 8, 2001; Pg. E01.

munication gap" which exists among local emergency response agencies, as related by Governor Keating's report on "Dark Winter."

Through cutting-edge technology, communication is rapidly moving towards becoming ubiquitous. To the extent that it is based on or modeled after the Internet, this communication system will be decentralized. Although the Internet is not invulnerable,[117] it is less vulnerable than more centralized communication systems, namely the telephone system. The origins of the Internet reflect a concern to create an alternative to the telephone system in order to have a communication system that would survive a nuclear attack. The Internet is a (con)federal system, with very minimal centralized control.

Current developments in communications are leading what has been called the technology of decentralization.[118] The Internet's distributed communication is now being recognized as a strategy for defending against terrorism.[119] As demonstrated on September 11th, however, the potential of the Internet is limited by the bottlenecks created by overloads on the centralized telephone system which is generally used to connect to the Internet. Instead of following the natural urge to centralize all communications that many in federal law enforcement have, the Federal Government could do much to defend against terrorism by centrally coordinating a rapid decentralization of the nation's communications system. This approach may seem as counter-intuitive as the President's proposed missile-defense system. Both proceed on the premise that the best offense is a good defense. In fact, the Defense agencies have recently announced such a decentralized communications model.[120] The federal government could coordinate the extension of that kind of decentralized communication infrastructure so that, for example, a mission-critical communication system would connect the nations' local emergency-response resources of police, fire and health agencies with each other, with federal agencies, with public health experts, and with the public.

MANDEL, LIPTON AND STEVENSON LIMITED
LAW OFFICES
CHICAGO, ILLINOIS 60602
December 4, 2001

Senator Russell D. Feingold
506 Hart Senate Office Building
Washington, D.C. 20510–4904

Re: Farid Khorrami A77–928–803

Dear Senator Feingold.

I am a lawyer in Chicago and I represent Dr. Ahmad Farid Khorrami in matters related to his immigration status in the United States I am writing to you to provide information about Dr. Khorrami's case which might be useful to you and other Judiciary Committee members during the hearings into the Justice Department practices in the aftermath of September 11th Dr. Khorrami is a 46 year old native of Iran and citizen of the United Kingdom Dr. IGhorrami first came to the United States in 1973 or 1974 as a student. He earned a Bachelor's degree from Purdue University, attended Cornell University and MIT for a short period of time, earned a Master's degree from the California Institute of Technology, and a Master's degree from the University of California at Berkeley, where he also completed most of the requirements for a Ph.D. degree He then moved to the United Kingdom where he spent more than a decade, earning a Ph.D degree from Oxford University, becoming a British citizen, and working as a researcher at University College, London His studies and research have been in Engineering, Aeronautical Engineering, Aeronautics and Mathematics. He has been a teacher and has had a serious academic

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[117] See Thomas E. Weber, "Terrorist Attacks Raise The Issue of How Best To Protect the Internet," *The Wall St. Journal*, Oct. 8, 2001, A15.

[118] Thomas E. Weber, "A Primer on Technology That Has the Potential To Help Foil Terrorism," *The Wall St. Journal*, Sept. 17, 2001, Pg. B1.

[119] *See* Kevin Maney, "Could Internet be used as a weapon against bioterrorism?," *USA TODAY*, Oct. 24, 2001, Pg. 3B.

[120] On October 1, 2001, the United States Joint Forces Command published a document on the previously approved Global Information Grid (GIG), which is described as "a globally interconnected, end-to-end, interoperable, secured system of systems." The document is posted at on a non-classified web site, https://jdl.jwfc.jfcom.mil

research career in Aeronautical Engineering, with a number of published research papers, as well as consultancy experience with industry in the United Kingdom.

Pursuing a lifelong love of flying, Dr. Khorrami returned to the United States in the late 1990's in M–1 status to take pilot training at the University of North Dakota, from which he graduated. Dr. Khorrami had taken his first flying lessons while an undergraduate at Purdue almost a quarter century earlier. After graduation from North Dakota, the INS granted him M–1 practical training and he worked for a short time as a flight instructor.

Dr. Khorrami met, fell in love with and married a United States citizen, and in July, 2000 applied for permanent residence as the immediate relative spouse of a United States citizen As part of the lengthy process of adjustment of status, Dr. Khorrami applied for and was granted permission to travel internationally, which is granted to all applicants for adjustment of status, and is called advance parole. He used the advance parole to travel to Canada in February and March of 2001 and returned to the U.S.

Six months later, on September 16, 2001, Dr. Khorrami was telephoned at home twice by someone claiming to be a reporter from the *Chicago Tribune*. Dr. Khorrami asked the "reporter" where he got his name, and the person said that he got it from the FBI. Dr. Khorrami then called the local office of the FBI to ask if They had given out his name and they claimed that they had not Dr. Khorrami described who he was and that he had briefly worked at two flight schools in Florida, and told the agent he would be happy to talk with him. The agent made arrangements to visit Dr. and Mrs. Khorrami the next day, Monday, September 17, 2001 at their home. Chicago FBI Special Agents Patrick Murphy and Josh Skul came to Dr. Khorrami's apartment on that Monday at 9:OOa.m. and interviewed him for approximately three hours. At the conclusion of the interview, Dr. Khorrami asked if he were a suspect and Agent Murphy stated that if there had been any concerns, Dr. Khorrami would be leaving with them. He told Dr. Khorrami and his wife to go about their normal lives, and left.

That same afternoon, Dr. Khorrami and his wife went to meet with his Supervisor at Skyway Airlines in Milwaukee. At the time of this meeting on Monday afternoon, September 17, 2001, FBI and INS agents began the questioning and interrogation of Dr. Khorrami which was to continue until 5:OOa.m. on Tuesday, September 18th. At the end of the interrogation, Dr. Khorrami was taken into custody. At all times, Dr. Khorrami voluntarily cooperated with government officials and answered all of their questions. While under the duress of this interrogation he was asked to take polygraph examinations on two occasions, and agreed to do so.

While in INS/FBI custody, some time after 4:OOa.m. on September 18th, Dr. Khorrami was served with a written notice revoking the parole that he had used six months earlier to travel. The notice contained no reason or specification of immigration violation on which the revocation was based. The warning attached to Dr. Khorrami's advance parole said that if his adjustment of status application was denied, he would be placed in removal proceedings. His application was not denied before the revocation was issued. Dr. Khorrami was then given a Notice to Appear in Removal Proceedings with a date and time to be set. The Notice to Appear alleged that he was a U.K. citizen who had last entered the United States on advance parole in March; that the advance parole had been revoked; and that as a result, he was an intending immigrant without proper documentation As a parolee whose parole has been revoked, Dr. Khorrami is not eligible for bond during the pendency of the removal proceedings, but is subject to release on parole, only as authorized by the District Director of the INS in Chicago, who is the person who revoked the parole and issued the Notice to Appear. These actions were taken despite the fact that Dr. Khorrami was an applicant for adjustment of status with an unadjudicated visa petition by his wife and his own unadjudicated application for permanent residence.

On September 24th Dr. Khorrami was transferred to Chicago by the INS and has been in custody at the DuPage County Jail ever since. Since his transfer to the Chicago area on September 24th nobody from the FBI has spoken with him. We only found out about the first hearing in Dr. Khorrami's case through inquiries made by Congresswoman Schakowsky's office as the notice of hearing was sent by mail to Dr. Khorrami "c/o custodial office" and was never received by him or his representative. Closed hearings, barring even Dr. Khorrami's wife, conducted with Dr. Khorrami in handcuffs have been held in the basement of the INS office in Chicago on October 10th, October 24th, and November 14th. The hearing scheduled for November 28th was cancelled due to illness of the Immigration Judge. Through the push of the immigration judge on October 24th, the INS scheduled an interview on the pending adjustment of status/immediate relative visa petition on October 29th An INS officer interviewed and took a Q&A for one hour of Mrs. Khorrami, and then

the officer and I went to the basement to the INS detention office where she took a two hour question and answer from Dr. Khorrami. The officer then handed me a pre-printed notice denying Dr. Khorrami's application for adjustment of status on the basis that the District Director who had revoked the advance parole of Dr. Khorrami lost jurisdiction over the adjustment of status application when the same District Director issued the Notice to Appear in Removal Proceedings. On November 7, 2001 at 9:OOp.m three INS agents appeared at Mrs. Khorrami's residence door without announcement by the doorman in her highrise building. One agent remained in the hallway and two agents came in and interviewed her for approximately one half hour regarding her marriage.

Despite all of this, there has been no decision on the wife's I–130 immediate relative visa petition although documentary and testimonial evidence of the bona fides e s of the marriage have been submitted, and no contrary evidence exists. If the I–130 immediate relative visa petition is approved by the INS, the Immigration Judge is then able and willing to adjudicate Dr. Khorrami's application for adjustment of status to conditional permanent resident of the United States Without an adjudication of the I-130 petition, the judge cannot hear evidence on the application. The hearing has been continued repeatedly because of the nonadjudication by the INS of the I–130 petition. There is no legitimate basis for either a further delay or a denial of this immediate relative visa petition; the delay is merely INS facilitation -of continued detention of Dr. Khorrami by instigation of other law enforcement authorities, probably the FBI, which could not itself hold Dr. Khorrami without charge.

This case has involved no substantive charge of immigration violation or violation of criminal law. There was reason to interview, and perhaps interrogate and investigate Dr. Khorrami in midSeptember, there has been no lawful basis to detain him without a substantive charge for 2 ½ months. He should not be in custody or in Removal Proceedings. We need Congress to press the Justice Department to restore law and order and to stop these denials of basic constitutional rights to due process of law. Thank you for your attention to this matter.

Very truly yours,

MANDEL, LIPTON AND STEVENSON LIMITED
Terry Yale Feiertag

Statement of Charles W. Gittins,* Judge Advocate and Lieutenant Colonel, Marine Corps Reserve

EXECUTIVE ORDER IS UNNECESSARY AND UNWARRANTED CURTAILMENT OF DUE PROCESS

No one who witnessed the murder of thousands by terrorists using airliners as guided missiles, would dispute the imperative that those responsible for those attacks on America be brought to justice. The President's November 13, 2001, Executive Order authorizing "military commissions" to selectively try those non-citizens the President deems subject to his order, however, is not the answer. The Order exceeds presidential authority, does not provide due process, and is unnecessary.

As applied to Al Queda terrorist "enemy *combatants*" found outside the United States, the Supreme Court, in *Application of Yamashita*, concluded that the President's power to direct trial by military commission is "without qualification. . .so long as a state of war exists—from its *declaration* until peace is proclaimed." The Congress has not declared war on Al Queda nor has the President requested such an explicit *declaration*. Absent the *declaration* of war required by *Yamashita*, the President arguably has no Constitutional or statutory warrant to employ anachronistic military commissions.

For those persons lawfully in the United States accused but not under arms and, therefore, not "enemy *combatants*," military commissions may not be employed where the civilian courts are open and functioning. Supreme Court cases dating from Reconstruction have uniformly, and correctly, circumscribed authority of military tribunals to try civilians located on American soil.

As justification for the present incarnation of military commissions, the President and Attorney General have oft-cited Franklin Roosevelt's use of a secret military commission to try German saboteurs in the United States during World War II. The

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*Charles VW. Gittins, a judge advocate and Lieutenant Colonel in the Marine Corps Reserve, specializes in representing military personnel in courts-martials and other military tribunals.

example, however, is inapt: the Germans were military *combatants*: a state of declared war existed between the two countries; and, the trial procedures followed in the military commission were the very same as procedures then-applicable to courts-martials for American military personnel. Since then, the Articles of War, under which Roosevelt's military commissions were conducted, have been superceded by Congress' enactment of the Uniform Code of Military Justice in 1951 and notions of required military due process have substantially evolved.

The promulgation of summary procedures that depart substantially from traditional notions of due process and appropriate commission procedure is a danger signal. During hearings on the Articles of War and wartime military commissions, the Army Judge Advocate General clearly articulated to Congress that military commissions and military courts-martials should be governed by *identical* procedures. Since last employed by President Roosevelt, military due process has substantially improved: the accused is entitled to representation-by a qualified lawyer; a specially qualified military judge presides over the trial; rules of evidence govern admission and exclusion of evidence; and, military appeals courts review courts-martials, including mandatory review by the United States Court of Appeals for the Armed forces where an accused is sentenced to death. The Order, reliant as it is on outmoded and superceded World War 11 procedures, has not accounted for the substantial evolution of due process and its present application to military courts.

The administration also claims that protection of classified information compels the secrecy requirement and attenuation of basic procedural safeguards provided in federal courts anal courtsmartials. Such concerns, however, do not mandate the regressive trial procedures described in the Order. Federal courts and military courts-martials both are subject to and employ the Classified Information Procedure Act ("CIPA"), enacted by Congress with the support of the Executive branch. CIPA's purpose is to protect classified "sources and methods" from public disclosure. Military and civilian trials too numerous to count, including the just completed federal court trials of the terrorists involved in the 1993 World Trade Center bombing, have successfully balanced the need to protect classified information with the requirements of due process for the accused. Curtailment of due process, where permitted, must be made with surgical precision. We rightly should be skeptical of a non-specific "national security" talisman—such as provided President Roosevelt justification to imprison Japanese-Americans during World War 11 and for the secret exposure of soldiers to nuclear blast radiation during the 1950%.

Finally, employment of jerry-built military commissions is unnecessary to successfully prosecute terrorists. If full and fair trials in military courts for *combatants* found outside of the United States is appropriate, the Uniform Code of Military Justice, Article 18, provides full court-martial jurisdiction and well-established trial procedures. Court-martials, providing for adversarial pre-trial investigation; trial procedures providing for a qualified military judge presiding; rules of evidence assuring only relevant and competent evidence is admitted at trial; public trials, consistent with CIPA procedure; and, judicial review of convictions obtained in those trials will not, as the Attorney General recently suggested be a "spectacle." Instead, transparent public trials conducted pursuant to established law, under procedures applied equally to American service personnel, that are fair and perceived to be fair, will ensure that the results are accepted by world observers as more than "victor's justice."

For non-citizen residents tried pursuant to presidential accusation, federal courts are fully capable of providing justice, as the recent World Trade Center bombing trial demonstrated. Exigency is no reason. to abandon exemplary American judicial process. Further, eroding the rights of a small class of accused U.S. residents upon bare accusations threatens the liberty of us all, as Thomas Paine observed: "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." Congress rightly should exercise its oversight to prohibit employment of military commissions within United States borders and require that military trials conducted outside the United States comply with present notions of due process provided in courts-martial.

Article by William Glaberson, The New York Times, December 2, 2001

THE LAW

TRIBUNAL COMPARISON TAINTS COURTS-MARTIAL, MILITARY LAWYERS SAY

Former military lawyers say they are angered by a public perception, fed most recently by the top White House lawyer, that the military tribunals authorized by President Bush are merely wartime versions of American courts-martial, a routine part of military life with a longstanding reputation for openness and procedural fairness.

In fact, the proposed tribunals are significantly different from courts- martial, the lawyers say, adding that confusion between the two has distorted the debate over the tribunals and unfairly denigrated military justice.

"It bothers me that people are thinking we try thousands of people this way in the courts-martial system," said Ronald W. Meister, a New York lawyer who is a former Navy lawyer and judge.

"We do nothing of the sort," he said. "These commissions are a totally different animal."

John S. Cooke, a retired Army judge who is the chairman of the American Bar Association's committee on armed forces law, said military courts had been tainted by association with the tribunals, which many commentators, politicians and civil libertarians criticized as an effort to find a foolproof shortcut to a guilty verdict.

"There's been a lot of talk about military kangaroo courts," Mr. Cooke said. "Having grown up in the courts-martial system, I'm rather offended by it, because it is a good system that provides more than adequate due process for the men and women in our military service."

Standard military courts closely resemble civilian courts in many ways, Mr. Cooke said. He added that they offered many of the fundamental protections that critics had said the president ignored in his Nov. 13 order authorizing the military tribunals. Courts-martial, for example, are governed by rules of evidence similar to those in civilian courts. They give defendants full rights to appeal a conviction, require proof of guilt beyond a reasonable doubt and require a unanimous decision to impose the death penalty.

But those and many other protections were missing from the sketchy outline of the tribunals proposed in the president's order. The administration is working on more detailed rules, and officials have said the criticism is premature.

But the order specified some details that distinguished the tribunals from courts-martial. The order Tribunal Comparison Taints Courts-Martial, Military Lawyers Say provides, for instance, that sentences—apparently including the death penalty—can be imposed by a two-thirds vote of the tribunal members.

In courts-martial, the rules limiting the kind of evidence that can be heard are as strict as they are in civilian courts.

Hearsay, for example, is limited in both civilian courts and courts-martial because it is often unreliable. But the president's order suggested that any evidence—apparently including hearsay would be admitted if it had "probative value to a reasonable person."

ite the differences between the systems, administration officials have sometimes seemed to confuse the two.

In an Op-Ed article in The New York Times on Friday, Alberto R. Gonzales, the White House counsel, defended the commissions, saying they would be fair.

Mr. Gonzales continued with an assertion that appeared to liken the commissions to courts-martial.

"The American military justice system is the finest in the world," he wrote, "with longstanding traditions of forbidding command influence on proceedings, of providing zealous advocacy by competent defense counsel and of procedural fairness."

Some critics say the administration appears to be fostering the confusion to blunt criticism of the tribunals.

"The confusion benefits the administration," said Eric M. Freedman, a professor of constitutional law at Hofstra University School of Law in Hempstead, N.Y. "If the government can spread the impression that the tribunals are like the courts-martial, that would allay many fears."

In the battle of perception, both sides have been making statements that may not be accurate. Critics have said tribunals will conduct "secret trials."

Mr. Gonzalez wrote that the commissions "will be as open as possible," though the president's order permits closed proceedings.

It is not yet clear how far the administration will go in closing proceedings. But lawyers say the issue of whether the trials will be public also shows the differences between the two military systems.

Courts-martial, like civilian courts, are presumed to be open, and judges close them only in extraordinary circumstances.

Last spring, news organizations from all over the world attended preliminary hearings in the military justice system for Cmdr. Scott D. Waddle, the commander of a Navy submarine that accidentally sank a Japanese fishing trawler off Hawaii in February.

By contrast, the last time the United States used military commissions, German saboteurs were tried, convicted and sentenced to death in closed proceedings in Washington in World War II.

Some lawyers say such contrasts show how different the two systems are.

They say the administration seems unaware that trials that appear to include shortcuts to win convictions may raise suspicions around the world.

Edward F. Sherman, a former Army lawyer who was until recently the dean of Tulane Law School in New Orleans, said a prominent example was that under the president's order, defendants in the tribunals might not be permitted to select their own lawyers.

Defendants in courts-martial are allowed to do so.

Mr. Sherman said that and many other omissions raised questions about how commission trials would be perceived.

"If it appears they're assigning lawyers and just going through the steps and then imposing the death penalty," Mr. Sherman said, "there would be questions around the world about whether these kinds of trials comport with the basic due process we expect in our legal system."

RANDALL B. HAMUD
SAN DIEGO, CA 92101
November 29, 2001

Honorable John Ashcroft
Attorney General of the
United States Department of Justice
Room 4400
950 Pennsylvania Avenue N. W.
Washington, D.C. 20530–0001

Re: Civil Rights Violations of Arab/Muslim Detainees Mohdar Abdallah and, Osama Awadallah

Dear Mr. Ashcroft:

During your news conference on November 27th, you stated that you were unaware of any civil rights violations having befallen any of the approximately 1,200 people arrested as part of your dragnet of Arabs and Muslims. You further stated that all of the persons arrested were entitled to family visits and had counsel or the opportunity to retain counsel. Moreover, you expressed hope that "those who make allegations about. . .violation. . .of an individual's civil rights would not do so. . .without specificity. . . ."

You were mistaken about the absence of civil rights violations, and you were mistaken about family visits and contact with counsel. At your invitation, I take this opportunity to provide you with the specifics which you claim to lack even though your subordinates have been aware of them since their occurrence. For example, during the news conference two FBI agents in the company of Mr. Jesse Berman, Esq., Mr. Awadallah's criminal defense attorney in New York, were at the New York Metropolitan Correctional Center (hereinafter "MCC") interviewing Mr. Awadallah about the violation of his civil rights while in federal custody.

First, I begin by stressing that since their arrest as "material witnesses" on September 21, 2001, my clients' civil rights have been repeatedly violated by the incarcerating authorities, i.e., the prison officials and the local offices of the United States Attorney. Those violations began almost immediately when each of them was denied any opportunity to call a lawyer after his arrest in spite of having received Miranda warnings.

Mr. Awadallah's family retained me on the afternoon of the 21st to represent him. When I was finally able to interview him at MCC San Diego on the morning of September 22nd, he reported to me that he had requested to call an attorney, that his

request had been denied, and that he was told that he would be taken to New York and jailed for "a year,"

I was unable to interview Mr. Awadallah on the 21st" because when I visited the San Diego MCC that evening, I was initially told by the prison guards that no such person was there. I knew otherwise. Coincidently, that same afternoon I had been at the FBI headquarters on another matter; and the agents with whom I was dealing had confirmed that Mr. Awadallah had been arrested and was at MCC. After one and one-half hours of cajoling the FBI from my cellular telephone in front of MCC, I was finally told that, indeed, Mr. Awadallah was there and that I could see him. When I was finally directed to the attorney interview room on the third floor, I found a young man whom I thought to be Mr. Awadallah, whom I had never met.

The young man proceeded to tell me that he had been arrested that afternoon as a material witness; that he had requested to call and attorney; that his request had been denied; and that he was told that he would spend the next year in jail in New York. Then we discovered that he was not Mr. Awadallah. He was Mohdar Abdallah. Notwithstanding that the incarcerating authorities had been denying him the opportunity to contact an attorney, one was now in his presence. Suffice it to say that he immediately retained me.

After completing my initial interview of Mr. Abdallah, I went back downstairs and explained the mistake to the prison guards. I informed them I now represented Mr. Abdallah and requested to see my other client, Mr. Awadallah, I was told to leave the prison immediately. My protests were futile, and I left. I was finally saw Mr. Awadallah on the morning of September 22nd.

Even after assuming a documented representational role of behalf of my clients, time and again the incarcerating officials have interfered with the former's ability to communicate with me and with my ability to with visit them. While they were material witness detainees, my clients were never allowed to call me by telephone when they needed to speak with me. And several times, I was denied access to them when I attempted to visit them both at MCC in San Diego and at MCC in South Manhattan.

As the Attorney General of the United States, you should be especially sensitive to the importance of a represented inmate's right to free and unobstructed access to his or her attorney. Time and again, that has not been the case relative to my clients when they were being held as material witnesses. On September 23, 2001, I visited MCC in San Diego and was told that neither of them was there. After more cellular-telephone cajoling with the FBI, I was told that, in fact, they were there and that I could see them. I note that their presentation to the magistrate was scheduled for September 24th. This was a deliberate attempt by the incarcerating authorities to interfere with my preparations for their coming court appearances. After completing of the magistrate's appearances on September 25th, sometime between that day and September 27th they were spirited out of MCC in San Diego. Not until the morning of October 1st did I learn that they were in New York. Both of my clients informed me that daring their transit to New York they had repeated requested to contact me and that their requests had been denied. Similarly, between October 24th and November 5th, when Mr. Abdallah was returned to San Diego to face incidental immigration charges, he again was denied any opportunity to call me while in transit. I had no idea of his whereabouts until he turned up in San Diego on the morning of November 5th.

And I note that after Mr. Awadallah completed his material witness testimony in New York on October 15th and was rearrested and charged with allegations of misrepresentation before the grand jury, both Mr. Berman and Mr. Awadallah have encountered similar obstacles. I enclose for your information a copy of Mr. Berman's letter of November 12, 2001, addressed to the Honorable Shira A. Scheindlin, District Court Judge, in which he catalogues his many complaints and frustrations. Note that his complaints include the inability of Mr. Awadallah to call Mr. Berman, the refusal to allow Mr. Berman to see Mr. Awadallah, and the continuing refusal of the incarcerating officials to allow Mr. Awadallah family visits. As October 23th, Mr. Berman was denied access to Mr. Awadallah,

This inappropriate behavior by the incarcerating authorities made Mr. Berman's preparation for the November 21st bail hearing even more problematical. It was as though the government was deliberately doing everything that it could to prevent him from fully preparing his client and his witnesses for that hearing. Such conduct is almost beneath comment.

An even more egregious violation of Mr. Awadallah's civil rights occurred on the afternoon of October 4, 2001. At that time, Mr. Berman and I observed bruises on Mr. Awadallah's upper right arm, neck, wrists, and ankles. Mr. Awadallah informed us that the guards had hurt him.

We observed his injuries during a 2:00 p.m. proffer session in a fifth-floor conference room at the offices of the United States Attorney in South Manhattan, 500 Pearl Street. Present at the session were the following United States Attorneys: Robin Baker, Chris Marvillo, and Rob Spencer. Also present were FBI agents Adam Cohen, Jacqueline McGuire, and Ryan Plunkett. All of them observed the bruises, as Mr. Berman and I pointed them out to those present. Further, at that time Mr. Awadallah told us that earlier that day he had been taken to the prison dispensary for xrays to determine whether he had any broken bones. And a blood sample had been taken from him, and possibly, he had received some sort of injection. In our presence, he still wore a bandage over the needle sticks) in his left arm vein.

I was quite distressed at seeing his injuries. You see, on the morning of October 2nd before court proceedings were convened in South Manhattan, Mr. Awadallah had informed me that he had been beaten by the prison guards. Because of the order sealing those proceedings, I am not at liberty to disclose the substance of what occurred after I discovered this information. However, as the Attorney General of the United States, you may obtain this information by reviewing the transcripts of those proceedings. I invite you to do so.

On the afternoon of October 4th I informed Ms. Baker and the others present that I wanted my clients moved from MCC before any further injuries were inflicted on any of them. I gave them twenty-four hours within which to do so. The next day, I was informed by Ms. Baker that my clients would not be moved. My response was to publicize the incident that afternoon in the hope that publicity would prevent further brutality. Apparently I had some modicum of success, as Mr. Awadallah later reported to me that a physician had examined him, that a prison official had met with him and given him tips about placating his guards, and that his physical treatment had somewhat improved. My thanks to the Fourth Estate.

Finally, regarding my clients' overall treatment while at MCC's in San Diego and New York, I have several other complaints. In addition to the earlier discussed denial of family visits, they were denied television and radio privileges; reading and writing materials; mail privileges; and meals in conformity with their Muslim faith. I know full well that "kosher" meals, which my clients may eat, are available at both facilities and that such meals were repeatedly denied to them. As recently as November 5th, when meeting with Mr. Abdallah at the federal court holding facility in San Diego, he was served a ham sandwich for lunch. Further, at MCC in New York, the guards constantly harassed my clients and the other material-witness Arab/Muslim inmates by referring to them as "f ——— ing terrorists;" by making sexually inappropriate remarks to them when they are stripped naked and videotaped several times a week (for security purposes?); and by mocking and denigrating their religious practices (e.g., forcing them to replace the sheet on their bed whenever they were attempting to use it as a rug on which to conduct their Muslim prayers), and their Prophet (Praise be I-iis Name). I believe that one of my clients best described their conditions on incarceration. when he stated that "people in this country treat their animals better than we were treated."

Before closing, please let me comment about your observation on November 27th that the absence of any civil rights lawsuits pertaining to detainees like my clients led you to believe that no civil rights violations had occurred. As an attorney, you know full well that the timing of such lawsuits depends on many factors other than your own impression about when they should be filed. And you also know that many of these proceedings remain under seal, which complicates any immediate filings.

But let me assure you, sir, that such lawsuits are being readied. They are a natural consequence of your own words and deeds. As you yourself have said, "all possible measures are being taken to detect and prevent future attacks to both incapacitate and deter would be terrorists." You have chosen to do by casting a nationwide dragnet woven from the threads of racial, ethnic, and religious profiling. You have chosen to do by advising your President to eavesdrop on the communications between profiled inmates and their attorneys. You have chosen to do so by casting aside the United States Constitution and the finest criminal justice system in the world and advising your President to empanel military tribunals for the trial and probable execution of accused who will have no right of judicial review. Doubtlessly, at the appropriate time and in the appropriate venues, the offices of the United States Attorneys across this great country will be very busy in the courts responding to the multitude of lawsuits engendered by your misguided policies.

In conclusion, I hope that I educated you regarding the civil rights violations that have befallen my clients. I am certain that their situations are the rule rather than the exception among those presently incarcerated. I leave it to you to determine henceforth whether such violations will remain the rule rather than the exception. And a final note of legalese'. this letter is for informational purposes and is not to be construed to be a formal claim prefatory to the filing of any lawsuit against the

federal government or any other state or local entity or any individual. If necessary, such formal claim or claims will be later filed under separate cover.

Very truly yours,

RANDALL B. HAMUD

CC:

Sen. Patrick Leahy, Chair
Senate Judiciary Committee
By Facsimile: 202-224-9516 (w/encls)

Senator Russ Feingold
By Facsimile: 202-224-2725 (w/encls.)

Representative Bob Barr
By Facsimile: 202-225-2944 (w/encls.)

Jesse Berman, Esq.
By Facsimile: 212–941–0980 (w/o encls.) encls.

JESSE BERMAN, ATTORNEY AT LAW
NEW YORK, NEW YORK 10013
November 12, 2001

Hon. Shira A. Scheindlin
United States Court House
500 Pearl Street
New York, NY 10007

Re: *U.S.* v. *Osama Awadallah* 01 Crim. 1026 (SAS)

Your Honor:

As the November 21, 2001, bail hearing in this matter approaches, I want to provide an update on the status of my attempts (1) to have Mr. Awadallah be allowed to telephone me t at my office and (2) to have the MCC officials approve Mr. Awadallah's family so that they could visit him prior to the bail application.

The history surrounding these two questions is as follows:

The government has known since October 4, 2001, that I am Mr. Awadallah's attorney: I represented him at his October 4, 2001, proffer session with the government: I represented him at his October 10 and 15, 2001, appearances before the grand jury; I represented him at his October 16, 2001, appearance before Judge Mukasey; and I represented him at his October 19, 2001, appearance before Magistrate Judge Gorenstein. On that same day, I filed my notice of appearance on behalf of Mr. Awadallah with the clerk of the Court.

In mid-October 2001, Mr. Awadallah (who has been held in solitary confinement since September 21, 2001) filed with hi' counselor at MCC, Mr. Santiago, a written request that his father, Ismail Awadallah, and his brother, Jamal Awadallah (both of whom are United States citizens), be permitted to visit him.

On October 23, 2001, I attempted to visit Mr. Awadallah at MCC and was denied access to him. After I waited in the ground-floor lobby of MCC for an hour, I was permitted to speak over the telephone to Les Owen, the in-house legal counsel at MCC. Mr. Owen, who refused to emerge from his ground-floor office to see me face-to-face, said that the government had not yet informed MCC that I was Mr. Awadallah's lawyer. I asked Mr. Owen to phone the magistrate's clerk's office, where my notice of appearance on behalf of Mr. Awadallah was on file. He refused, stating that only the U. S. Attorney's office, and not the Court, would tell MCC who could visit anyone.

On November 1, 2001, I visited Mr. Awadallah at MCC, on 9 South, the Special Housing Unit. I asked the officers on 9 South if Mr. Awadallah's family had been approved to visit him. I was told to check with Counselor Santiago. Counselor Santiago was not in the counselor's office at that time. I was also told by the 9 South officers that Mr. Awadallah was allowed to phone me if he gave 48 hours written notice.

On November 2, 2001, I phoned Mr. Santiago. Again I was told that he was not in his office at the time. I left Mr. Santiago a clear message to call me. He has never returned my call.

On that same day, I phoned MCC counsel Les Owen and left him a message to call me. He has never returned my call.

When I raised these issues in court on November 5, 2001, the Court suggested that AUSA Robin L. Baker look into it. On November 6 or 7, 2001, 1 phoned Ms.

Baker. She said she had spoken to Mr. Owen, who had informed her that Mr. Awadallah is *not permitted to phone me at all*, since my office is not out of town. Ms. Baker said that Mr. Owen would be writing me a letter explaining this policy. Mr. Owen has never written me.

I visited Mr. Awadallah today at MCC, on 9 South. Prior to going up to 9 South, I asked the lobby desk officer whether Mr. Awadallah's family had been approved yet to visit him. He said that they had not been approved yet, because the computer had been down for the past three weeks.

Mr. Awadallah's brother, Jamal Awadallah, is flying here from San Diego on November 19, 2001. The family is of modest means, and airline tickets purchased on short notice at Thanksgiving time are, of course, very expensive.

I am requesting this Court to intervene to the limited extent of directing that Mr. Awadallah and his brother and I be permitted to meet on November 20, 2001 at MCC or, if that is impossible, at the court house, so that we might prepare for the bail hearing of November 21, 2001.

Respectfully yours,

JESSE BERMAN

cc: AUSA Robin L. Baker

Article by Hon. Orrin Hatch, in USA Today, December 6, 2001

THREAT WARRANTS LEEWAY

OPPOSING VIEW: ADMINISTRATION'S USE OF LAWFUL POWERS FOLLOWS THE CONSTITUTION.

America is at war. Our adversary is a global terrorist organization that has imbedded hundreds of "sleeper agents" in America. These "sleeper agents" have killed thousands of Americans and stand ready to launch further attacks if given the chance.

The American people understand the threat we face. They know our leaders are acting out of a sincere concern for both our security and our liberty. They understand we must do everything in our power, consistent with our Constitution, to protect ourselves from those who aim not to change our way of life but to kill as many of us as possible. And they agree with noted Harvard law professor Lawrence Tribe when he arms that "Civil liberty is not only about protecting us from our government. It is also about protecting our lives from terrorism."

The Senate Judiciary Committee recently held oversight hearings concerning the administration's efforts to protect America from terrorists. Those hearings culminate today with an appearance by the attorney general. He will confirm what countless other legal experts already have told the committee: The administration has aggressively used every lawful power at its disposal to investigate and prevent terrorist attacks. These powers are appropriate given the threat we face. And the use of these powers military commissions, alien detention and monitoring communications of suspected terrorists and their attorney agents does not violate our Constitution.

Military commissions have been used since George Washington used them in the Revolutionary War. They have been used by other presidents including Franklin Roosevelt They have been authorized by Congress and repeatedly approved by the Supreme Court for use in trying war criminals.

The 608 people detained by the justice Department have been detained for criminal offenses, immigration violations or because they are material witnesses in the terrorism investigation. The detainees have access to attorneys and to our courts. Independent federal judges have ruled that these individuals should not be released on bond. Publishing detainees' names would jeopardize the terrorism investigation, endanger lives and violate detainees' privacy. Ironically, the same civil liberties groups demanding publication of the detainees' names previously opposed the publication of the names of convicted sexual predators.

The Justice Department's regulation lawfully allows the monitoring of conversations between extremely dangerous federal prisoners and those attorneys suspected of carrying messages for them. The Constitution does not require that we allow terrorists to conduct their murderous operations from within our prisons.

Yes, the administration has been aggressive in using the Constitutional powers at its disposal to protect Americans. But given what happened Sept. 11, wouldn't it be unforgivably derelict if it did not?

Sen. Orrin Hatch, R-Utah, is ranking minority member of the Senate Judiciary Committee.

Statement of the Heritage Foundation, by David D. Rivkin, Jr*., Lee A. Casey, and Darin R. Bartram, Washington, D.C.

BRINGING AI-QAEDA TO JUSTICE: THE CONSTITUTIONALITY OF TRYING AI-QAEDA TERRORISTS IN THE MILITARY JUSTICE SYSTEM

EXECUTIVE SUMMARY

As the United States and its coalition partners execute diplomatic, financial, and military responses to the September 11 terrorist attacks, the legal options regarding the trial of members of the alQaeda terrorist organization are being increasingly discussed.[1]. As many as 1,000 individuals have been detained by law enforcement authorities in this country in response to the attacks.[2] Reports that some of them may have been directly involved in the September 11 conspiracy or were planning to carry out similar terrorist acts add a particular urgency to the discussion.[3] Attorneys have been appointed for, or employed by, those who have been detained, and legal proceedings likely have begun with respect to their detention. At some point in the near future, the executive branch will likely have to decide whether to release them, deport those that are subject to deportation, or charge them with a crime. With respect to the last option, the government will have to decide what charges to bring against them and W what court system.

Some commentators have suggested that members of al-Qaeda apprehended in or extradited to the United States should not be treated as ordinary criminal defendants, but instead tried in military courts, either by regular courts martial or by specially constituted military commissions. Media reports indicate that this issue is already being considered by, among others, the staff of the Senate Committee on the Judiciary.[4]

From the government's perspective, the use of the military justice system to try al-Qaeda members involved in terrorist acts on behalf of a hostile foreign power offers several advantages. In particular, trials before military tribunals need not be open to the general public and they may be conducted on an expedited basis, permitting the quick resolution of individual cases and avoiding the disclosure of highly sensitive intelligence material, which would have to be made public in an ordinary criminal trial. A number of government officials have indicated that the previous trials of terrorist defendants, including the 1993 bombers of the World Trade Center, resulted in damaging disclosure of information on intelligence sources and methods, investigative techniques, and other matters that have made it more difficult for the United States government to uncover and prevent such plots in the future.[5]

Under the Uniform Code of Military Justice (UCMJ), and military court decisions interpreting it, the accused enjoy extensive due process protections, but their rights are not coextensive with the protections civilians enjoy in normal criminal trials

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*David B. Rivkin, Jr., Lee A. Casey, and Darin R. Bartram practice law in the Washington office of Baker & Hostetler, LLC. They frequently write on constitutional and international law issues. Messers. Rivkin and Casey served in a variety of legal positions in the Reagan and Bush Administrations.

[1] Osarna bin Laden, the acknowledged leader of the al-Qaeda network, may be killed in the fighting. If he is captured, the United States and other countries involved have several legal options available to them regarding his trial. *See infra*. But the legal analysis in this memorandum would apply to bin Laden if he were extradited to and tried within the United States.

[2] Neil A. Lewis, "Detentions After Attacks Pass 1,000, U.S. Says," *The New York Times*, October 30, 2001.

[3] Philip Shennon and Don Van Natta, Jr., "U.S. Says 3 Detainees May Be Tied to Hijackings," *The New York Times*, November 1, 2001.

[4] Richard Willing, "Feds Explore How to Try Terrorism Suspects," *USA Today*, October 15, 2001, at 13A.

[5] Although some measures can be, and have been, taken to protect classified evidence in the context of criminal trials, e.g., the Classified Information Procedures Act of 1980 (CIPA), 18 U.S. C. App. §§ 1–16, constitutional imperatives ensure that the judicial proceedings in the ordinary federal courts cannot go too far down this path. The CIPA primarily constrains pretrial "discovery" opportunities. In the normal federal courts, the CIPA does not substantially alter the government's obligation under Article III of the U.S. Constitution and the Sixth Amendment to conduct a "public trial" and present to the jury, in open court, the facts on which it is relying to establish a defendant's guilt.

held in the United States. Military tribunals are not required to offer the same due process rights guaranteed by the Constitution in Article III, the Fourth, Fifth, Sixth, and Fourteenth Amendments, as well as those articulated in various judicial decisions interpreting those constitutional provisions. For example, the precise contours of the Fourth Amendment exclusionary rule that flowed from *Mapp* v. *Ohio*, 367 U.S. 643 (1961), and later cases do not apply in military courts, although military court decisions have imposed an analogous exclusionary rule in courts martial. It is, of course, possible for the President to incorporate all of the due process protections of the UCMJ and related legal precedents, or a great number of them, into any specially constituted military tribunal. Nevertheless, any al-Qaeda defendant will almost certainly object to the jurisdiction of a military commission and argue that he is entitled to trial in a non-military court with exactly the same protections as other civilians.

As a result, the constitutional basis for the use of military commissions, or even of regular courts martial, to try members of al-Qaeda must be carefully considered. Although the practical benefits of military trials may be obvious, their use with respect to individuals not regularly enrolled in a military force represents a clear departure from normal legal processes in the United States and from some of its most fundamental judicial traditions. In addition, there could be diplomatic difficulties and other costs associated with trying al-Qaeda terrorists by military tribunal. If intelligence sources and methods would not be compromised by a public trial and the risk of additional terrorist actions were not substantial, the United States might prefer a public trial so that the rest of the world can evaluate the strength of the evidence against each defendant.

For the foregoing reasons, this memorandum is not intended to present an argument for or against the use of military tribunals to try al-Qaeda terrorists; instead, it merely presents an analysis of the constitutionality of that option. In the end, only the executive branch will possess the necessary information to weigh the potential harm to America's intelligence apparatus and other risks of along public trial against the foreign policy ramifications or other potential effects of a military trial.

BRIEF SUMMARY

It has long been recognized that the Constitution, in Justice Arthur Goldberg's much-quoted phrase," is not a suicide pact,"[6] and that the government enjoys extraordinary power during wartime. As Chief Justice William Rehnquist has noted:

> In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts in favor of order—in favor of the government's ability to deal with conditions that threaten the national well-being.[7]

At the same time, limiting the due process rights, particularly the right of public trial by jury, of individuals accused of capital crimes is a grave and extraordinary measure involving procedures that the Supreme Court has approved in only very limited circumstances. In particular, the only case in which the Supreme Court explicitly upheld the constitutionality of trying individuals, who were apprehended in the United States and who were not regularly enlisted in the armed forces of the United States or some other power by military commission, was decided during the summer of 1942—a time soon after the entry of the United States into the World War II.

When the Supreme Court rendered this decision, *Ex parte Quirin*,[8] the United States was engaged in a formally declared war, a point noted by the Court. To date, Congress has not declared war with respect to the armed conflict between the United States and al-Qaeda's primary state sponsor, Afghanistan's ruling Taliban; and there appears to be no immediate plan to do so. This raises difficult questions regarding whether America is nevertheless in a state of war for certain constitutional purposes, and if so, with whom it is at war. We believe the Supreme Court would defer to Congress's determination of those issues in a formal declaration of war and uphold the trial of saboteurs and spies, like those in Quinn, who violate the laws of war on behalf of a hostile foreign power.

Although our focus in the rest of this memorandum is on the question of whether al-Qaeda members apprehended in the United States, or extradited to the United States, can be tried by military commission in the absence of a declaration of war, it is likely that the Supreme Court would allow the trial overseas by military com-

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[6] *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 159–160 (1963).

[7] William Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Alfred A. Knopf, 1998), p. 222.

[8] 317 U.S. 1 (1942).

mission of al-Qaeda members captured in Afghanistan, regardless of how it would treat defendants in this country. As discussed more fully later in this memorandum, international law would permit such treatment. Moreover, the Supreme Court has approved the use of military commissions to try enemies captured overseas for violations of the laws of war.[9] In addition, the Court has suggested that a broad range of individuals (including "civilians") may be subject to military justice in an actual theater of operations.[10]

Whether the United States may constitutionally subject individuals associated with the alQaeda network to trial by military commission in the United States in the absence of a formally declared war is far less clear. There certainly is some support, based upon the applicable rules of international and constitutional law, for the proposition that a formal declaration of war by Congress would, in the current situation, be unnecessary to such proceedings, because a "state of war" between the United States and Afghanistan can nevertheless be said to exist. Much of Quinn's reasoning does not depend on a formal declaration of war, and there are other historical precedents that would support the creation of military tribunals to try al-Qaeda terrorists.

At the same time, it has long been recognized that the authority available to the government in time of an "undeclared" or "limited" war is less expansive than that available during a declared war. Moreover, in the past 50 years, the Supreme Court has become more protective of civil liberties, and it is less likely to defer as extensively to the political branches in time of war or national emergency as it once did. Thus, heavy reliance on historical examples from the 19th century or one decision from the mid-20th century is ill advised.

In the absence of a formal declaration of war, we simply cannot predict with a high degree of certainty which way the Supreme Court would rule. Because the matter is in doubt, we believe that Congress should formally declare war before the United States resorts to the use of military commissions, so as to place the use of such extraordinary measures on the best possible legal footing.

LEGAL PRECEDENTS REGARDING THE TRIAL OF CIVILIANS IN MILITARY COURTS

In the past, the United States has treated individuals accused of terrorism as civilians, subject to trial in the federal courts established under Article III of the Constitution, with the full application of the Bill of Rights, including the right to a public trial by jury and the Federal Rules of Criminal Procedure. This was the case, for example, following the first attack on the World Trade Center in 1993. A total of 15 terrorists, including Sheikh Omar Abdel Rahman, an Egyptian cleric and leader of the radical group al-Gaina'a al-Islamiya, were tried and convicted in the course of three trials in federal court in New York. Moreover, such treatment may have been constitutionally mandated, since civilians are not ordinarily subject to military justice and must be tried for federal crimes in Article III courts.

This point was made clear by the Supreme Court shortly after the Civil War (during which civilians were subjected to trial by "military commission" in certain cases) in the landmark case of Ex pane *Milligan*.[11] There, the Court ruled that military justice "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[12]

The *Quirin* Case represents a narrow exception to the rule adopted by the *Milligan* Court that would permit individuals who are not enlisted in a regular military force to nevertheless be subjected to military law, and to be tried by military commissions. In that case, the Supreme Court ruled that eight Nazi agents, who had secretly entered the United States to undertake acts of sabotage, could be tried by a military commission established, pursuant to statute, by President Franklin D. Roosevelt.[13] The Court carefully distinguished *Milligan*, noting that the defendant

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[9] *See In re Yamashita*, 327 U.S. 1 (1946) (Japanese general Tomoyuki Yamashita could be tried by military commission).

[10] See *Reid* v. *Covert*, 354 U.S. 1, 33 (1957) ("In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront. From a time prior to the Constitution the extraordinary circumstances present in the area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.").

[11] 71 U.S. 2 (1866).

[12] Id. at 121.

[13] There is no military tribunal or commission established at this time to try any captured terrorists. However, the President arguably could establish one without seeking additional authority from Congress if the constitutional prerequisites exist. In *Quirin*, the Supreme Court rec-

Continued

there was "a non-belligerent, not subject to the law of war." In *Quirin*, by contrast, the individuals were considered to be "belligerents" or "combatants,"[14] although not formally enlisted in the German Wehrmacht. Thus, they were classified as "unlawful belligerents," subject to trial in military commissions for violations of the laws of war.

It is this authority under which Osama bin Laden and his associates could be subjected to trial by military cormnission. There are, however, two conditions that must be satisfied before such proceedings can be employed. First, the accused individuals must be properly classifiable as "unlawful combatants," a status that only arises in the context of an "armed conflict." Second, the United States must itself be in a "state of war."

ARE MEMBERS OF AL-QAEDA "UNLAWFUL COMBATANTS"?

Under the traditional rules of international law, individuals who engage in warlike activity, but who do not enjoy the immunities associated with enlistment in a lawful military organization, are treated harshly. As explained by Emmerich de Vattel, a leading 18th century scholar of international law who had a profound influence on the Framers of the U.S. Constitution:

> 11When a nation or a sovereign has declared war against another sovereign by reason of a difference arising between them, their war is what among nations is called a lawful war, and in form; and as we shall more particularly shew the effects by the voluntary law of nations, are the same on both sides, independently of the justice of the cause. Nothing of all this takes place in a war void of form, and unlawful, more properly called robbery, being undertaken without right, without so much as an apparent cause. It can be productive of no lawful effect, nor give any right to the author of it. A nation attacked by such sort of enemies is not under any obligation to observe towards them the rules of wars in form. It may treat them as robbers. The city of Geneva, after defeating the attempt of the famous Escalde hung up the Savoyards, whom they had made prisoners, as robbers who had attacked them without any cause, or declaration of war. Nobody offered to censure this proceeding, which would have been detested in a formal war.[15]

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ognized that the Constitution "invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect. . .all laws defining and punishing offenses against *The Law of Nations*, including those which pertain to the conduct of war." 317 U.S. at 26. At that time, the Court found it unnecessary to determine whether the President had inherent authority to constitute a military tribunal to try the saboteurs, because he had been expressly given this authority by Congress through the Articles of War. See 317 U.S. at 27 (citing Articles of War 12, 15). The same relevant provisions of the Articles of War have been carried over into the Uniform Code of Military Justice (UCMJ). See 10 U.S.C. §§ 818, 821; see also Michael A. Newton, Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes, 153 *Mil. L. Rev.* 1, 4 (1996) ("American commanders have authority to convene a general courtrnartial or a military commission to punish foreign nationals who violate the laws of war during an international armed conflict."); Marc L. Warren, Operational Law: A Concept Matures, 152 *Mil. L. Rev.* 232, 305 (1996) ("The United States refrained from trying any of the [Somali] detainees (many of whom were unlawful combatants or common criminals) by military commission or general court-martial as it could have under Articles 18 and 21 of the UCMJ and under the law of anned conflict."). While the use of the existing military court martial system to try al-Qaeda members would not present any constitutional issues that are different from those implicated by the use of military commissions, UCMJ strictures specifically define categories of persons who may be tried by courts martial, and unlawful combatants do not appear to fit into any of the current categories. See 10 US. C. § 802 . Congress could, of course, amend the UCMJ to remove this obstacle. Moreover, nothing prevents the President, having created a specialized military commission to deal with unlawful combatants, to instruct it to operate in accordance with the standard procedures followed by courts martial.

[14] For the purposes of this discussion, the terns "belligerents" and "combatants" are interchangeable. "Belligerents" was more in vogue during an earlier era, but carries no different meaning in the authorities cited herein.

[15] Emmerich de Vattel, *The Law of Nations*, 481 (Luke White ed., Dublin 1792). The *Quirin* Court noted a number of later authorities supporting the general proposition that "unlawful" combatants are generally considered to be subject to summary disposition. See 317 U.S. at 35–36 & n.12. See also Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, reprinted in 7 John Moore, *A Digest of International Law* § 174 (1906) (" [m] en, or squads of men, who commit hostilities. . .without being part and portion of the organized hostile army, and without sharing continuously in the war, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.").

Whether, under current international norms, an unlawful combatant may be killed out of hand, as Vattel suggests, is highly debatable.[16] Nevertheless, it is clear that such individuals—both substantively and as a procedural matter—are not entitled to the same rights as lawful combatants (who must be treated as prisoners of war), or of non-combatants.

"*Lawful Combatants*." The question of who is an "unlawful combatant" depends, in the first instance, on who qualifies as a "lawful combatant." Although irregular or "guerrilla" forces are not automatically excluded from this category, in order to be treated as "lawful combatants" or "lawful belligerents" (entitled to be treated as such under the laws and customs of war), a group must meet the following basic requirements according to the governing Hague Convention:

1. They must operate under a recognizable command structure;
2. Their members must wear a uniform or other "fixed distinctive emblem recognizable at a distance";
3. Their members must carry arms openly; and
4. They must conduct their operations in accordance with the laws and customs of war.[17]

The al-Qaeda organization, although it may or may not satisfy the first requirement, obviously fails to meet the last three. As a result, its members may be treated as "unlawful combatants" under international law.

Similarly, under United States domestic law, al-Qaeda's members also may be considered to be "unlawful combatants." The United States became a party to the Hague Convention (IV) on January 26, 1910, and the definitions contained in that instrument are fully applicable under U.S. law. They also are entirely consistent with the working definition of "unlawful combatant" adopted by the Supreme Court in *Quirin*. There, the Court explained that "unlawful combatants" are individuals who associate themselves with an enemy of the United States and who:

> [d]uring time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property.[18]

The members of al-Qaeda who carried out the September 11 attacks, and their surviving compatriots, clearly entered the United States out of uniform and for the purpose of committing hostile acts involving the destruction of life and property here.[19] The critical question, however, is whether they acted as enemies of the United States during "time of war."

DOES A STATE OF WAR EXIST?

INTERNATIONAL LAW

Under both international and domestic law, the laws of war apply from the beginning of an international armed conflict until its conclusion.[20] There is little doubt

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[16] Protocol I Additional to the Geneva Conventions of 1949, which the United States has never ratified, but which embodies norms of customary international law in at least some respects, suggests that even unlawful combatants must be treated "humanely" and provided with certain basic due process guarantees. See Protocol I Additional to the Geneva Conventions of 1949, Art. 75(1) (4). This instrument does not, however, suggest that the use of a military tribunal or commission to try unlawful combatants would be impermissible.

[17] See Annex to Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907), Art. 1. It should be noted that this requirement refers to the actions and institutional policy of the group involved, rather than to the acts of individuals. An individual may qualify as a lawful combatant, being associated with an armed force with a recognizable command structure, wearing distinctive emblems, carrying arms openly, and conducting its operations in accordance with the laws of war, and still be subject to prosecution for "war crimes" based on individual actions.

[18] 317 U.S. at 36.

[19] Some authors have suggested that, given the gravity of offenses committed by terrorists of various stripes and the serious threat they pose to the security of the United States, all such persons should be tried by military commissions. See Spencer J. Crona, "Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism," 21 *Okla. City U. L. Rev.* 349 (1996). However, there is no support, either in the Constitution or in the Supreme Court's precedents, for subjecting individuals, who do not otherwise qualify as unlawful combatants on behalf of a hostile foreign power, to such proceedings. Civilians, even those accused of "terrorism," like Timothy McVeigh or Theodore Kaczynski, who do not fall within the category of unlawful combatant as defined by international law, must be tried in Article III courts.

[20] See Yamashita, 327 U.S. at 11–12. The issue here is more complex when a noninternational, or "internal" armed conflict, such as a civil war, is at issue. In such cases, the conflict must reach a certain level of intensity and duration before the laws of war will apply. See Anto-

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that, as an international law matter, an armed conflict now exists between the United States and, at a minimum, the Taliban regime in Afghanistan, and that this conflict has existed at least since September 11, 2001.

This assessment is true even though the actual individuals who carried out the September 11 attacks appear to have been members of the al-Qaeda terrorist network. Al-Qaeda operates freely in Afghanistan with the knowledge, blessing, and support of the Taliban authorities. It controls a number of military bases in that country, and recent reports suggest that al-Qaeda may actually be the senior partner, vis-a-vis the Taliban, in controlling Afghanistan.[21] Significantly, al-Qaeda forces are engaged together with Taliban forces in fighting the Northern Alliance, a loose coalition of resistance fighters. Moreover, the Taliban's most elite military unit, the 55th Brigade, is said to be comprised mostly of al-Qaeda members.[22]

There clearly is an identity of interest and action between al-Qaeda and the Taliban sufficient to justify the United States in characterizing the attacks of September 11 as an "act of war" and to justify a military response. Here, an analogy may be drawn to the response of the United States to the depredations of the Barbary pirates, operating out of Tripoli, in 1802. At that time Congress, on February 6, 1802, authorized the President to use force, including all "acts of precaution or hostility as the state of war will justify, and may, in his opinion require." Moreover, America's NATO allies have accepted this characterization and have, accordingly, taken action to "operationalise" Article 5 of the North Atlantic Treaty, which requires that an "armed attack" against one member of the alliance is to be considered an attack on all.[23]

The fact that the United States has not chosen to declare war on Afghanistan, the Taliban, or alQaeda does not change the conclusion under international law that a state of war exists. International law has long recognized that "a formal declaration is not necessary to constitute a state of war,"[24] and, in particular, that an anned attack creates a state of war without the necessity of the defending state declaring war. Again, to quote Vattel: "[h]e who is attacked and makes only a defensive war, need not declare it, the state of war being sufficiently determined by the declaration of the enemy, or his open hostilities."[25]

Consequently, as a matter of international law, the United States is at war and would be fully justified in treating the al-Qaeda members it encounters (and any Taliban forces who do not behave in a manner so as to qualify as lawful combatants) as "unlawful combatants," subject to proceedings before a military court.

U.S. DOMESTIC LAW

Whether a "state of war" can be said to exist between the United States and the Taliban/alQaeda as a matter of U.S. domestic law, however, is a more difficult question.

Although the *Quirin* Court made clear that a "state of war" was necessary before individuals arrested in the United States could be subjected to trial by military commission, it did not specifically address the question of how this state of war was to be brought about. The text of the Constitution, however, does specifically address

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nio Cassese, "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law," 3 *Pac. Basin L. J.* 55, 105, 112 (1984); "The Spanish Civil War and the Development of Customary Law Concerning Internal Anned Conflicts," *Current Problems of International Law: Essays on United Nations Law and the Law of Armed Conflict* 288 (A. Cassese ed., 1975).

[21] See Bob Woodward, "Bin Laden Said to 'Own' the Taliban," *The Washington Post*, October 11, 2001, at Al.

[22] In addition, since 1996, al-Qaeda has carried out a number of armed attacks against the United States, including the destruction of U.S. embassies in East Africa; assaulting an American warship, the *U.S.S. Cole*, in the harbor of Aden, Yemen; and the bombing of the Khobar Towers in Dhahran, Saudi Arabia, which housed hundreds of U.S. service members. The Taliban was fully aware of each of these actions and yet failed to take action against alQaeda. Although a high level of control and coordination may generally be necessary in order to attribute the actions of a "client" organization to a supporting state, see *Nicaragua* v. *United States* 1986 I.C.J. 14 (Merits) (Jun. 27, 1986) (suggesting the need for a high level of dependence and control before acts of irregular forces may be attributable to supporting state), that level appears to be fully present in this case.

[23] See Statement by NATO Secretary General, Lord Robertson, on the North Atlantic Council Decision on Implementation of Article 5 of the Washington Treaty following the I I September Attacks against the United States, October 4, 2001.

[24] 7 Moore, *supra* note 14, at 171.

[25] Vattel, *supra*, at 478. At the same time, a formal declaration offers a number of tangible legal and practical benefits. In particular, it removes all doubt regarding the rights and obligations of both the belligerents and neutral states—which are far more ambiguous, or at least open to contest, in the context of an undeclared war.

this issue—it grants to Congress the power to "declare war."[26] By that phrase, the Constitution's Framers understood the power to create a state of war between the United States and another power, for they carefully distinguished this power from the power to "make" war, i.e., to use military force, which is vested in the President as Chief Executive and Commander in Chief of the armed forces.[27] This division of authority made eminent sense, since, unlike the use of armed force, a formal declaration of war worked a number of important legal changes (permitting, for example, the expulsion or internment of enemy aliens and the seizure of their property) more appropriate to the legislative, rather than the executive, branch.

The actual meaning of this constitutional provision, however, became a matter of dispute almost immediately among the Founding generation itself. For example, in 1793 James Madison and Alexander Hamilton clashed, in the "Helvidius/Pacificus" debate, over whether President Washington had the power, on his own authority, to issue a proclamation of neutrality with respect to the war between Britain, her allies, and Jacobin France. These early disagreements included the question of whether a declaration of war was necessary for any U.S. military action. During the conflict between the United States and the Barbary Pirates, for instance, the Jefferson Administration evidently took the position that a declaration by Congress was necessary before the United States could seize Algerian vessels on the high seas. Alexander Hamilton took particular umbrage at this view, writing that a state of war "between two nations is completely produced by the act of one—it requires no concurrent act of the other." He further noted that the Constitution did not incorporate such a rule, claiming that "[t]he framers of it would have blushed at a provision, so repugnant to good sense, so inconsistent with national safety and inconvenience. . . .[W]hen a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at war, and any declaration on the part of Congress is nugatory: it is at least unnecessary."[28]

Hamilton's view, at least for certain purposes, prevailed. The Supreme Court recognized very early that some form of a "state of war" could exist without a formal declaration by the United States.[29] Barely 10 years after the Constitutional Convention, a naval war erupted between France and the United States—the so-called Quasi-War. In two cases involving the disposition of ships captured by the U.S. Navy during this conflict, the Supreme Court acknowledged that the United States could wage a limited war, which was not based on a formal declaration, but was instead governed by several federal statutes. It made clear, however, that a limited war brought only restricted war-related powers into play. As explained by Justice Chase in *Bas* v. *Tingy*

Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects and in time. If a general war is declared, its extent and operation are only restricted and regulated by the jus belli, forming a part of *The Law of Nations*; but if a partial war is waged, its extent and operation depend on our municipal [domestic] laws.[30]

Similarly, as Justice John Marshall explained in *Talbot* v. *Seeman*

The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry. It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities, in which case the general laws of war apply to our situation; *or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed*.[31]

Thus, although the United States government can only obtain all of the potential "war powers" available to it under the Constitution through a formal declaration of war, it may nevertheless exercise some lesser measure of that power during a partial or limited war.[32] With respect to any particular power, the test articulated by

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[26] U.S. Const., Art. I, § 8, cl. 11.

[27] See James Madison, Notes of Debates in the Federal Convention 476–77 (Koch ed., 1966).

[28] See Alexander Hamilton, "The Examination, No. 1, 17 Dec. 1801," reprinted in, 3 The Founder's Constitution (Kurland & Lemer eds. 1987).

[29] The Supreme Court also has recognized that a "state of war" could be created by the actions of another power. *See The Pedro*, 175 U.S. 354, 363 (1899) (recognizing that war with Spain began prior to actual declaration by Congress based upon declaration of Spanish government).

[30] 4 U.S. 37, 43 (1800).

[31] 5 U.S. 1, 28 (1801) (emphasis added).

[32] The Court has indicated, however, that during the limited war the relevant limitations must be scrupulously respected. In *Little* v. *Barreme*, 6 U.S. 170, 177 (1804), for example, the Supreme Court struck down a presidential proclamation authorizing the interception of vessels sailing from or to France, reasoning that Congress had, by statute, allowed only the interception of vessels sailing to French ports.

the Supreme Court is whether it is necessary or "actually applicable" to the level of hostilities Congress has authorized. A reasonable argument can be made that this lesser measure includes the right to subject unlawful combatants to trial by military courts, because the laws of war dealing with unlawful combatants are so basic to any level of hostilities-dealing with the questions of who may lawfully take part in a conflict, and how they must be treated upon capture or defeat—that they always apply when the United States is engaged in an armed struggle. This would support the legality of subjecting unlawful combatants, such as the members of alQaeda, to trial by military courts where Congress has authorized hostilities, even though it has not formally declared war.[33]

Nevertheless, subjecting civilians—even as unlawful combatants—to military justice, and particularly to the type of military commission at issue in *Quirin*, is an extraordinary measure in recent times. Military commissions were used in such conflicts during the early- to mid-19th century. In 1862, for example, 37 Dakota Sioux Indians were executed in Minnesota. These individuals were tried before a five-member military commission for the massacre of settlers along Minnesota's western borderlands.[34] Yet, there are relatively few instances of such proceedings since the 1860s. *Quirin* represents the only instance in which the Supreme Court specifically approved, in the face of a constitutional attack, the use of military commissions in the United States to try individuals not otherwise subject to military justice. Moreover, in the years after *Quirin* was decided, the Court returned to a far more circumspect attitude toward the government's ability to employ military justice vis-a-vis individuals not actually enrolled in military service. In *Reid* v. *Covert* (1952),[35] for example, the Court ruled that the civilian dependents of armed service members, even when overseas, could not be subjected to military courts, noting that:

> the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language of Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.

Moreover, the fact remains that the *Quirin* Court itself addressed a situation that involved a formally declared state of war. Following Hitler's declaration of war on the United States on December 11, 1941, Congress immediately declared that a state of war existed between the United States of America and the government of Germany, in addition to authorizing the President to use "the entire naval and military forces of the government to carry on war against the Government of Germany." This fact was noted by the *Quirin* Court in its decision, in particular with respect to its discussion of the constitutional issues presented by that case:

> The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against *The Law of Nations*, including those which pertain to the conduct of war.[36]

Citing other opinions from World War I and II, Chief Justice Rehnquist recently wrote that "[w]ithout question the government's authority to engage in conduct that infringes civil liberties is greatest in time of declared war."[37] Thus, it is possible that the Court would have reached a different conclusion i11 1942 if Congress had not invoked the full war powers available to the United States, under the Constitution as well as *The Law of Nations*, through a formal declaration of war. Although Congress, in its Joint Resolution of September 18, 2001, has invoked a broad range of the war powers of the United States, authorizing the President "to use all nec-

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[33] It should also be noted that the Supreme Court has ruled that the United States could be considered to be "at war" without a formal declaration in the case of undeclared or "limited" wars with the Indian Tribes. See *Montoya* v. *United States*, 180 U.S. 261, 267 (1901) ("We recall no instance where Congress has made a formal declaration of war against an Indian nation or tribe; but the fact that Indians are engaged in acts of general hostility to settlers, especially if the Government has deemed it necessary to dispatch a military force for their subjugation, is sufficient to constitute a state of war.").

[34] See generally, Carol Chomsky, "The United States-Dakota War Trials: A Study in Military Injustice," 43 *Stan. L. Rev.* 13 (1990) (criticizing the practice of using military tribunals for this purpose).

[35] 354 U.S. at 21.

[36] 317 U.S. at 26 (emphasis added).

[37] Rehnquist, *All the Laws But one, supra* at 218.

essary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on Sept. 11, 2001," it has not formally declared a state of war to exist.

Perhaps even more important than the precise differences between the current situation and that in 1942 is that the Supreme Court has become far more protective of civil rights and civil liberties in the past 50 years. It can even be said that it views the protection of civil rights and civil liberties as its special and unique role in the national government and the federal scheme. The *Pentagon Papers* case is an example of how much more protective of civil liberties the Court was in 1971 than it was earlier in the century. The national security risk posed by the disclosure of a classified history of America's involvement in Vietnam was probably far greater than that posed by journalists and pamphleteers opposed to World War I. Nevertheless, the Court refused to defer to the judgment of the executive branch in 1971 and created a standard that was either impossible for the government to meet (in the case of two concurring justices) or was at least much more difficult to meet.[38]

Indeed, Chief Justice Rehnquist ends his book on civil liberties in wartime by contrasting the modern Court with earlier judges who seemed to adopt the Latin maxim, Inter arma silent leges: In time of war the laws are silent. His concluding remarks have an independent significance given his role on the High Court.

[T]here is every reason to think that the historic trend against the least justified of the curtailments of civil liberty in wartime will continue in the future. It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the court on the basis for the government's claims of necessity as a basis for curtailing civil liberties. The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.[39]

Given the evolution of the Supreme Court's exercise of authority, we believe some justices of the Supreme Court today might not reaffirrn *Quirin* even if the facts were identical to that in 1942. This may also render earlier historical precedents of limited value in predicting which way the modern Court would rule.

Despite this evolution in the Supreme Court's independent role, we believe a majority of the Court today would feel constrained to follow its decision in Quinn if Congress declared war on the Taliban/al-Qaeda. But the absence of a formal declaration of war might lead several justices to distinguish *Quirin*, even if we believe the distinction is not constitutionally significant. Modern judicial activists have discarded far more established and well-reasoned cases than *Quirin*. Thus, in the absence of a formal declaration of war, we simply cannot say with a high degree of certainty which way the Court would rule.

CONCLUSION

Although Congress has not yet issued a formal declaration of war, there is no doubt that, as a matter of international law, an armed conflict currently exists between the United States and the Taliban/alQaeda regime in Afghanistan. It also is clear that members of al-Qaeda have acted as "unlawful combatants." Whether they can be treated as unlawful combatants under the domestic law of the United States, and be subjected to trial by military courts or commission, however, depends upon whether a "state of war" exists pursuant to the United States Constitution.

There is very early support in the judicial precedents of the Supreme Court, actually decided during the active political careers of the Constitution's Framers, suggesting that a "state of war" can exist between the United States and a foreign power without a formal declaration of war by Congress, albeit of a limited character. Since the question of who is a lawful and unlawful combatant is central to the law of war, whenever it is applicable, it can reasonably be argued that an undeclared war is sufficient, as a matter of constitutional law, to justify the use of military commissions to try such individuals in the United States.

At the same time, the use of military courts to try non-military personnel is an extraordinary process that has been used in only very limited circumstances during U.S. history. The only direct and definitive authority permitting such trials remains the Supreme Court's decision in *Ex parte Quirin*. That case involved a state of for-

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[38] *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). It is true that the *Pentagon Papers* case involved a prior restraint of speech, and this does distinguish it somewhat from the facts of the World War I cases, but the majority that ruled against the United States in 1971 would not have likely upheld the conviction of Jacob Abrams in 1919. A simple comparison of the majority's discussion of the issues in *Abrams* v. *United States*, 250 U.S. 616 (1919) with that in the *Pentagon Papers* case will reveal a marked difference i11 the deference the Court accords the executive branch.

[39] Rehnquist, *All the Laws But one, supra* at 224–25.

mally declared war, and this point was noted by the Court as part of its ruling. Other practical questions might arise in the absence of a formal declaration of war, including with whom the United States is at war. A formal declaration of war would resolve such questions and allow the President to try al-Qaeda terrorists-who have violated the law of wars in military tribunals.

In the absence of a formal declaration, we believe the correct constitutional answer is less clear, and that it is even less obvious how the Supreme Court would rule. Thus, we believe a formal declaration of war should be sought before the United States employs military courts to try al-Qaeda members.[40] This would place such tribunals, which clearly represent a departure from this country's normal legal processes and traditions, on the best possible constitutional basis.

Statement of Charles D. Siegal, Munger Tolles & Olson, Los Angeles, CA, on behalf of Human Rights Committee

INTERNATIONAL LAW AND CONSTITUTIONAL LAW RAMIFICATIONS OF THE PRESIDENT'S

Military Order of November 13, 2001 I Dear Senator Leahy, Senator Feinstein and Other Members of the Judiciary Committee:

The Human Rights Committee of the American Branch of the International Law Association writes to express its views concerning the November 13, 2001 Military Order on The Detention, Treatment, and Trial of Certain Non-Citizens In The War Against Terrorism ("Order"). For the reasons that follow, we consider the Order to be in violation of long-standing principles of international law and to raise significant and troubling United States constitutional law concerns.

The Human Rights Committee of the American Branch of the International Law Association ("Human Rights Committee") has a longstanding interest in the progressive development of the international legal order, the rule of law and the protection of fundamental human rights. It is comprised of individuals from the academic, public and private sectors who have extensive experience in the field of international law and, specifically, human rights law. Members of the Human Rights Committee have taught subjects such as international law, foreign relations law, human rights law and constitutional law and have written extensively in these fields. They have participated extensively at the trial and appellate court levels, including the United States Supreme Court, and have litigated cases involving the tights of aliens under domestic and international law. In the past, members of the Committee have testified before the Foreign Relations Committee of the United States Senate on a variety of issues, including human rights treaties.

The Human Rights Committee would like to express its serious concerns regarding the—Order. While the Committee recognizes the importance of the struggle against terrorism, eve have substantial concerns that the Order violates the United States' obligations under international law and the Constitution.

1. INTERNATIONAL LAW

Military tribunals are generally suspect under human rights treaties, international criminal law, and under established human rights law. We consider the Order to be in clear violation of each of those bodies of law.

A. HUMAN RIGHTS LAW

1. Due process

The Order fails to comply with Article.14 of the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party and which sets forth a minimum set of customary and treaty-based human rights to due process guaranteed to all persons by customary international law, the ICCPR, and thus also by and through Articles 55(c) and 56 of the United Nations Charter. This treaty has become increasingly important as a source of human rights and the United States should, as a matter of policy, and must, as a matter of legal obligation, follow it.

[40] It should be noted, however, that once a state of war is formally declared, there appears to be no requirement that Congress declare war against each state in which al-Qaeda operatives may be discovered. Once Congress has invoked the full range of war powers by a formal declaration, those powers would continue to apply until the armed conflict is concluded. During this period, under *Quirin*'s teaching, anyone who actually qualifies as an unlawful combatant in the context of that conflict could be subjected to trial by military commission.

The rights guaranteed by the ICCPR include the right to a fair hearing by an independent and impartial tribunal, the right to know, the charges, the right to have defense counsel of choice, the right to examine and cross examine witnesses, the right to present witnesses and other evidence, and the right to an appeal to a higher tribunal. The Order fails to meet the ICCPR's minimum due process requirements in virtually all respects.

The Order is also defective as it is overly broad and open-ended, with no defined standards of uniform application. Under this Order, the Secretary of Defense is empowered to be the sole authority to decide if there is reason to believe that any non-United States citizen (including long-time United States lawful permanent residents) anywhere in the-world might have committed or attempted to commit "violations of the laws of war and other applicable laws." Individuals who are deemed subject to this Order include any non-citizen who has "aided or abetted, or conspired to commit acts of international terrorism. . .that threaten to cause or have as their aim to cause. . .adverse effects on the United States foreign policy or economy."

Under the language of the Order, a long-term United States permanent resident who has. . .written articles and made speeches criticizing the foreign policy of the United States and calling for a worldwide boycott of American-made products and for other forms of direct action might be subject to prosecution before a 'military court. It is not enough to say that no United States Secretary of Defense would be so rash or foolish enough to pursue such a prosecution. The fact—that such an act could be treated as a terrorist act subject to the jurisdiction of the specially created military tribunal proves the point that such a system lacks the checks and balances necessary to prevent such an injustice.

The Order denies the accused the basic international human right to appellate review. The Order dispenses with the need for a unanimous verdict by providing that a conviction and sentence, including the death penalty, maybe imposed upon only a two-thirds vote. This is in sharp contrast to the procedures followed not only by our federal and state courts, but also by our military courts under the Uniform Code of Military Justice. We note that Section 836 of the United States Code, relied upon by as authority for the Order, requires that military commissions shall, if practicable, apply the -principles of law and the rules of evidence recognized in the trial of criminal cases in the United States district courts. Nowhere does the Order articulate a basis why it is not practicable to apply the principles of law and-rules of evidence followed in the district counts. Indeed, the recent successful prosecution in the Southern District of New York of the perpetrators of the African Embassy bombings demonstrates that the principles and rules followed in the United States district courts can most certainly be applied to other terrorists as well.[1]

2. NON-DEROGATION

Major human rights treaties contain "derogation" clauses that govern the suspension of rights during states of emergency that threaten the life of the nation. The Article 4 of the ICCPR limits derogation as follows:

1. *Rights may be suspended only during a state of emergency that threatens the life of the nation*. To justify a suspension of fair trial rights guaranteed by the ICCPR, the United States must prove that it faces a threat to the life of the nation. This is a very high threshold. An ongoing risk of terrorist violence is a permanent condition for contemporary democratic states. The "life of the nation" is not imperiled by the United States military action in alliance with the Afghan Government.

2. *Certain rights are non-derogable and may not be suspended even if the life of the nation is at stake*. These include, most relevantly in the current context, the right to life; the prohibition on torture and cruel, inhuman and degrading treatment or punishment; the prohibition on retroactive criminal penalties; the right to recognition as a person before the law; and freedom of thought, conscience, and religion.

3. *Derogation measures may not be applied in a discriminatory manner*. Where rights are suspended during a genuine state of emergency, derogation measures may not be applied in a manner that discriminates on the basis of race, color, sex, language, religion, or social origin.

4. *Any derogation measures must be strictly required by the exigencies of the situation*. The ICCPR and regional human rights treaties establish a very strict rule of proportionality to emergency measures taken in derogation of human rights. Only measures that are vital to preserving the life of the nation are permitted.

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[1]Further, with respect to prisoners of war, the Order is violative of the 1949 Geneva Prisoner' of War Convention, especially articles 102 and 130.

5. *Measures in derogation of the right to fair trial and the right to take judicial proceedings to determine the lawfulness of detention are strictly limited and largely forbidden*. has been suggested that his military commissions are necessary to protect jurors, However, there is no evidence that jurors in prior cases against Al Qaeda operatives have been menaced in any way. Successful prosecutions for Al1 Qaeda crimes have recently been completed both in Los Angeles and in New York. The federal courts are actively processing charges against persons arrested in the post-September 11 dragnet. The United States Government may find these prosecutions to be inconvenient, especially where it lacks evidence of the detainee's guilt-This is why the derogation clause of the ICCPR is narrowly written,

The Administration has also suggested that one purpose of the commissions is to permit the use of coerced testimony inadmissible under the Fifth Amendment. The desire to use secret evidence is also cited, although the ordinary federal courts have provisions for use of classified information in carefully delineated circumstances.

Decades of practice under the derogation clauses of human rights treaties have resulted in the emergence of important principles that apply to the Order. The Human Rights Committee, the UN treaty body that implements the ICCPR, issued an interpretive "General Comment" on the derogation clause in August 2001. Relevant passages of General Comment No. 29 state:

> Measures derogating from the provisions of the Covenant must be of am exceptional and temporary nature. . . .
>
> Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation. . . .
>
> It is inherent in the protection of (non-derogable] rights that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. . . . Thus, for example, as article 6 [on the right to life] is non-derogable in its entirety, any trial leading to the imposition of the death penalty-during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 [fair trial] and 15 [prohibition on retroactive criminal

Safeguards related to derogation. . . are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State, party's decision to derogate from the Covenant.

The United Nations Human Rights Committee, the European Court of Human Rights, and the Inter-American Court of Human Rights have examined many situations involving purported emergencies. A-recurring issue has been the trial of civilians, suspected of terrorist offenses, by secret military tribunals. For example, Peru. has been condemned by the Inter-American Court for this practice. An American citizen, Lori Berenson, was convicted of terrorist offenses by Peruvian "faceless judges" in a proceeding criticized by the United States. . . Government as a deprivation of fundamental human rights. When Turkey obtained custody of Abdullah Ocalan, the notorious leader of the PKK with a "terrorist" reputation to rival that of Osama Bin Laden, it placed him on trial before a National Security Court, but quickly amended its legislation to provide that only civilian judges could preside and held the trial in public. International human rights officials were given access to Ocalan in order to insure that he was not subjected to torture or cruel treatment The legality of Ocalan's trial remains under consideration by the European Court of Human Rights.

6. *No derogation is valid unless the state proclaiming the emergency provides official ' notification of the provisions from which it has derogated and of the reasons why it imposed these speck emergency measures.*

B. Humanitarian Law

Military commissions may be established in the aftermath of international armed conflict to try persons who have committed war crimes or crimes against humanity in connection with the conflict. The Nuremberg Tribunal is one example. * Military commissions were also established under Control Council Law No. 10 to try Nazi

war criminals, some of whom were civilians who. . . had committed crimes against humanity, such as enslavement, as part of the Nazi war effort. . . Trial by such military commissions was approved in *In re Yamashita*, 327 U.S. 1 (1946). The—defendant in *Yamashita* was a Japanese general charged with war crimes—a combatant enemy alien in a declared international armed conflict. It is noteworthy that *Yamashita* appears in the. same volume of the United States Reports as *Duncan* v. *Kahanamoku*, which struck dozen trials by military commissions of civilians charged with common crimes committed in the "theater of war."[2]

The United States could request the United Nations Security Council to establish an *ad hoc* international criminal tribunal to try crimes against humanity and other crimes of international significance committed by members of Al Qaeda or other suspected terrorists. Such trials Would be conducted in compliance with principles of international law relating to fair trial, as described below. The United States may not create it own *ad hoc* commissions, lacking guarantees of fundamental fairness, as an alternative, simply because terrorist crimes are perceived as unusually grave or difficult to prosecute. The United States should apply to Al Qaeda the policies it has willingly and successfully advocated for other groups that have committed gross violations of human rights, The International Criminal Tribunals for Former Yugoslavia and Rwanda have performed valuable services both in bringing violators of international criminal law to justice and in setting standards for the proper trial of suspected violators. A similar tribunal for suspected terrorists would serve the same salutary function.

II. Constitutional Law

The Order raises serious constitutional concerns. Those concerns include:

Whether the President may, without the approval by Congress, suspend habeas corpus? In Ex pane Milligan, 71 U.S. 22 (1866) the Supreme Court ruled that the military lacks any constitutional power even in a time of war to substitute its tribunals for civil courts that are open and operating, and held that only Congress may declare martial law. The Court subsequently reaffirmed this bedrock constitutional principle in the World War II era case of *Duncan* v. *Kahanmoku*, 327 U.S. 304 (1946), when it invalidated the Governor of Hawaii's suspension of the writ of habeas corpus and.the implementation of military tribunals:

> Only when a foreign invasion or civil war actually closes the courts and renders it impossible for them to administer criminal justice can martial law validly be involved to suspend their functions. Even the suspension of power under those condition is of a most temporary character.

Whether the President can create military commissions for use in a non-war context for prosecution of nonbelligerents for crimes other than war crimes? Case law indicates that whatever powers the President may have as Commander in Chief to order trial by a military. commission, such powers do not extend beyond wartime or a war context. The Order is open ended and contains no such limitations. Indeed by the President's own admission, the "war" on terrorism is without apparent end and is envisioned to last for the indefinite future. Without a formal declaration of war, there can be no official declaration of peace, and the Order might remain in effect for generations, to come.

Whether the proposal to subject civilians to trial by military commission violates the text of the Fifth Amendment? The amendment reads: "no person shall be held to answer for a capital 1or otherwise infamous crime unless on presentment by a grand jury, except in-cases arising in the lancer or naval forces, or in the militia, when in actual service in time of war or public danger, nor be deprived of life, liberty, or property, without due process of law" (emphasis added). The argument is made that if United States military personnel are subject to military justice, then foreign terrorist suspects can expect no better. This argument fails for two reasons: (1) the Constitution itself authorizes courts martial for United States service personnel and does not authorize military trials for civilians suspected of terrorist or other common crimes;[3] (2) the military commissions envisioned in the November 13 Order lack the protections guaranteed to military defendants in courts martial.

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[2]One, of the habeas corpus petitioners in *Duncan* was convicted of assaulting military police at a shipyard; the other was convicted of fraud. The Court recognized that Hawaii was in the "theater" of the Second World War, but held this fact did not justify trial by military commission where the civil courts were capable of functioning.

[3]Common crimes" is a legal term denoting criminal offenses that are not war crimes or political offenses. "Common crimes" may of course be unusual or extraordinary, as were the attacks of September 11. Some crimes committed by terrorists are "international," in one of two re-

Continued

Whether proposed defendants who are not "enemy aliens" may be subject to military trio? Ex parte Quirin, 317 U.S. 1 (1942), provides. no support for the Order. The defendants, in Quirin were enemy aliens tried for war crimes. "Enemy aliens" is a technical legal term that denotes citizens of a state with which the United States is at war. They are subject to special. treatment under international law and United States statutes dating back as early as 1798. The Supreme Court based its finding of legality in Quirin squarely upon the international law of war, as it then existed. The Court emphasized the status of the defendants as enemy combatants, in a declared international armed conflict, who had forfeited their status as prisoners of war by removing their uniforms and engaging in acts of sabotage.

None of the proposed defendants in the Commissions is an "enemy alien." Nor is the Order limited to those enemy aliens charged with war crimes committed in the context of any armed conflict, either international or internal.[4] Indeed, Zacarias Moussaoui, reportedly a prime target of the Order, is a citizen of France.[5] He was admitted to the United States and was. detained in August 2001 in Minnesota for suspected violations of the immigration laws. He is not a combatant in any armed conflict. According to news reports, it appears that the Administration lacks sufficient evidence to try him in federal court. for any crime.

The United States is not at war with Afghanistan. United States military action in Afghanistan is being undertaken *in alliance with* the recognized Government. The United States has for many years recognized the Rabbani Government, and never recognized the Taliban as the lawful regime. The consistency of this United States position is reflected in the fact that the United States never placed Afghanistan on the State Department's list of "state sponsors of terrorism." Even after the imposition of UN sanctions against the Taliban for harboring Osama Bin Laden following his indictment for the 1998 embassy bombings, the Secretary of State refrained from adding Afghanistan to the list of state sponsors of terrorism because the Taliban did not wield "state" authority in Afghanistan.

As was the case with Panama at the time of the United States invasion, the *de jure* Rabbani regime in Afghanistan lacked control over most of the nation's territory at the time the United States intervened militarily. Acting in concert with elements allied with the *de jure* regime, the United States altered the situation on the ground so as to take control from a de facto regime (Manual Noriega, in the case of Panama; the Taliban, in the case of Afghanistan). Once seized, Panamanian General Noriega was tried by a federal district court, receiving the full protection of the Bill of Rights. He was not charged with "war crimes" and was not tried by a military commission. The use of military force to effect his arrest had no impact on his treatment, other than certain details concerning his conditions of detention (Noriega claimed to be a "prisoner of war"). The fact that Noriega's prosecution took place in the context of a metaphorical "war on drugs" was of no legal significance.

Whether non-citizens possess the same constitutional rights as citizens when subjected to criminal prosecution? The Order is defended on.the ground that it does not apply to United States citizens. Over a century ago, in the midst of the racist, anti-immigrant "Chinese exclusion". era, Congress enacted a statute subjecting undocumented Chinese immigrants to one year of imprisonment at hard labor, without providing a criminal trial with all the guarantees of the Bill of Rights. The United States Supreme Court invalidated this statute, in *Wang Wing* v. *United States*, 163 U.S. 228 (1896), as a deprivation of the immigrants' constitutional rights. In the rnidst of the Cold War, the Supreme Court described *Wong Wing* as standing for the principle that "Under our law, the alien in several respects stands on an equal footing with citizens. . . .[I]n criminal proceedings against him he must be accorded the protections of the Fifth and Sixth. Amendments." *Harisiades* v. *Shaughnessy*, 342 U.S. 580 (1952). The Order cannot be sustained on any theory that foreigners

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spects: (1) crimes such as airplane hijacking are the subject of treaties obligating states parties to prosecute or extradite suspects, regardless of the location where the crime was committed (universal jurisdiction and the principle of *out dedere out judicare*); (2) deliberate and systematic or widespread attacks against civilians by organized non-state entities may be "crimes against humanity" as defined in Article 7 of the Statute of the International Criminal Court (ICC Statute) These crimes are not "war crimes," however. "War crimes" are only those *committed in the context* either of international armed conflict (a conflict *between* two or more states) or an internal armed conflict. Article 8 of the ICC Statute defines a long list of war crimes and explicitly states that it. "does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."

[4] The list of 93 persons charged with criminal offenses in the post-September 11, roundup; issued by the Department of Justice on November 27, 2001, reveals no charges relating. to war' crimes or linked to armed conflict of any type.

[5] Don van Natta, Jr., "Debate Centers on Which Court Will Decide Fate of Arab Man," N.Y. Times, Nov. 22, 2001, B6.

who are not enemy aliens can be deprived of trial in the civil courts and subjected to military commissions, any more easily than citizens. The principle of equal protection under the Bill of Rights for non-citizen criminal defendants is deeply grounded in United States Constitutional law, and has been categorically affirmed by the Supreme Court during previous periods of harsh measures against perceived foreign threats to national security.

Whether Article III forbids the president to send these criminal cases to military commissions? Pursuant to Article III of the Constitution, Congress has the authority to establish the lower federal courts. Only Article III courts staffed by judges with lifetime tenure and protection against salary reduction may hear "Article III cases," which include prosecutions for federal crimes. There are only three exceptions to this principle: territorial courts, courts martial, and cases involving public rights such as federal benefits. The proposed military commissions are not courts martial; they provide far fewer guarantees of fairness than those established.in the Uniform Code of Military Justice, and they are designed to exercise jurisdiction over civilians. Quirin suggests an exception for war crime trials of enemy aliens during international armed conflict, but as explained above that situation does not exist in the United States at the present time.

The Order is designed to strip the federal courts of their jurisdiction over certain federal crimes, and to commit these cases to trial by commissions established by executive fiat. The Order violates Article III in depriving the defendants of their constitutional right to be tried by Article III judges. Those judges have lifetime tenure precisely to insulate them from political pressure and to insure that unpopular defendants receive justice. The Order further violates Article III by invading the exclusive power of Congress to define the jurisdiction of the federal courts, and by invading the province of the federal judiciary to exercise the jurisdiction Congress has conferred upon it to try federal crimes.

Whether the Military Commissions lack constitutional protections essential to protect against conviction and execution of the innocent? Every single Constitutional guarantee intended to prevent the conviction and punishment of the innocent is deliberately sacrificed in the design of the Commissions. There is no indictment by grand jury, no jury trial, no presumption,. of innocence, no privilege against self-incrimination, no public trial, no right to counsel, of the defendant's choosing, no right to confront the evidence against one, no right to trial by an independent and impartial judge, no right to be convicted only by proof beyond a reasonable doubt. Conviction and death sentence may be imposed by two-thirds of the hand-picked commission members. There is no appeal. There are no rules of evidence. It is unclear what substantive law of crimes the commissions will apply. If the commissions create their own criminal code and apply it retroactively to detainees, the United States Government will also violate the prohibition on *ex post facto* laws. Congress possesses the exclusive authority to define federal crimes.

For all of these reasons we believe that the Order to be in violation of international and constitutional law principles. We urge the President to rescind this order and to rely on the authority of the Federal court system to prosecute persons accused of terrorism.

Very truly yours,

CHARLES D. SIEGAL, CHAIR

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Statement of Human Rights Watch, Washington, D.C.

PAST U.S. CRITICISM OF MILITARY TRIBUNALS AND DENIAL OF DUE PROCESS ABROAD

Under President Bush's November 13th Executive Order on military commissions, any foreign national designated by the President as a suspected terrorist or as aiding terrorists could potentially be detained, tried, convicted and even executed without a public trial, without adequate access to counsel, without the presumption of innocence or even proof of guilt beyond reasonable doubt, and without the right to appeal.

The U.S. State Department has repeatedly criticized the use of military tribunals to try civilians and other similar limitations on due process around the world. Indeed, its annual Country Reports on Human Rights Practices evaluate each country on the extent to which it guarantees the right to a "fair public trial"—which it defines to include many of the due process rights omitted by the President's Executive Order. The Order may make future U.S. efforts to promote such standards appear hypocritical. Indeed, even if its most egregious failings are corrected in subsequent regulations, the text of the Order may become a model for governments seeking a legal cloak for political repression.

Several countries about which the State Department has expressed concern include:

Burma: The State Department described the Burmese court system, in its most recent Country Reports as "seriously flawed, particularly in the handling of political cases," where trials are not open to the public and military authorities dictate the verdicts. SLORC Order 7/90 allows commanders to try Buddhist clergy members before military courts for "activities inconsistent with and detrimental to Buddhism." The Burmese government justifies all such trials by citing threats to national unity and security.

China: The State Department has documented numerous means by which Chinese officials undermine due process. The United States has criticized China's system in part because defendants do not enjoy a presumption of innocence or its corollary rights, such as habeas corpus, standard of guilt, or the burden of proof necessary to ensure it. Trials involving national security, espionage or state secrets are conducted in secret. The government has broad authority to define crimes that endanger "state security" as it sees fit. Police can monitor client counsel meetings and defendants are not always allowed to confront their accusers. The most recent Country Reports state that, "the lack of due process is particularly egregious in death penalty cases." The lack of procedural safeguards has enabled China to engage in crackdowns on dissent that the United States has condemned, including a crackdown in predominantly Muslim areas that has "failed to distinguish between those involved with illegal religious activities and those involved in ethnic separatism or terrorist activities," as the State Department's annual report on religious freedom concluded in 2000.

Colombia: Colombia's use of faceless prosecutors, judges, witnesses and attorneys in cases of narcotics trafficking, terrorism, kidnapping, subversion and extortion during the early and mid-1990s has been criticized in the Country Reports. The 1996 Report noted that, "it was still difficult for defense attorneys to impeach or cross-examine anonymous witnesses, and often they did not have unimpeded access to the State's evidence."

Egypt: The most recent Country Reports criticized the manner in which military tribunals were used to try a wide range of offenses in Egypt, from non-violent dissent to acts of terrorism. The judges in these trials are military officers appointed by the Ministry of Defense. Verdicts may not be appealed, and are subject to review only by a panel of other military judges and then confirmed by the President. In 2000, two members of the "Islamic Gihad group in Egypt" who had been sentenced by military courts to death in absentia were executed. Civilians are often referred to military courts, some accused of membership in organizations that do not advocate or practice violence, but which are illegal. The 2000 Country Report stated that "this use of military courts. . .has deprived hundreds of civilian defendants of their constitutional right to be tried by a civilian judge." It added that "military courts do not ensure civilian defendants due process before an independent tribunal" and that the military officers who serve as judges in these courts "are neither as independent nor as qualified as civilian judges in applying the civilian Penal Code."

Kyrgyzstan: The State Department has noted that in Kyrgyzstan, "the government frequently used the judicial process to eliminate key political opposition figures." Opposition leaders have been tried in closed military courts—although a civilian

may be tried in military courts only if a codefendant is a member of the military. The decision of civilian courts to render an indeterminate verdict back to the Procurator for further investigation may not be appealed. The Country Report also stated that, "in practice, there was considerable evidence of executive branch interference in verdicts involving prominent political opposition figures."

Malaysia: Malaysia's 1975 Essential (Security Cases) Regulations restrict due process by allowing the accused to be held for unspecified periods of time before being charged and by lowering the standards used for accepting self-incriminating statements as evidence. These regulations usually apply only-to firearms cases but may be applied to other criminal cases if the government decides that national security considerations are involved. The most recent Country Reports adds that "even when the Essential Regulations are not invoked, defense lawyers lack legal protections against interference." Many lawyers are charged with contempt of court after filing motions on behalf of their clients, particularly if they bring about allegations of prosecutorial misconduct.

Nigeria: The State Department condemned Nigeria following the conviction and execution of author and minority rights activist Ken Saro-Wiwa and eight other activists before a specially constituted tribunal in which a military officer was one of three judges. The US ambassador was recalled for consultations and sanctions on the Nigerian regime were extended. Special tribunals in Nigeria, including military tribunals, became commonplace during the periods of military rule from 1966 to 1979 and 1983 to 1999, and had jurisdiction over offenses such as civil disturbances, armed robbery, some categories of corruption, coup-plotting, and illegal sale of petroleum. Many military decrees also included "ouster clauses" providing that government decisions could not be questioned in a court of law. In the Country Reports for 1996, the State Department noted that, in Nigeria, "in practice tribunal proceedings often deny defendants due process." In a statement before the House International Relations Committee in 1998, Assistant Secretary of State for African Affairs Susan Rice stated that, "military tribunals denied due process to political and other prisoners" in Nigeria.

Peru: Peru's use of military tribunals to try civilians accused of treason and terrorism has been repeatedly criticized by the State Department. The most recent Country Reports noted that "proceedings in these military courts—and those for terrorism in civilian courts—do not meet internationally accepted standards of openness, fairness, and due process." Treason trials may be held in secret if the courts deem it necessary, and defense attorneys are prohibited from accessing the State's evidence files or questioning military or police witnesses.

U.S. citizen Lori Berenson was tried and convicted of the terrorism-related crime of treason before a military tribunal. The State Department noted that her trial lacked sufficient guarantees of due process, and State Department Spokesman Phillip Reeker in a June 2001 briefing stated that her military trial had "egregious flaws." In 1996, Spokesman Glyn Davies said the United States "deeply regret[ed] that Ms. Berenson was not tried in an open civilian court with full rights of legal defense, in accordance with international juridical norms" and called for the case to be retried in an "open judicial proceeding in a civilian court"—a point repeatedly reinforced by State and White House officials to their counterparts in Peru.

Russia: The arrests and detentions of various government critics, including academics, human rights activists and journalists have been documented in the State Department's Country Reports. Espionage cases in particular have been subject to frequent abuses. In 1999, Igor Sutyagin, a researcher for the USA Canada Institute was detained on espionage charges. The Russian Federal Security Service (FSB) has claimed that Mr. Sutyagin violated a secret Ministry of Defense decree on secrecy. Evidence in his case was secret, and Mr. Sutyagin remains in detention. Other individuals who have been charged with treason include Aleksandr Nikitin, a retired Russian Navy captain and environmentalist. According the most recent Country Reports, "Nikitin's case was characterized by serious violations of due process." The Country Report also expressed concern about the trials of several non-Russians charged with espionage. As in the previous cases, the attorneys had trouble obtaining the details of the charges.

U.S. citizen Edmond Pope, a businessman, was arrested by FSB agents in April 2000, convicted of espionage and sentenced to 20 years in prison for his efforts to purchase Russian technology that reportedly was publicly available, and not classified, as was claimed. His trial took place behind closed doors—a fact protested by the United States.

Sudan: The United States has consistently condemned the government of Sudan for denying defendants the right to a fair public trial. As the 2000 Country Report on Sudan noted: "Military trials, which sometimes are secret and brief, do not provide procedural safeguards, sometimes have taken place with no advocate or counsel

permitted, and do not provide an effective appeal from a death sentence." The State Department has also expressed concern about special three-person security courts in Sudan, on which both military and civilian judges sit, and which deal with violations of constitutional decrees, emergency regulations, some sections of the Penal Code, as well as drug and currency offenses. These courts severely restrict the right of attorneys to effectively defend their clients, although they do permit defendants to appeal their sentences.

Turkey: The State Department has expressed concerns about Turkey's State Security Courts (SSC), which have been used to prosecute leaders of armed political Islamic movement, those associated with armed Kurdish movements, as well as non violent critics of military or government policies. SSC's try defendants accused of terrorism, drug smuggling, membership in illegal organizations, and advocating or disseminating ideas prohibited by law, including those "damaging the indivisible unity of the State." SSC's may hold closed hearings, and also allow testimony obtained during police interrogation in the absence of counsel to be admitted. The verdicts delivered by the SSC may be appealed to only a special department of the Court of Cassation that handles crimes against state security. Military courts may try civilians accused of "impugning the honor of the armed forces" or "undermining compliance with the draft."

Other countries have recently proposed legislation that limit due process. The "Anti-Terrorism, Crime and Security Bill" introduced by the Home Office in Great Britain on November 13 allows foreigners to be jailed without a hearing if police or security officials identify them as potential terrorists. If foreign nationals suspected of terrorism-related activities cannot be removed to their own or a third country due to either administrative problems or provisions of the European Convention on Human Rights that prohibit the removal of those who may be subject to torture, they may be indefinitely detained. On November 19, David Blunkett, Britain's Home Secretary, defended this law by arguing that it was not as severe as the Executive Order recently signed by President Bush.

HUMAN RIGHTS WATCH
WASHINGTON, D.C.
November 15, 2001

President George W. Bush
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear President Bush,

We are writing to express our profound concern with the new Executive Order can the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, issued on November 13, 2001 . We recognize that the existing state of emergency in the United States permits certain derogations of internationally protected human rights. Nevertheless, the broad reach of the executive order sacrifices (ices fundamental rights to personal liberty and to a lair trial that go tar beyond what is permitted even in times of crisis.

The United States has routinely condemned .such gross transgressions of basic due process rights when committed by other governments because they violate binding international law to which the U.S. government and over 140 other governments have subscribed. For example, the United Stales has:

- criticized the military court, in Peru that convicted U.S. citizen Lori Berenson for terrorism without adequate due process indeed, the State Department called on Peru to retry the case "in open civilian court with full rights of legal defense, in accordance with international judicial norms."
- condemned Nigeria for convicting and executing author and environmental activist Ken Saro-Wiwa and eight other activists alter a trial before a special military court appointed by the government.
- criticized the manner in which military tribunals are used to by accused terrorists in Egypt, pointing out in its most recent annual report on human rights in that courtly that "military courts do not ensure civilian defendants' due process before an independent tribunal.
- expressed great cancel shout trials of foreigners, including Americans, for espionage before closed tribunals in Russia.

If the Executive Order is implemented, it will do permanent damage to the United States' ability to champion human lights and the rule of law around the world. It will undercut the U.S. government's efforts to protect tile rights of U.S. citizens before foreign tribunals. And It will undermine tile human rights standards that you have said are key to distinguishing terrorism from lawful conduct.

The Executive Order raises important concerns regarding U.S. obligations under the International Covenant on Civil and Political Rights (ICCPR), which the U.S. ratified in 1992. Article 4 of the ICCPR does permit a state to take measures derogating Iron its obligations under the Covenant in time of public emergency that threatens the life of the nation and is officially proclaimed. The U.S. declaration of a national emergency on September 14 may be considered to have met that condition, although to our knowledge the required formal notification of the U.N. Secretary-General has not Occurred.

However, a state's ability to derogate from the ICCPR is not unlimited. Derogation is never permitted Iron certain rights, such as the right to be free from torture (article 7) and tile prohibition of *ex post facto* laws (article 15). Otherwise, a stale may derogate from its obligations under the ICCPR only "to the extent strictly required by tile exigencies of the situation" and provided that such measures are not inconsistent with its other obligations under international law. The Human Rights Committee, the international body charged with interpreting tile ICCPR and monitoring compliance with it, states in its General Comment on article 4 that "This condition requires that States parties provide careful justification not only their decision to proclaim a state of emergency but also for any specific measures based on such a proclamation. . . .[T]hey must be able to justify not only that such a situation constitutes a threat to the life of the nation. but also that all their measures derogating from the Covenant are strictly required by tile exigencies of the situation."

The U.S. must thus meet a high burden to show that the rights circumscribed under the Executive Order meet the standard for derogating from under the ICCPR. As discussed below the Executive Order fails to meet this burden as it sharply curtails the right to liberty and security of the person under article 9 and the right to a fair trial under article 14. These rights not only are found in international law but are central to the fundamental rights of due process in the United States.

RIGHT TO LIBERTY AND SECURITY OF PERSON

Section 2 of the Executive Order permits the arrest and detention of persons on grounds that are vague mid overbroad. It allows taking a person into custody if the President his "reason to believe" that the individual look part in "acts of international terrorism" against the United States. Because neither tile meaning of "international terrorism" nor the nature of proscribed complicity is defined, the Executive Order is an extreme derogation of the ICCPR article 9 prohibition against arbitrary arrest and detention. Indeed, given the possibility that these provisions could be interpreted to proscribe conduct that was not already criminal, the Executive Order could even run afoul of the ICCPR's non-derogable prohibition of *ex post facto* criminal laws.

In addition, Section 3 of the Executive Order risks rendering ICCPR article 9 effectively meaningless by providing for conditions of detention that are distinct from those under existing U.S. law. Most significant are not the protections afforded detainees—including humane treatment, adequate food and water, access to health care—but those fundamental protections left off the list. There is no requirement, for example, that persons detained under the Executive Order be told the reason for their arrest or be promptly informed of charges against them; that persons deprived of their liberty be brought before a judicial authority who can decide on the lawfulness of their detention; or that those unlawfully arrested or detained shall have an enforceable right to compensation. Effectively the Executive Order allows for the arrest and indefinite detention of persons without charge and without legal recourse should they be unlawfully held. This is a clear abrogation of the fundamental right to liberty and security of person, well beyond the derogation permitted under article 4 of the ICCPR.

RIGHT TO A FAIR TRAIL

Humand Rights Watch believes the open-ended provisions for the trial of persons under the Executive Order also exceed the limits of acceptable derogation of the right to a fair trial under international law. Although the mere establishment of a military commission and various procedures set out in the Executive Order are not necessarily in violation of international law, the absentee of key provisions regarding certain fundamental rights is a basis for extreme concern.

Section 4 of the Executive Order states that at a minimum all trials shall be "full and fair," but leaves the specifics open to future orders and regulations. For instance, there are no provisions for determining whether and to what extent trials should be public, nor even a requirement that judgments to made public. There is no requirement of a presumption of innocence, or that defendants have access to the evidence submitted against them, or even that proof of guilt be established beyond a reasonable doubt. It is left undetermined to what extent defendants will have access to legal counsel of their choosing, whether they will be able to communicate with counsel, and whether adequate time and facilities will be provided for a defense. No protection is provided against forced confessions.

Sections 7 of the Executive Order states that a terrorist suspect "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf" before a U.S. or any other court. Indeed, there is not even a provision for appellate review by a separate military commission panel, only non-judicial review by the President or the Secretary of Defense as the President's designate. This denies the defendant the right to an appeal provided under international law, which is especially troubling because the Executive Order expressly contemplates military commissions handing down death sentences. It also denies the right to effective redress to all persons, including U.S. citizens, who might be affected adversely by the law.

The comments made yesterday by Attorney General Ashcroft do nothing to Correct these sever deficiencies. He claimed that because the terrorists responsible for the September 11th attacks committed war crimes, they "do not deserve the protection of the American Constitution." But the U.S. government has repeatedly argued that people accused of war crimes deserve full due process protection. That is certainly the case for U.S. soldiers who might be accused of war crimes by foreign courts, and it has even been true of alleged war criminals in Bosnia and Rwanda. The United States cannot credibly insist on due process when others are the victims if it refuses to accord the same due process when Americans are the victims.

Umand Rights Watch believes the Executive Order is contrary to fundamental principles of human rights. While the rights in question may be derogated from in times of emergency, the U.S. must shoe that this is being done only to the extent strictly required by the exigencies of the situation. The far-reaching and ambiguous reach of the Executive Order strongly indicates that this is not the case. It is hard to imagine such a military commission escaping criticism by the U.S. government if created by another government. It is wrong and unlawful for the U.S. government to arrogate to itself the power to transgress these well established protections of international human rights law.

We urge you to rescind the Executive Order. Should any derogation from the rights provided under the ICCPR prove necessary, it should be done in a manner consistent with the strict requirements of international law.

Sincerely,

KENNETH ROTH
Executive Director

Statement of Douglas W. Kmiec, Dean & St. Thomas More Professor of Law, The Catholic University of America School of Law, Washington, D.C.

Dear Senator Hatch and Members of the Committee on the Judiciary:

I am pleased to respond to your request for my views regarding the issue of military tribunals and other measures that the Attorney General has undertaken to pursue the war against terrorism. As you know, it was my privilege to serve as head of the Office of Legal Counsel in the Reagan and first Bush administrations.

WE ARE AT WAR

First, this is a war. The bloodshed that stains our National integrity in New York, Washington DC and Pennsylvania can be little else—actually and constitutionally. It is declared by some, most notably my friend and constitutional law colleague, Professor Laurence Tribe of Harvard, that Congress' joint resolution of force in response to the September 11 attacks upon our sovereignty and thousands of innocent Americans does not possess "the ritualistic solemnity of a declaration of war." It is not clear what this means, however, even to Professor Tribe since he later admits in the same commentary that "we are engaged in a real war, not a metaphorical one akin to the 'wars' on drugs or poverty." In this latter sense, he is of course entirely

correct there is nothing artificial about the grievous loss of innocent life already suffered, or threatened to be inflicted again, by terrorists who want nothing less than the destruction of America, herself.

MILITARY TRIBUNALS ARE FULLY CONSTITUTIONAL

To put an end to the constitutional speculation, it is necessary to remember that war has been declared only five times by the Congress (the War of 1812, the Mexican American War of 1848, the Spanish American War of 1898, and World War I and World War II), while the U.S. military has been engaged in hundreds of military campaigns, including, of course, Korea, Vietnam, and the Persian Gulf without such formal declarations. In passing joint resolutions supporting these larger number of military campaigns, including the present one, it is abundantly clear that the President is entitled to exercise the full authority of the Commander in Chief, including the authority to create military commissions for the purpose of trying unlawful belligerents. As long ago as 1801 in *Talbot* v. *Seeman*, Chief Justice Marshall held that: "Congress may authorize general hostilities. . .or partial [war], in which case the laws of war, so far as they actually apply to our situation, must be noticed."

CONGRESS HAS AUTHORIZED THE PRESIDENT'S ACTIONS

Justice Jackson once observed as well that the President's foreign affairs authority is at its zenith when Congress and the President have acted together. Given the joint resolution of force, the congressional appropriations in support of the Afghanistan campaign, the provisions of Title 10 which authorize the President to convene military commissions outside the normal rules of procedure and evidence, it would be fatuous to suggest that the President lacks authority to undertake the military order issued.

The American Civil Liberties Union nevertheless immediately decries this logical, and entirely constitutional, exercise of war power as "deeply disturbing" and in contravention of ideas "central to our democracy." In fact, as just observed, the President's order is well-grounded upon constitutional text, statute and past practice, and is more likely to preserve civil liberty than to undermine it.

ORDINARY CRIMINAL COURTS FAIL TO ACCOMPLISH OUR MILITARY OBJECTIVES

Terrorism is not garden-variety crime within an ordered society. It is the indiscriminate killing of civilian innocents and destruction of civilian property. As such, it is the quintessential crime against humanity, rather than a social or cultural dysfunction capable of rehabilitation or rectification by means of ordinary law enforcement and prosecution.

Past experience with attempting to try terrorist acts within the regular criminal justice system has been unsatisfactory largely because standards of proof and rules of evidence entirely appropriate to peacetime are ill-suited to the effective punishment and deterrence of terrorist act. Presumed innocence, proof beyond a reasonable doubt and Miranda rights and privileges against self-incrimination all make sense when the delicate balance of citizen right is being balanced against societal interests in confining the use of force by authority. However, when a the Congress has authorized a President to respond to unprovoked attack with all necessary force to events like those of September 11 and "any future act" of international terrorism, the state of war intends the balance to be different.

The standard applied in military tribunals is simple and pragmatic. If those perpetuating war crimes are not disposed of upon the field of battle, military tribunals may be empowered to ascertain with evidence that is "probative to a reasonable man"—that is, more probable than not. What the tribunals seek to ascertain is whether a given person or organization has committed what Sir Edward Coke called centuries ago, a crime against humanity. In other words, the type of crime only committed by the enemies of mankind.

Practically, this will mean neither the hearsay rule (which has bedeviled prior terrorist trials in federal court because of the disappearance or unreachability of direct witnesses) nor ill-fitting exclusionary rules that have no deterrence-based relevance to this setting would derail the admission of evidence obtained under the noncoercive interrogation authorized by the President's order. The President has specifically provided as well that this humane treatment be afforded "without any adverse distinction based on race, color, religion, gender, birth, wealth, or similar criteria." ACLU charges of "racial and ethnic profiling" thus find no support within the scope of the President's own directive.

A FULL AND FAIR TRIAL WILL BE PROVIDED

As in past cases, the actual composition and procedures of these tribunals—which can sit either in the United States or elsewhere—are left to be determined by the Secretary of Defense and military commanders subordinate to the President, subject however to the provision of a "full and fair trial," with conviction and sentencing upon the concurrence of two-thirds of the tribunal or commission present. So while the rules and regulations are yet to come, we can get some inkling of their content by examining those promulgated by military commanders, such as Dwight Eisenhower in the European theater of WWII and Douglas MacArthur in the Pacific. While there are subtle differences, both commanders specified greater evidentiary latitude, including allowing secondary evidence where witnesses are unavailable and copies of documents and confessions to be admitted without undue delay or the kind of elaborate foundations required in cases before judges and juries, rather than military personnel.

Is all this just an elaborate denial of due process and sham proceeding? Hardly, the use of military tribunals was commonplace in World War II and those appearing before them were both exonerated and executed. The same is likely now. The "fair trial" mandated by the Bush order is also more likely to become reality simply because the discipline of legally-trained military personnel sitting in judgment has a better chance of being humanly evenhanded than finding somewhere in the universe a jury capable of being dispassionate about the use of human weapons of mass destruction against the Trade towers and Pentagon. Professor Tribe and I agree when he concedes that due process of law "both linguistically and historically permits trying unlawful combatants for violations of the laws of war, without a jury or many of the other safeguards of the Bill of Rights, provided each accused may hear the case against him and receives a fair opportunity to contest it through competent counsel."

Most importantly, military tribunals have the virtue of allowing evidence to be considered without necessitating the disclosure of classified information in open court or the identification of intelligence personnel and sources. And here the point of military tribunals, and their appropriateness, becomes plain. These bodies, unlike regular Article III criminal justice system, are not primarily for purposes of punishment. They are extensions of the military campaign and the efforts of the President to "protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks."

Perhaps, that is why the creation of these tribunals in war time for the trial of war crimes is so well fixed and unassailable in constitutional precedent. The Supreme Court does not sit in ultimate review of the tribunal's work beyond assuring itself that the commission was properly empaneled. It is also why the jurisdiction of these bodies depends upon Congress' war power and the individual who, with how ever much reluctance he must surely have, acts as our Commander in chief.

Military tribunals are a necessary part of the war on terrorism, but they are not the only part. Attorney General Ashcroft has received from Congress enhanced law enforcement authority to combat terrorist organizations and those who harbor or finance them. Necessary questions were asked, and in my judgment, sufficiently answered as to whether these proposals curtail our civil liberties. They do not. Congress' prudent passage of the recent anti-terrorism legislation is well aimed at reconciling warrant and surveillance authority with global communications and detaining and removing those entering the United States for the purpose of causing civilian deaths through weapons of mass destruction. Unless construed well beyond their intended text and context, they should have no effect on the constitutionally protected speech and association of American citizens.

But it is surely now unfair and incredulous to harangue Attorney General Ashcroft for advising the President that should the new anti-terrorism legislation lead to the apprehension of bin Laden and his confederates that a civilian trial as if he were a common thief or murderer—times, of course, several thousand—would be appropriate.

As sensible as it may be to expand warrant authority in the context of terrorist emergency to include wireless and Internet communication and to raise the penalties for the knowing possession of biological toxins not reasonably necessary for peaceful purposes, to assume that the terrorist organizations responsible for September 11 should be tried in federal court is to confuse war and the crimes of war. Terrorists are neither soldiers nor garden variety criminals, meriting federal indictment, they are war criminals.

As the Afghan bombing has proceeded, the nature of the military operations needed to root out these architects of war crime is expensive and prolonged. Of course, it is also open to doubt whether any of the malefactors will be taken alive. But as-

suming some will, it is far healthier for the rule of law that the President has indicated their ultimate destination and method of punishment in advance. My former Justice Department colleague and U.S. Attorney General, William Barr, has been quoted as saying "[t]here's a basic tension as to whether to treat this as a law enforcement issue or a national security/military issue." He, of course, is right—that is the heart of the issue.

Mr. Barr suggests that we "[f]ind these people and demolish them." That may happen on the field of battle, but if it does not and we apprehend them instead, their destination should be a military tribunal, not the U.S. District Court. By definition, terrorism is aimed at indiscriminately killing civilian innocents and destroying civilian property. Professor Tribe may think that definition imprecise, but I doubt that the citizens of New York who now live without mothers and fathers or sons and daughters share in his belief. Respectfully, whatever imprecision may exist under the order does not render it, to use Professor Tribe's words, "riddled with flaws," but merely subject to the reasonable construction historically accorded President's in the tactical decision making that accompanies a war effort.

EVEN OPPONENTS CONCEDE THE UNSUITABILITY OF REGULAR COURTS

Professor Tribe has sagaciously observed, however, that even if regular criminal proceedings might be stretched to accommodate the trial of unlawful belligerents, "it does not follow that they are best-suited for the task. . . .[S]uch nonmilitary trials grant an extended pulpit to an accused bent on claiming martyrdom and capable of stirring others to further acts of international terrorism." Professor Tribe's important observation reminds us, as President Bush's military order does, that the tribunals are only partially to punish, they are also to prevent "the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States." Yes, our objective is to punish those who took our brothers and sisters—or in my case a faculty colleague killed in the Pentagon plane—but it is also to root out and deter the instigators of further harm. In battle, this is best accomplished by a partial or targeted declaration of war, not against Afghanistan, itself, but the terrorists resident there, or anywhere. Tactically, in the present war, the battle necessarily extends to the disposition of those who are apprehended and suspected of war crime.

Are military tribunals then a violation of civil liberties? No, simply a recognition of well established precedent. Military belligerents violating the international laws of war are properly tried before a panel of military officers. Such military commissions received extensive use in the Civil War, and were affirmed by the Supreme Court in the famous World War II decision sentencing General Tomoyuki Yamashita to hang for the brutal atrocities he ordered against civilians in the Philippines. When Yamishita petitioned the Court for habeas corpus, the Court rebuffed him stating that the war power delegated by Congress includes administering a system of military justice for the trial and punishment of those combatants who have committed war crimes. No case contradicts this. The Civil War precedent, *Ex parte Milligan* that nominally questions the availability of military tribunals where civilian courts remain open, as Professor Tribe noted, was later confined to its unique domestic insurgency facts, and specifically the fact that Milligan was not—in international parlance—an "unlawful belligerent." Terrorists clearly are.

FARFETCHED HYPOTHETICALS SHOULD NOT DISTRACT US FROM THE SERIOUS TASKS AT HAND

Professor Tribe, and others, argue with various farfetched hypotheticals that the President's order might be misapplied. Aside from whether the President deserves in this time of emergency greater deference, it is simply not sound constitutional practice to invalidate executive action that has a completely constitutional range of application because it might be misapplied under a strained application of its text. Professor Tribe wants the Congress to step in, but it is not clear to what end. Indeed, given the text of the order and the President's full intention to apply it to the leadership of al Qaida or its terrorist equivalent, there is nothing to correct or rectify. Instead, opponents of the order proceed to mix issues by broadly complaining of Justice Department initiatives to interrogate those who have recently traveled to or from terrorist nations and fit other criteria or to monitor the conversations of those already convicted of terrorism and in jail or awaiting trial for espionage.

THE LAWFULNESS OF THE DETENTION POLICY

It is appropriate in concluding, therefore, to briefly examine the Attorney General's actions. First, as to detentions, it is very clear that the Attorney General is

holding individuals who are either violating immigration law or needed as a material witness. In the former case, existing immigration procedures will be employed to dispose of the cases. In the second, Title .18 and Supreme Court precedent affirm the right to detain material witnesses who have knowledge of facts closely connected to a crime and whose testimony would likely be relevant and highly probative in a criminal proceeding. In this instance, the Attorney General is doing little more than applying well established statutory law that allows detention where a judicial officer determines that it may become impractical to secure the presence of the person by subpoena. 18 U.S. C. 1844. As Justice Jackson stated long ago for the Court, "the duty to disclose knowledge of crime. . .is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness." *Stein* v. *New York*, 346 U.S. 156, 184 (1953).

THE LAWFULNESS OF THE REQUEST FOR INFORMATION

A *fortiori* if a citizen can be detained to disclose knowledge of a crime as a duty of citizenship, noncitizens here on immigration visas can certainly be asked to voluntarily answer questions that may lead to the apprehension of terrorists. As the Attorney General has repeatedly emphasized these individual have not been singled out for reasons of animus. They are being sought for reasons of common sense police work related to recent (with the last two years) connection with terrorist locations and their arrival on student, tourist and business visas similar to those employed by the terrorists of September 11.

As the FBI noted almost three years prior to September 11, "we have a problem with Islamic terrorism. . . .If we had a problem with Latvian terrorism, we'd focus on Latvians." John Mintz and Michael Grunwald, FBI Terror Probe Focuses on U.S. Muslims," Wash. Post, October 31, 1998 at A1. There is nothing unconstitutional about focusing police work on the likeliest suspects. Indeed., it is arguable that the factual profile being employed by the Attorney General in any given case with a few additional facts—could support the reasonable suspicion standard allowing not just voluntary, but involuntary, detention and questioning. The Attorney General with considerable restraint has not pressed this position. Rather, he has taken a narrow view of his authority that coincides fully with precedent, such as the Supreme Court's recent denial of review in Brown v. Oneta (2001). Police questioning based upon race is not unconstitutional so long as it is based on a race-neutral policy of obtaining a description of the assailant and seeking out persons who match it. Even putting aside the substantial questions of whether the Fourth Amendment applies to noncitizens in the same fashion as it does to citizens—a proposition that is highly doubtful in light of the Supreme Court's plurality decision in *United States* v. *Verdugo-Urquidez*. (1990) (indicating that aliens do not necessarily qualify as "the people" under the Fourth Amendment)—the Attorney General is well authorized to undertake the investigation that he has.

PRISONERS HAVE NO PRIVILEGE TO PLOT FUTURE TERRORIST ACTIVITY FROM PRISON

Turning lastly to the monitoring of prisoner communications, the Attorney General has prudently limited this practice to 12 convicted terrorists and four people being held on espionage charges. In may come as a surprise to some, but a prisoner has no legal right to privacy. Prison officials regularly screen mail and monitor visits of those incarcerated. True, the law recognizes various privileges—such as attorney-client—but conversations are privileged only if they legitimately fall within the scope of the relationship. A conversation with one's attorney that facilitates new acts of terrorism is not privileged. The Justice Department policy is well-crafted to observe these constitutional strictures. First, the affected prisoners are notified in advance of the monitoring. Second, a "taint team" uninvolved in the prosecution of the affected prisoner will monitor and either discard privileged material related to trial preparation and the like or seek disclosure but only (barring emergency) with the approval of a federal judge. Again, even assuming that the Fifth and Sixth Amendments (privilege against self-incrimination and fair trial) apply to noncitizens in the same way as citizens, there is no constitutional violation unless the prosecution actually and intentionally obtains confidential information pertaining to trial preparation and defense strategy and that information is used to the defendant's substantial detriment. As the Supreme Court has long held intrusions into the attorney-client relationship are not per se unconstitutional. There must be a concrete showing of harm to the defendant and benefit to the State. *Weathersford* v. *Bursey* (1977). The Attorney General has established a procedure to monitor conversations not to harm criminal defendants, but to ensure the safety and security of innocent American citizens from future terrorist attack. That is not now, nor should it ever be, unconstitutional.

I hope this opinion is useful to the work of the committee, and I thank you for the opportunity to present it to you for your deliberations.

Article by Harold Hongju Koh, The New York Times, November 23, 2001

WE HAVE THE RIGHT COURTS FOR BIN LADEN

NEW HAVEN—If we should capture 0sama bin Laden or his accomplices in the days ahead, where should we try them? Two unsound proposals have recently emerged. The first, and by far more dangerous, is already law: the president's misguided and much criticized order authorizing secret trials before an American military commission. The second, more benign approach, offered by prominent international lawyers, is to try terrorists before an as yet uncreated international tribunal.

Both options are wrong because both rest on the same faulty assumption: that our own, federal courts cannot give full, fair and swift justice in such a case. If we want to show the world our commitment to the very rule of law that the terrorists sought to undermine, why not try mass murderers who kill American citizens on American soil in American courts?

I hope never to see 0sama bin Laden alive in the dock. As Mohammed Atefs recent death shows, international law entitles us to redress the killing of thousands by direct armed attack upon Osama bin Laden and other Al Qaeda perpetrators responsible for the attacks of Sept. 11. But if they surrender, we should not lynch them, but rather try them, to promote values that must stand higher than vengeance: to hold them accountable for their crimes against humanity, to tell the world the true facts of those crimes and to demonstrate that civilized societies can provide justice for even the most heinous outlaws. Israel tried Adolf Eichmann. We can try 0sama bin Laden, and without revealing secret information, making him a martyr or violating our own principles. President Bush's order for secret military trials undermines these values.

I have long supported international adjudication, but that option makes little sense here. As recent efforts to try international crimes in Cambodia and Sierra Leone show, building new tribunals from scratch is slow and expensive and requires arduous negotiations. Geopolitical concerns in this case would predominate, and the impartiality of the tribunal would inevitably be questioned by some in the Muslim world. These tribunals are—preferable only when there is no functioning court that could fairly and efficiently try the case, as was the situation in the former Yugoslavia and in Rwanda.

American courts have tried international criminals who have violated the law of nations including pirates and slave traders—since the beginning of the nation. We have convicted hijackers, terrorists and drug smugglers (including Panama's Manuel Noriega, who surrendered to American soldiers after extended military operations).

Osama bin Laden and his top aides have already been indicted in federal court. We have successfully tried and convicted Al Qaeda members and associates for attempting to blow up the World Trade Center and planning the August 1998 bombings of the American embassies in Tanzania and Kenya. With venue changes, careful security and intensive investigative efforts, Timothy McVeigh was tried, convicted and sentenced for a comparable terrorist act. As for protecting classified information, existing law gives prosecutors ample authority to prevent such information from being compromised in trial.

If any judicial system in the world can handle a case like this fairly, efficiently and openly, it is ours. If four or 400 Americans had died at the World Trade Center and the perpetrators had been caught, no one would suggest that we try the murderers anywhere but in American courts. No country with a well functioning judicial system should hide its justice behind military commissions or allow adjudication of the killing of nearly 4,000 residents by an external tribunal. Why not show the world that American courts can give universal justice?

Harold Hongju Koh, a professor of international law at Yale, was assistant secretary of state for human rights in the Clinton administration.

The Honorable Patrick J. Leahy
433 Russell Senate Office Bldg.
United States Senate
Washington, DC 20510

Dear Senator Leahy:

We, the undersigned law professors and lawyers, write to express our concern about the November 13, 2001, Military Order, issued by President Bush and directing the Department of Defense to establish military commissions to decide the guilt of non-citizens suspected of involvement in terrorist activities.

The United States has a constitutional court system of which we are rightly proud. Time and again, it has shown itself able to adapt to complex and novel problems, both criminal and civil. Its functioning is a worldwide emblem of the workings of justice in a democratic society.

In contrast, the Order authorizes the Department of Defense to create institutions in which we can have no confidence. We understand the sense of crisis that pervades the nation. We appreciate and share both the sadness and the anger. But we must not let the attack of September 11, 2001 lead us to sacrifice our constitutional values and abandon our commitment to the rule of law. In our judgment, the untested institutions contemplated by the Order are legally deficient, unnecessary, and unwise.

In this brief statement, we outline only a few examples of the serious constitutional questions this Order raises:

- The Order undermines the tradition of the Separation of Powers. Article I of the Constitution provides that the Congress, not the President, has the power to "define and punish . . . Offenses against the Law of Nations." The Order, in contrast, lodges that power in the Secretary of Defense, acting at the direction of the President and without Congressional approval.
- The Order does not comport with either constitutional or international standards of due process. The President's proposal permits indefinite detention, secret trials, and no appeals.
- The text of the Order allows the Executive to violate the United States' binding treaty obligations. The International Covenant on Civil and Political Rights, ratified by the United States in 1992, obligates States Parties to protect the due process rights of all persons subject to any criminal proceeding. The third Geneva Convention of 1949, ratified by the United States in 1955, requires that every prisoner of war have a meaningful right to appeal a sentence or a conviction. Under Article VI of the Constitution, these obligations are the "supreme Law of the Land" and cannot be superseded by a unilateral Presidential Order.

No court has upheld unilateral action by the Executive that provided for as dramatic a departure from constitutional norms as does this Order. While in 1942 the Supreme

Court allowed President Roosevelt's use of military commissions during World War II, Congress had expressly granted him the power to create such commissions.

Recourse to military commissions is unnecessary to the successful prosecution and conviction of terrorists. It presumes that regularly constituted courts and military courts-martial that adhere to well-tested due process are unable to handle prosecutions of this sort. Yet in recent years, the federal trial courts have successfully tried and convicted international terrorists, including members of the al-Qaeda network.

It is a triumph of the United States that, despite the attack of September 11, our institutions are fully functioning. Even the disruption of offices, phones, and the mail has not stopped the United States government from carrying out its constitutionally-mandated responsibilities. Our courts should not be prevented by Presidential Order from visibly doing the same.

Finally, the use of military commissions would be unwise, as it could endanger American lives and complicate American foreign policy. Such use by the United States would undermine our government's ability to protest effectively when other countries do the same. Americans, be they civilians, peace-keepers, members of the armed services, or diplomats, would be at risk. The United States has taken other countries to task for proceedings that violate basic civil rights. Recently, for example, when Peru branded an American citizen a "terrorist" and gave her a secret "trial," the United States properly protested that the proceedings were not held in "open civilian court with full rights of legal defense, in accordance with international judicial norms."

The proposal to abandon our existing legal institutions in favor of such a constitutionally questionable endeavor is misguided. Our democracy is at its most resolute when we meet crises with our bedrock ideals intact and unyielding.

Respectfully submitted,

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Article by Anthony Lewis, The New York Times, November 30, 2001

WAKE UP, AMERICA

BOSTON—It is the broadest move in American history to sweep aside constitutional protections. Yet President Bush's order creating military tribunals to try those suspected of links to terrorism has aroused little public uproar. Why? Because, I am convinced, people do not understand the order's dangerous breadthand its defenders have done their best to conceal its true character.

The order is described as if it is aimed only at 0sama bin Laden and other terrorist leaders. A former deputy attorney general, George J. Terwilliger III, said the masterminds of the Sept. 11 attacks "don't deserve constitutional protection."

But the Bush order covers all noncitizens, and there are about 20 million of them in the United States immigrants working toward citizenship, visitors and the like. Not one or 100 or 1,000 but 20 million.

And the order is not directed only at those who mastermind or participate in acts of terrorism. In the vaguest terms, it covers such things as "harboring" anyone who has ever aided acts of terrorism that might have had "adverse effects" on the U.S. economy or foreign policy. Many onetime terrorists Menachem Begin, Nelson Mandela, Gerry Adams—regarded at the time as adverse to U.S. interests, have been. "harbored" by Americans.

Apologists have also argued that the Bush military tribunals will give defendants enough rights. A State Department spokeswoman, Jo-Anne Prokopowicz, said that they would have rights "similar to those" found in the Hague war crimes tribunal for the former Yugoslavia.

To the contrary, Hague defendants like Slobodan Milosevic are entitled to public trials before independent judges, and to lawyers of their choice. The Bush military trials are to be in secret, before officers who are subordinate to officials bringing the charges; defendants will not be able to pick their own lawyers. And, unlike the Hague defendants, they may be executed.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . .." That covers citizens and noncitizens in this country alike.

On a few occasions, acts of war have been treated as outside Sixth Amendment protection. Roosevelt set up a military tribunal to try Nazi saboteurs landed on our shores in World War II. But that example—a tribunal for a particular occasion, limited in time and scope—shows the very danger of the Bush order. It is unlimited, in a fight against terrorism that could go on for years.

"It's worth remembering that the order applies only to noncitizens," a Wall Street Journal editorial said. I hope The Journal's editors, who are usually supportive of immigrants and their role in building this country, will consider the pall of fear this order may put on millions of noncitizens.

And the Bush order could easily be extended to citizens, under the administration's legal theory. Since the Sixth Amendment makes no distinction between citizens and aliens, the claim of war exigency could sweep its protections aside for anyone in this country who might fit the vague definitions of aiding terrorism.

But George W. Bush would never let his order be abused, one of its defenders said the other day. It was a profoundly un-American comment. From the beginning, Americans have refused to rely on the graciousness of our leaders. We rely on legal rules. That is what John Adams meant when he said we have "a government of laws, and not of men."

The Framers of our Constitution thought its great protection against tyranny was the separation of the federal government's powers into three departments: executive, legislative, judicial. Each, they reasoned, would check abuse by the others.

There is the greatest danger of the Bush order. It was an act of executive fiat, imposed without even consulting Congress. And it seeks to exclude the courts entirely from a process that may fundamentally affect life and liberty. The order says that a defendant "shall not be privileged to seek any remedy. . .in any court," domestic or foreign.

I do not doubt that leaders of Al Qaeda could properly be tried by a military tribunal. But the Bush order cries out for redrafting in narrower, more careful terms. Under the Constitution, that is the duty of Congress. Its leaders have so far been afraid to challenge anything labeled antiterrorist, however dangerous. It is time they showed some courage, on behalf of our constitutional system.

Article by Anthony Lewis, The New York Times, December 4, 2001

DUST IN OUR EYES

Boston—President Bush's order establishing military tribunals has a particular distinction apart from its impact on American traditions of justice. For a presidential directive of such profound importance, it is extraordinarily ill drafted.

So we must conclude from statements made by supporters of the Bush proposal. For they have defended it by running away from the language of the order, spinning the text to make it seem more reasonable.

A striking example was a piece by the president's counsel, Alberto R. Gonzales, on the OpEd page of The New York Times last week. The article read as if Mr. Gonzales were defending an order that he wished he and his colleagues had written instead of the one that Mr. Bush actually issued.

"The order preserves judicial review in civilian courts," Mr. Gonzales wrote. "Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court."

In fact, the order said:

"The individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal."

Far from "preserving" judicial review, as Mr. Gonzales said, the order sought to prevent it. A court might nevertheless entertain a habeas corpus petition, but review on habeas corpus is usually more limited than on a regular appeal.

Military commissions, Mr. Gonzales said, "can dispense justice swiftly, close to where our forces may be fighting." That sounds as though the order covers only enemies captured in Afghanistan, or potentially on other foreign battlefields. Others have argued for the order from the same premise. But it is false.

The order covers all immigrants, visitors and other non-citizens in the United States, about 20 million of them. Asians, Hispanics, Russians, Israelis and others who came here to struggle for a better life will now know that they are at risk of being detained and tried by a military tribunal if someone thinks they have something to do with terrorism. It is a two-tier system of justice: a violation of America's historic promise of equal justice.

"The president will refer to military commissions only non-citizens who are members or active supporters of al Qaeda or other international terrorist organizations targeting the United States," Mr. Gonzales said. But the order applies much more broadly and vaguely, for example to anyone who has "harbored" someone who has ever prepared terrorist acts.

"The American military justice system is the finest in the world," Mr. Gonzales said, suggesting that the Bush military commissions will be the same as courts-martial under the Uniform Code of Military Justice. But they will be very different.

For example, the jury in a regular military court must be unanimous to impose a death sentence. Mr. Bush's tribunals require only a two-thirds vote of commission members "present at the time of the vote," and only a majority of members need be present. A five-member commission can operate with three present, and two could impose the death penalty: less than half the full commission.

Court-martial judgments are appealable on all issues of fact and law. The courts use strict rules of evidence comparable to those in civilian courts, as against the relaxed standard allowed by Mr. Bush. Court-martial defendants have the right to choose their own lawyer; the Bush order gives no such assurance.

Attorney General John Ashcroft said last week that the administration's measures had been "carefully crafted to not only protect America but to respect the Constitution and the rights enshrined therein." Critics, he said, "have sought to condemn us with faulty facts or without facts at all."

To the contrary, Mr. Ashcroft and his colleagues have sought to conceal the menacing facts of the Bush order. They remind me of my old boss James Reston's quip, "Don't confuse us with the facts."

But these are not just word games. The issues are as serious as any that have faced our constitutional system in a long time. The Bush military tribunal order, The Economist of London says this week, "is deeply disturbing . . . . When so much is going so well for the United States, and deservedly so, it would be foolish to hand Mr. bin Laden such an unnecessary gift."

Article by Jim McGee, Washington Post, November 28, 2001

EX-FBI OFFICIALS CRITICIZE TACTICS ON TERRORISM

DETENTION OF SUSPECTS NOT EFFECTIVE, THEY SAY

Until Sept. 11, the FBI employed a distinctive strategy for fighting terrorists: By using informants and wiretaps, the bureau monitored suspected cells—sometimes for years—before making any arrests. The theory was that only such long-term investigations reveal useful information about potential plots.

Since the terrorist attacks on New York and Washington, that strategy has undergone a wholesale revision. Under the new approach, the FBI will focus chiefly on preventing terrorist acts by rounding up suspects early on, before they get a chance to act.

The aggressive FBI dragnet—championed by Attorney General John D. Ashcroft—has provoked much commentary and criticism for its impact on civil liberties. Now, in a series of on-the-record interviews, eight former high-ranking FBI officials have offered the first substantive critique of the Ashcroft program, questioning whether the new approach will have the desired effect.

The executives, including a former FBI director, said the Ashcroft plan will inevitably force the bureau to close terrorism investigations prematurely, before agents can identify all members of a terrorist cell. They said the Justice Department is resurrecting tactics the government rejected in the late 1970s because they did not prevent terrorism and led to abuses of civil liberties.

"It is amazing to me that Ashcroft is essentially trying to dismantle the bureau," said Oliver "Buck" Revell, a former FBI executive assistant director who was the primary architect of the FBI antiterrorism strategy during the 1980s. "They don't know their history," he said, "and they are not listening to people who do."

Former FBI director William H. Webster said Ashcroft's policy of preemptive arrests and detentions "carries a lot of risk with it. You may interrupt something, but you may not be able to bring it down. You may not be able to stop what is going on."

In the past, Webster said, when the FBI identified a person or group suspected of terrorism, agents neutralized the immediate threat of violence. Then they began a long-term investigation using informants, surveillance or undercover operations, "so when you roll up the cell, you know you've got the whole group."

Ashcroft declined to be interviewed for this article, as did FBI Director Robert S. Mueller III. Justice Department spokeswoman Mindy Tucker defended the change in tactics as part of a wartime mobilization at the department prompted by the Sept. 11 attacks.

"The world is different and the priorities are different," Tucker said. "I understand this is not the traditional way the FBI handled things. But that's the priority."

A senior Justice Department official who spoke on the condition of anonymity said that none of the changes ordered by Ashcroft would have enabled the FBI to prevent the Sept. 11 attacks. After two months of intensive investigation, the FBI has concluded that the 19 suspected hijackers acted alone in the United States as a self-contained terrorist cell whose mission was planned and funded overseas.

"There was not a lot of the plot we could have jumped on here," the official said.

Webster and others say Ashcroft's conviction that FBI counterterrorism operations require radical surgery ignores a record that, though not widely known outside the bureau, includes 131 prevented terrorist attacks from 1981 to 2000.

"We used good investigative techniques and lawful techniques," said Webster, who left the FBI in 1987 to take over the helm at the CIA. "We did it without all the suggestions that we are going to jump all over the people's private lives, if that is what the current attorney general wants to do. I don't think we need to go that direction."

Many of the prevented attacks were potentially catastrophic, with targets that included a 747 airliner, a gas pipeline, a crowded movie theater and a visiting world leader, Indian Prime Minister Rajiv Gandhi.

"Interdiction [of planned terrorist attacks] became an investigative-planning tool, and we were rather successful at it," said former FBI assistant director Kenneth P. Walton, who established the first Joint Terrorism Task Force in New York City.

The sharp increase in FBI intelligence wiretaps and terrorism investigations after the 1995 Oklahoma City bombing led to the prevention of 15 attacks in 1997 and 10 in 1998, FBI documents show.

"We lived to prevent a terrorist act," Robert Blitzer, former chief of the FBI's counterterrorism section, said. "That was our whole program. We prevented many acts of terrorism."

But not the ones on Sept. 11, which came at a time when the FBI was reeling from high-profile embarrassments, from misplaced FBI laptops and guns to a much-criticized investigation of Wen Ho Lee to the treason of former FBI agent Robert P. Hanssen.

FBI management reforms were under consideration even before Ashcroft announced his new strategy in a series of carefully orchestrated public statements over the past two months. The key elements include:

- Arresting and jailing "suspected terrorists" on minor criminal or immigration charges. "It is difficult for a person in jail or under detention to murder innocent people or to aid or abet in terrorism," Ashcroft said on Nov. 13.
- Cutting short long-term criminal terrorism investigations when agents detect the possibility of new violence. "Even though this may hinder a criminal investigation, prevention of terrorist attacks, even at the expense of a prosecution, must be our priority," Ashcroft said on Oct. 29.
- Deploying hundreds of state and local police officers to conduct voluntary interviews of 5,000 Middle Eastern men who are legal residents in the United States, based on their age and the country issuing their passport.
- Shifting control of the FBI Joint Terrorism Task Forces across the country from the FBI to presidentially appointed local U.S. attorneys.

Although none of the former officials interviewed for this article questioned the value of fine-tuning FBI operations in light of Sept. 11, they contended that Ashcrofts new policies will weaken the FBI's primary strategy for penetrating terrorist cells.

"It's the Perry Mason School of Law Enforcement, where you get them in there and they confess,"

Walton said of the plan to interview 5,000 Middle Eastern men. "Well, it just doesn't work that way. It is ridiculous. You say, 'Tell me everything you know,' and they give you the recipe to Mom's chicken soup."

While Revell and others said the 5,000 interviews may have a short-term deterrent effect, they said the tactic is problematic. "One, it is not effective," Revell said. "And two, it really guts the values of our society, which you cannot allow the terrorists to do."

Through years of trial and error, the FBI has found that intelligence-gathering rarely deterred terrorist acts unless it was combined with long-term criminal investigations that employed informants, undercover agents and electronic surveillance.

In virtually every case in which the FBI prevented a terrorist attack, these sources said, success depended on long-term investigations, whose hallmarks were patience and letting terrorist plots go forward.

"You obviously want to play things out so you can fully identify the breadth and scope of the conspiracy," said James Kallstrom, former chief of the FBI office in New York, who oversaw two large investigations of the Qaeda terrorist network. "Obviously, the most efficient and effective way to do that is to bring it down to the last stage."

Former FBI assistant director John Otto described a case in which a long-running FBI investigation in Chicago of a Serbian nationalist terrorist cell prevented the deaths of nearly 300 Serbian American children attending a Christmas party at a church. An informant tipped off an agent to the plot.

"Long-term successful investigations are our forte," Otto said. "I don't think there is ever a need to get away from them. Look at the track record over time."

Although there are inherent risks, the ex-officials said there is no known case in which an FBI decision to let a bombing plot unfold resulted in injury or death.

Former FBI deputy director Floyd I. Clarke said he sympathized with Ashcroft's desire to take aggressive preventive measures, but said most preventions arise from methodical investigations. He cited one case in which FBI agents found out where a terrorist cell stored its explosives.

"We did not want to just go and arrest them and grab the explosives," he said, "because we knew they were connected with other groups."

Instead, FBI agents entered the building surreptitiously, rendered the explosives inert and sat back and waited. "Eventually, we ended up taking down a whole cell of people," Clarke said. "You try to make sure you have got as complete a picture as you can."

After the World Trade Center bombing in February 1993, the FBI quickly arrested several Middle Eastern men with ties to the radical Islamic religious leader

Sheik Omar Abdul Rahman, who was based in New Jersey. The bureau came under pressure to arrest or detain Abdul Rahman and others around him on immigration charges. But the FBI resisted.

"We wanted to take the whole cell down and get him off the street for the rest of his life," said Blitzer, the former counterterrorism chief, "not just allow him to be deported some place where he could continue on as the kind of terrorist leader he had been."

The FBI inserted a confidential informant into Abdul Rahman's inner circle and began intensive electronic surveillance. Within two months, the informant reported a second plot.

In June 1993, agents raided a warehouse in Queens, N.Y., where they surprised five Islamic fundamentalists. The men were bent over large mixing barrels and stirring a porridge of bombmaking chemicals, which they planned to use to blow up the Holland and Lincoln tunnels and other New York landmarks.

"We had to let the information develop," said former FBI assistant director William Gavin, who oversaw the investigation. "Taking them off the street at an early stage of the investigation, I don't believe would have afforded us the opportunity to discover and resolve the intent to blow up the tunnels."

Statement of Hon. Zell Miller, a U.S. Senator from the State of Georgia

MILLER TO ASHCROFT'S CRITICS: 'GET OFF HIS BACK'

WASHINGTON—U.S. Senator Zell Miller (D–GA) today issued the following statement in advance of Thursday's (12–6) Senate Judiciary Committee meeting, at which Attorney General John Ashcroft is expected to be grilled—about the Administration's proposal to bring terrorists to justice using military tribunals:

"They need to get off his back and let Attorney General Ashcroft do his job.

"Military tribunals have been used throughout history. The Supreme Court has twice upheld them as constitutional.

"Now, we're at war, and we're talking about using military tribunals only for noncitizens.

"Why in the world would we try our own soldiers with this system of justice but not some foreigner who is trying to kill us? It's crazy.

"These nit-pickers need to find another nit to pick. They need to stop protecting the rights of terrorists.

"This is about national security. This is about life and death."

NATIONAL DISTRICT ATTORNEYS ASSOCIATION
ALEXANDRIA, VIRGINIA 22314
December 5, 2001

Honorable Patrick J. Leahy
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510–6275

Honorable Orrin G. Hatch
Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510–6275

Dear Chairman Leahy and Senator Hatch:

As the President of the National District Attorneys Association I strongly support the President, and Attorney General Ashcroft, as they seek out those who have subjected our nation to unheralded attack. As we face a future of uncertain dangers we must rise to the challenge of doing the utmost to preserve the safety and well being of our citizens while bringing international criminals to justice.

In these unprecedented circumstances we must take extra ordinary measures, consistent with our legal traditions and principles of law, to bring stability to a chaotic and threatening period in our history.

The terrorist's heinous acts pose a clear threat to national security. We must all recognize, therefore, that the disruption of communications between international

criminal elements is vital to prevent further attacks and loss of life. If, to do this, temporary restraints must be effectuated to further the criminal investigation and interrupt the flow of intelligence then we must be willing to accept this as necessary to protect our freedom.

Even before this War Against Terrorism, America's prosecutors have been stymied by international requirements that limit the prosecution of criminals that have successfully fled to other countries. After the attacks of September we must not allow those responsible for thousands of deaths to escape punishment because our system of laws cannot adapt to the new reality of international terrorism.

The President's plan to use military tribunals protects our national security interests while still ensuring the American tradition of the Rule of Law. The due process requirements that have been placed on the use of military tribunals, and their limited jurisdiction over non-US citizens, ensures that justice can be achieved.

To Be the Voice of America's Prosecutors and to Support Their Efforts to Protect the Rights and Safety of the People

While Congress is proper in it's continual scrutiny of our federal system of criminal justice I would urge that it support our President in this time of crisis.

Sincerely,

KEVIN P. MEENAN
District Attorney, 7th Judicial District, Casper, WY
President, National District Attorneys Association

Article in Newsday (New York, NY) November 25, 2001

WHAT PRICE SECURITY?; IN SEARCH FOR SAFETY, U.S. SACRIFICES TOO MANY RIGHTS
1,147 PEOPLE HAVE BEEN SNARED IN ASHCROFT'S TERROR PROBE

FOR A DEMOCRATIC nation at war, deciding how much freedom to relinquish in search of security is an unavoidable dilemma. Some choices are easy. Pat-downs before boarding airplanes? Absolutely. Men in military fatigues randomly searching vehicles at bridges and tunnels into the city? Certainly. Metal detectors at the entrances to sports arenas? Sure. Such intrusions are little more than inconveniences and their contribution to public safety is obvious. The choices get tougher when the intrusions are more clandestine, the security justification is less direct and the cost is measured in loss of privacy or liberty rather than mere inconvenience. Congress made those kinds of choices when it enacted an anti-terrorism law six weeks after the Sept. 11 attacks on the Pentagon and the World Trade Center. Washington nudged the balance toward security by authorizing roving wiretaps, broader surveillance of the Internet, longer detention of non-citizens without charges and wider sharing within government of information collected by law enforcement. Those tough but necessary steps were hammered out through weeks of principled bipartisan negotiation.

But before the ink was dry on that sweeping expansion of law enforcement power, the administration unilaterally pushed the envelope further with orders for military tribunals, detentions and dragnets, and eavesdropping on conversations between attorneys and their clients. The motive, of course, is to prevent additional terrorist attacks. The burden for Congress, the courts and the nation is to determine where the line should be drawn between what's legal and acceptable and what isn't in these unprecedented times. That's the only way to know when officials go a step too far, as they may have with detentions, as they certainly have when eavesdropping on attorneys and their clients and as they will if President George W. Bush opts for military tribunals for people arrested on American soil.

SECRET JUSTICE

Osama bin Laden and his henchmen have a price on their heads and a shrinking corner of Afghanistan in which to hide. The prospect that some will be taken alive is real. If caught, they - as well as anyone in the United States believed to be a member of the al-Qaida network - could face trial by military tribunal with few of the legal protections customary in U.S. courts.

Secret military trials and summary executions are not the face of justice that America should show to the world. While they may be appropriate for combatants captured in the field in Afghanistan, such trials would be an abomination when suspects are arrested in the United States.

Unfortunately, all it will take to strip stateside suspects of customary legal protections is an assertion by Bush that someone who is not a U.S. citizen is in cahoots

with al-Qaida, or has engaged in international terrorism, conspired to do so or harbored others who have. No evidence supporting the assertion is required.

The tribunals could conduct trials in secret. A panel of senior military officials, not a jury, would sit in judgment. They wouldn't need a unanimous verdict to convict or to impose a death sentence. Evidence inadmissible in any U.S. civilian court would be allowed. The standard of proof could be something less than guilt beyond a reasonable doubt. And there would be no judicial appeal. Only Bush or his defense secretary could review the tribunals' decisions.

The nation has a long, if undistinguished, history of wartime military tribunals. They were used during the Civil War to try Confederate saboteurs. And during World War II, the Supreme Court upheld a military tribunal's convictions and death sentences for a handful of German agents who came ashore in New York and Florida intent on sabotage.

Those situations do not directly parallel today's undeclared war against a shadowy enemy that represents no nation. During the civil war, Southern states were in open rebellion against the government. In the 1940s, the United States had officially declared war and the men executed were soldiers of an enemy nation.

TWO STANDARDS

Senate Judiciary Committee Chairman Patrick Leahy, (D–Vt.) is right to worry that Bush's order creating the tribunals "sends a message to the world that it is acceptable to hold secret trials and summary executions, without the possibility of judicial review, at least when the defendant is a foreign national." Embracing two standards of justice, one for Americans and another for everyone else, "could put U.S. citizens abroad, including military personnel and peacekeepers, at grave risk."

Bush countered that because of national security concerns "the option to use a military tribunal in the time of war makes a lot of sense. It is in the interests of the safety of potential jurors that we have a military tribunal."

Security during terror trials in U.S. courthouses is an obvious concern. But such trials have been safely and successfully conducted before in cases arising from the 1993 bombing of the World Trade Center [trial pictured, below] and the 1998 bombings of American embassies in Africa. Before exercising the extraordinary option of military tribunals, Bush should make the case that the federal courts and security apparatus are not up to the job.

DETENTIONS AND DRAGNETS

As the job of federal law enforcement has inexorably shifted from investigating crimes to preventing terrorism, the threat to civil liberties has grown.

The government is holding hundreds of people captive without revealing who many are, the charges against them or the need for such secrecy. At last count, 1,147 people had been snared in Attorney General John Ashcroft's terror investigation—185 for immigration violations. Others have been charged with crimes unrelated to terrorism. A small number are being held indefinitely as material witnesses. While some people have been released, most are still in custody.

Justice Department officials say they have provided "as much information as possible" about the detainees "within the bounds of privacy regulations, grand jury regulations and judges' specific orders." Congress wants more detail so it can see if the detentions are necessary to protect the nation. After failing for weeks to respond to letters from an increasingly exasperated Leahy and others in Congress, Ashcroft has agreed to appear before the Senate Judiciary Committee. He must be prepared to provide real answers.

While he's at it, Ashcroft should also respond to questions about his request that local police track down and interview 5,000 people who entered the country on student or tourist visas, most from Mideast countries. Officials say they are not criminal suspects but may have information about terrorists. Voluntary interviews are fair game. But the request has occasioned concern about racial profiling and possible violations of local laws prohibiting police from gathering intelligence for political purposes. Police in Portland, Ore., last week became the first to say no to Ashcroft's request.

LAWYERS, CLIENTS AND FEDS

Ashcroft should also be grilled about his unilateral decision to allow government monitoring of conversations and letters between attorneys and their terrorist-suspect clients in custody. The policy is unjustifiable.

Ashcroft is worried that lawyers will ferry information between terrorists behind bars and conspirators on the outside. So far, based on his assertion of "reasonable suspicion," Ashcroft has authorized eavesdropping on 13 suspects and their attor-

neys. That's a troubling expansion of police power and a serious erosion of the right to counsel. The inability to speak candidly with a lawyer compromises the right to effective counsel, which is a basic component of the right to due process. Officials should instead seek court orders for wiretaps and surveillance of lawyers they suspect of being conspirators and track their conversations with others after they leave their clients.

American citizens don't have to worry right now that they will be subject to these troubling White House initiatives. And if ever there was an unsympathetic law enforcement target, the foreign-born terrorist is it.

But American-style civil liberties allow individuals the presumption of innocence and shield them from the crushing weight of government power until they are proved guilty. Those legal protections have been honed through centuries of experience to accomplish their objectives without crippling law enforcement. They protect the innocent, as well as assuring that guilt is judged fairly. They should not be circumvented lightly.

Editorial in the New York Times, November 10, 2001, Saturday, Late Edition-Final

DISAPPEARING IN AMERICA

Thousands of detainees being held in secret by the government; wiretaps on prisoners' conversations with their lawyers; public debate about the advisability of using torture to make suspects talk. Two months into the war against terrorism, the nation is sliding toward the trap that we entered this conflict vowing to avoid. Civil liberties are eroding, and there is no evidence that the reason is anything more profound than fear and frustration.

We trust the Bush administration is not seriously considering torture—an idea that seems more interesting to radio talk shows and columnists than to government officials. But Attorney General John Ashcroft has been careless with the Constitution when it comes to the treatment of people arrested in the wake of Sept. 11, raising fears he will be similarly careless when it comes to using the broad new investigative powers recently granted him by Congress. A new rule just imposed by Mr. Ashcroft allows the government to listen in on conversations and intercept mail between some prison inmates and their lawyers—in effect suspending the Sixth Amendment right to effective counsel. He has also refused to provide basic information about the 11,000plus people who have been arrested and detained in the course of the government's terrorism investigation. Even the White House seems uninformed. Questioned about the mass detentions early last week, the president's spokesman, Ari Fleischer, responded that "the lion's share" had been released after questioning. He was forced to backtrack and concede that he did not know any exact numbers when the Justice Department gingerly noted that a majority of all detainees remained in custody.

To justify these extreme measures, the administration has been floating theories about what detainees might have done or known, which turn out upon further investigation to be unfounded. The Justice Department has backed away from Mr. Ashcroft's recent suggestion that three Arab men in custody in Michigan had advance knowledge of the Sept. 11 hijackings. Although the men were suspected of having links to Al Qaeda at the time of their arrest, law enforcement officials have said that no hard evidence to that effect has since emerged.

The limited need for secrecy while investigating domestic terrorism hardly justifies blanket stonewalling. Mr. Ashcroft says that his strategy of "aggressive detention of lawbreakers and material witnesses" has been vital in preventing new horrors. That assertion has to be taken on blind faith, and it would be easier to accept if the attorney general had shown more overall restraint. But his definition of the Bill of Rights includes eavesdropping on lawyerclient conversations and withholding from the public such key facts as the identities of those still in custody, the reason for their continued detention—including any charges filed—and the facilities where they are being held. The secrecy even extends to refusing to explain the resort to secrecy. Meanwhile, reports suggest that some detainees cleared of any connection with terrorism have been held under harsh conditions for prolonged periods, and denied a chance to notify relatives of their whereabouts.

It is time the White House stepped in. Just as President Bush advises Americans to learn to lead their normal lives while being ever watchful for terrorism, the Jus-

tice Department can investigate domestic attacks while respecting the basic rights that we are in this war to preserve. http://www.nytimes.com

Editorial in the New York Times, November 16, 2001

A TRAVESTY OF JUSTICE

President Bush's plan to use secret military tribunals to try terrorists is a dangerous idea, made even worse by the fact that it is so superficially attractive. In his effort to defend America from terrorists, Mr. Bush is eroding the very values and principles he seeks to protect, including the rule of law.

The administration's action is the latest in a troubling series of attempts since Sept. 11 to do an end run around the Constitution. It comes on the heels of an announcement that the Justice Department intends to wiretap conversations between some prisoners and their lawyers. The administration also continues to hold hundreds of detainees without revealing their identities, the charges being brought against them or even the reasons for such secrecy.

The temptation to employ extrajudicial proceedings to deal with Osama bin Laden and his henchmen is understandable. The horrific attacks of Sept. 11 give credence to the notion that these foreign terrorists are uniquely malevolent outlaws, undeserving of American constitutional protections. Military tribunals can act swiftly, anywhere, averting the security problems that a high-profile trial in New York or Washington could pose.

But by ruling that terrorists fall outside the norms of civilian and military justice, Mr. Bush has taken it upon himself to establish a prosecutorial channel that answers only to him. The decision is an insult to the exquisite balancing of executive, legislative and judicial powers that the framers incorporated into the Constitution. With the flick of a pen, in this case, Mr. Bush has essentially discarded the rulebook of American justice painstakingly assembled over the course of more than two centuries. In the place of fair trials and due process he has substituted a crude and unaccountable system that any dictator would admire.

The tribunals Mr. Bush envisions are a breathtaking departure from due process. He alone will decide who should come before these courts. The military prosecutors and judges who determine the fate of defendants will all report to him as commander in chief. Cases can be heard in secret. Hearsay, and evidence that civilian courts may deem illegally obtained, may be permissible. A majority of only two-thirds of the presiding officers would be required to convict, or to impose a death sentence. There would be no right of appeal to any other court.

American civilian courts have proved themselves perfectly capable of handling terrorist cases without overriding defendants' basic rights. Federal prosecutors in New York recently won guilty verdicts against bin Laden compatriots who were accused of bombing two American embassies in Africa in 1998. Osama bin Laden himself was indicted in those attacks. Federal courts have ample discretion to keep sensitive intelligence under seal, while still affording defendants a legitimate adversarial process. The law already limits the reach of the Bill of Rights overseas. American troops need not show a warrant before entering a cave in Afghanistan for their findings to be admissible at trial in the United States.

Using secretive military tribunals would ultimately undermine American interests in the Islamic world by casting doubt on the credibility of a verdict against Osama bin Laden and his aides. No amount of spinning by Mr. Bush's public relations team could overcome the impression that the verdict had been dictated before the trial began. Reliance on tribunals would also signal a lack of confidence in the case against the terrorists and in the nation's democratic institutions.

A better way to administer justice must be found. If Mr. Bush is determined to bring terrorists to trial abroad, he should ask the United Nations Security Council to establish an international tribunal like the one set up to deal with war crimes in the Balkans. The proceedings of this court have been fair and effective, and it is respected around the world. If Slobodan Milosevic can be brought to trial before such a court, so can Osama bin Laden.

More than half a century ago the United States and its allies brought some of history's most monstrous criminals to justice in Nuremberg, Germany. In his opening statement at the trial of Nazi leaders, Robert Jackson, the chief American prosecutor, warned of the danger of tainted justice. "To pass those defendants a poisoned chalice is to put it to our lips as well," he said. President Bush would be wise to heed those words.

Editorial in the New York Times, December 2, 2001

JUSTICE DEFORMED: WAR AND THE CONSTITUTION

The inconvenient thing about the American system of justice is that we are usually challenged to protect it at the most inopportune moments. Right now the country wants very much to be supportive of the war on terrorism, and is finding it hard to summon up much outrage over military tribunals, secret detentions or the possible mistreatment of immigrants from the Mideast. There is a strong temptation not to notice. That makes it even more important to speak up.

After the brutal attacks of Sept. 11, the Bush administration began building a parallel criminal justice system, decree by decree, largely removed from the ordinary oversight of Congress and the courts. In this shadow system, people can be rounded up by the government and held at undisclosed locations for indefinite periods of time. It is a system that allows the government to conduct warrantless wiretaps of conversations between prisoners and their lawyers, a system in which defendants can be tried and condemned to death by secret military tribunals run according to procedural rules that bear scant resemblance to normal military justice.

The extreme nature of these new measures and the arbitrary way in which they were adopted are stirring a growing uneasiness among both Republicans and Democrats in Congress, as well as America's overseas allies. Yet so far the voices of opposition have been timid. It is never easy to criticize a president in wartime. It is especially difficult during this war, which began with the killing of thousands of civilians here at home.

But if the antiterrorism effort is to be a genuine success, Americans must speak up. We do not want history to record this as one of those mixed moments in which the behavior of our government failed to live up to the performance of our troops in the field. We do not want to remember this as a time when the nations of the world united in a campaign against terrorists, and then backed away when America attempted to prosecute foreign nationals in secret trials conducted according to unfair rules.

The administration has awarded itself some of these powers, which go well beyond those just granted in the antiterrorism legislation Congress approved at its request only a few weeks ago. It is now reported that Attorney General John Ashcroft is considering a plan to relax rules barring the Federal Bureau of Investigation from spying on domestic religious and political groups without probable cause. The Founding Fathers, properly wary of an unrestrained executive branch, created our system of checks and balances precisely to guard against a president and his aides grabbing powers like these without Congressional approval or the potential for judicial review. Mr. Ashcroft's appearance before the Senate Judiciary Committee this week should provide an opportunity for senators from both parties to express their concerns.

SECRET DETENTIONS

One of the most troubling moves by the administration has been the secret and in some cases prolonged detention of suspects rounded up after Sept. 11. The Justice Department, which has offered a shifting series of explanations as to why this is necessary, most recently suggested that it was responding to the possibility that Osama bin Laden might have sent "sleeper" agents to the United States. The American system does not hold with the idea of incarcerating a large group of people who it seems to have no credible reason to believe are dangerous, out of vague concern that somewhere among them might be a future law-breaker.

The administration certainly has a right to arrest people who are in the country illegally, and deport them after a judicial hearing. If the federal government had consistently kept track of visitors who failed to leave at the appointed time, it would have been harder for the terrorists to carry out their attacks in, New York and Washington. But there appears to be no evidence that the vast majority of those picked up on immigration charges are guilty of anything else, and the punishment must fit the crime. Now, the places they are held and in most cases their names are being kept from the public. Meanwhile there is mounting anecdotal evidence suggesting that some detainees have been held under harsh conditions with limited access to legal counsel.

Mr. Ashcroft retreated last week from some of his stonewalling and filled in certain previously missing details about 548 people in custody for immigration violations, while still refusing to reveal their names. He did release the names, along

with other details, for 93 people charged with other, mostly minor crimes. But it was far short of the sort of disclosure the situation calls for.

MILITARY TRIBUNALS

It is by no means clear that the president has the authority to set up military tribunals without specific Congressional authorization. For the administration to act unilaterally in this sphere is no trifling matter. Beyond trespassing on the separation of powers, it could undercut the legality of any military tribunal proceedings. The precedent the administration cites - Franklin Roosevelt's use of secret military commissions to try eight German saboteurs caught on American soil during World War II - is not reassuring. That trial, which actually did have the support of a Congressional declaration, was an embarrassing skirting of the legal process that occurred mainly to cover up the F.B.I.'s failure to listen when one of the saboteurs attempted to confess and turn in his comrades.

The military tribunals authorized by President Bush have little relation to actual military justice. Under normal military law, trials are not closed to the public, defendants have a right to review all the evidence presented against them, and they cannot be sentenced to death without a unanimous decision by the officers who sit as judges. Defendants also can appeal their cases to higher military courts, and to the Supreme Court. The Bush courts are free to proceed in secret, to withhold evidence from defendants and to deliver capital sentences if two-thirds of the judges consent.

Perhaps most disturbing is the fact that under the administration's order, the president's power to insist on military justice is not limited to accused terrorists who are captured overseas. The order's breadth is astonishing, allowing for the indefinite incarceration and trial of any non-citizen the president deems to be a member of Al Qaeda, to be involved in international terrorism of any type, or to be harboring terrorists. After Sept. 11, Americans were introduced to any number of homeowners who sheltered the men who were about to become hijackers, with no realization that they were anything but students. The scope of these powers should make the potential for abuse clear. The fact that the administration drew them that way should undermine confidence in its self-restraint.

FAITH IN THE COURTS

The Bush administration appears to have no faith in the American criminal justice system's ability to try terrorists fairly and openly, despite the fact that prosecutors have successfully brought to justice the men accused of the first World Trade Center bombing and the attack on the American embassies in Kenya and Tanzania.

Civilian courts are not as fragile as the administration fears. For one thing, longstanding federal laws make it possible to sanitize intelligence information so that it can be introduced as evidence in trials without compromising spying methods. Courts have also given greater latitude to prosecutors in bringing overseas defendants to trial even if they have not been accorded a traditional Miranda warning about their rights before they are questioned after their capture.

The administration has argued that even if the powers it is seizing are broad, it will not use them abusively. This has been a constant theme of Mr. Ashcroft and the administration in general - that they are people who can be trusted to use these broad, repressive rules wisely. That is not the way the American system works. This is a nation built around the rule of law, not faith in the goodness of particular officials.

At a time when the nation is reaching out to create and maintain a global coalition against terrorism, the Bush administration is taking us down a path that will surely wind up embarrassing the country and undermining our own standing as a defender of international human rights and global justice. The United States, which constantly criticizes other countries for holding secret trials, and for refusing to guarantee political prisoners due process, is breaking faith with its own standards. It is no wonder that European countries are uneasy about extraditing anyone to face such tribunals. Our country assures the world that its case against Osama bin Laden is a firm one, but if he is tried in secret, large parts of the world will never believe in his guilt.

ONE RULE OF LAW

The administration has been able to push so far down the road toward negating civil liberties without encountering much resistance because the parallel system it is creating only affects non-citizens. Mr. Ashcroft, for example, is not proposing to wiretap the conversations of American prisoners as they talk to their attorneys.

These are special rules for outsiders, a fact that is supposed to make those of us on the inside feel safe.

The country does treat non-citizens differently from Americans. Most important, authorities can deport them if they fail to live up to the terms of their visas. But the right to a fair trial, to consult with a lawyer beyond the range of government microphones and protection against being held in secret for minor crimes are not for Americans alone. We believe that they are the rights of all human beings. Our history is a story of continuous struggles to keep the government from sectioning off one segment of humanity as unworthy of the same basic civil rights as everyone else. This is not the time to start infringing the rights of people whose only relationship with international terrorists may be a shared nationality, religion or ethnic background.

We will be judged not by how we hold to our values when it is easy, but when it is difficult. The world is watching.

Article by James Orenstein, New York Times, December 6, 2001

ROOTING OUT TERRORISTS JUST BECAME HARDER

The debate about President Bush's order allowing suspected terrorists to be tried by military courts has focused on questions of constitutionality. There is an additional, practical concern: The order may actually make it harder to prevent and punish terrorism.

Law enforcement is increasingly a global effort, and nowhere more so than in the fight against terrorism. Federal agents routinely exchange information with foreign police and seek to bring criminals arrested abroad to the United States for trial. But that cooperation is imperiled when foreign governments don't trust us to respect the basic rights of the people we ask them to send us. Just two weeks ago, Spain said it would not extradite eight suspected terrorists without assurances that their cases would be kept in civilian court. Thus, even without a single military trial, the order is already undermining our ability to bring terrorists to justice.

The order can also harm our ability to participate in foreign investigations of terrorism against Americans abroad, like the bombing of the Khobar Towers or the attack on the destroyer Cole. In such cases, the Federal Bureau of Investigation tries to become as involved as possible, lest a suspect be executed by the host government before our agents can question him or follow up on leads to other terrorists. But our requests will be less persuasive when we claim the right to subject foreign nationals to secret military trials and even execute them without judicial review.

Actually using military tribunals could also reduce our ability to uncover and prosecute terrorist cells operating in this country. The president's order could apply to a green-card holder who has lived in America for decades and is suspected of only tenuous ties to terrorism, but not to an American citizen who actually carries out a deadly plot for Al Qaeda—like Wadih el-Hage, who was recently convicted (in a civilian court) for bombing the American embassies in Kenya and Tanzania. This discrepancy causes at least two problems.

First, it threatens a basic tactic in fighting complex criminal organizations: prosecuting a lowlevel member to help develop more evidence for another case against someone higher in the organization's chain of command. Indeed, much of what law enforcement now knows about Al Qaeda was developed as a result of civilian trials and investigations. But if one suspected terrorist is tried by a military tribunal without the usual constitutional safeguards, important evidence uncovered in that trial could be suppressed on constitutional grounds in later civilian trials, thus hampering our ability to prosecute the full range of people engaged in terrorism.

Second, prosecutors have greater success when they put as many defendants on trial at the same time as possible. For two decades they have used the federal racketeering law which was recently amended to apply in terrorism cases—to do just that. This tactic allows the prosecution to paint a fuller picture of the organization for the jury, and it helps secure convictions, especially against lower-level members who might fare better if tried alone. Since President Bush has said the order will be used sparingly, some terrorism defendants tried in civilian court could have a better chance of being acquitted because their co-conspirators are not in the courtroom with them. There is no need to take such chances.

The president argues that military tribunals will protect civilian jurors against reprisals from terrorists, but federal agents have fully protected judges, jurors and witnesses in many trials posing similar risks. Classified information is already pro-

tected from disclosure in civilian trials by the Classified Information Procedures Act. And the administration is unconvincing when it argues that evidence seized in a "war zone" would be difficult to authenticate for use in civilian courts. Federal civilian courts have a low standard for authentication—it boils down to asking, "Is it more likely than not that this evidence is what you say it is?" It's almost inconceivable that a military tribunal could allow evidence to be admitted more easily and still claim to be fair.

Our government has decades of experience and success in using civilian courts to combat organized crime, and it has successfully applied that experience to fighting terrorism. Abandoning that system for military tribunals needlessly blunts some of our society's most effective weapons in that fight.

James Orenstein is a former federal prosecutor and was associate deputy attorney general from 1999 to 2001.

Statement of Allan M. Spencer, Jr., Parkway Christian Fellowship, Birmingham, Alabama

The Honorable Senators Jeff Sessions and Charles Schemer

This is in regards to the Military Tribunal that you requested.

In my 23 years in the military my associates and I were of the opinion that there was never a case where the person on trial was incorrectly judged, either guilty or innocent. Unlike civil courts I contribute a lot of this to the fact that cases cannot be thrown out based on trivial technicalities. Also the fact that one individual can block a decision by a jury in a civil court is a catastrophe

Finally, while serving in Korea as a wing operations officer I was asked by a defendant to be has defense attorney in a they case. This afforded me an opportunity to see a military court in action. The base legal officer, who is required to be a law school graduate, did a remarkable job as judge. Incidentally the young airman was found innocent. The trial law lawyer was a law school graduate also.

A sampling of the people I have tallied to here are in favor of President Bush's plan to use a military tribunal for the terrorists war criminals.

Our Mission: "To turn unchurched people into Spirit-.filled followers of Jesus Christ"

Statement of Ralph G. Neas, President of People For the American Way, Washington, D.C.

Soon after the Sept. 11 tragedies, President Bush delivered a stirring address to the American people. These vicious attacks against our nation, the president said, were designed to strike not only the Pentagon and the World Trade Center towers, but also the core values of our democracy. The terrorists may have taken thousands of innocent lives, but they could not take the fundamental freedoms that are enshrined in our Constitution. However, People For the American Way is deeply concerned that unilateral, arbitrary powers being exercised by Attorney General John Ashcroft and others in the administration-under the guise of fighting terrorism-subvert a critical principle on which the Constitution was framed: the principle of "checks and balances."

To Thomas Jefferson, a system of checks and balances was vital. Jefferson wrote that he and other founders labored to create a government that "should not only be founded on free principles," but also ensure that "the powers of government should be so divided and balanced. . .that no one (branch) could transcend their legal limits, without being effectively checked and restrained by the others." Sadly, the attorney general and his allies are acting in ways that threaten to circumvent these checks and balances, effectively amending our Constitution and our laws by executive fiat.

People For the American Way has applauded both the president and the attorney general for affirming American pluralism and condemning hate crimes against people who are-or are perceived to be-Muslims or Arab Americans. However, a spate of orders approved recently by Mr. Ashcroft and the Justice Department are extremely troubling. They have ignored, even discarded, fundamental constitutional principles. Even worse, they have revealed a strong disdain for two critical pillars of our democracy: Congress and the courts.

Indeed, not long after the ink was dry on the extremely expansive counter-terrorism law, the attorney general and others in the administration marched forward with a series of new orders and policies that undermine the long-held principle of attorney-client privilege; attempt to legitimize the withholding of information about people being detained; establish military tribunals with no rights of appeal; and pose other serious threats to the Constitution and our democratic principles. These orders endanger the right to legal counsel, the right to due process, and other constitutional freedoms.

The vision of Jefferson and other founders has been cast aside by Mr. Ashcroft and the Justice Department. The attorney general's public statements pay lip service to oversight, but his actions suggest that he believes the Executive Branch is free to justify and execute virtually any action in the name of fighting terrorism and then police the action on its own terms-without proper oversight from the courts or Congress.

The recently signed executive order on military tribunals reflects the growing arrogance of senior officials in the Executive Branch. First, the administration embraced military tribunals without first consulting with Congress. It is also noteworthy that unlike the example that the administration has cited to justify this executive order-German saboteurs during World War II—the current push for military tribunals is occurring at a time when Congress has not approved a formal declaration of war. Second, we're not talking about an order that simply covers people who enter our country illegally to commit sabotage or who are captured on the battlefield. The order is worded so broadly that it could apply to legal residents who have lived in the U.S. for many years. Third, absent from the order are several key rights that the Uniform Code of Military Justice provides-a public trial, proof beyond a reasonable doubt, the right of the accused to select counsel, and rights to an appeal. The administration hasn't embraced military trials, but rather its version of a military trial-the complete details of which it has not disclosed.

In addition to the other branches of government, another important 'check' on the abuse of power is the people. Writing in the Federalist papers, Alexander Hamilton identified the "two greatest securities" that the American people had to hold their elected officials accountable. The first was "the restraints of public opinion," and the second was "the opportunity of discovering with facility and clearness" whether government officials have abused their authority. Sadly, the public is in a poor position to assess whether the arrest and detention of more than a thousand people by federal officials are in keeping with our democratic values. This is because the attorney general has provided very little information about the detainees that were apprehended in the wake of the Sept. 11 tragedies.

People For the American Way is one of numerous civil liberties organizations that recently filed a Freedom of Information Act request to determine the full scope of these detentions. But our FOIA request has been denied. We know that at one point as many as 1,147 people were being held by federal officials under their arrest-and-detention campaign. Yesterday, the attorney general released incomplete numbers, revealing that more than 600 people remain in federal custody in connection with the Sept. l 11th investigations. The attorney general provided figures on the number of detainees being held on immigration violations or federal criminal charges. But the Justice Department has yet to update the total number in custody. And, during yesterday's press conference, Mr. Ashcroft declined to release even the number of detainees being held as "material witnesses." The attorney general refused to release names of most of the detainees. Even assuming that Mr. Ashcroft's reasons are valid, there is no justification for why the Justice Department continues to withhold other important information about detainees-for example, how long each person has been in federal custody; what immigration law, if any, they are accused of violating; and the names of their defense attorneys.

Furthermore, it is not clear when or if Mr. Ashcroft will provide updated information on the number of detainees in the futureor if the figures he released yesterday were simply intended to defuse the controversy for now. The extremely limited information that has been made public hinders the ability of the civil rights and legal communities to adequately monitor the reasons, the length and the conditions of these detentions. In addition, federal officials have failed to share important information with Congress and to consult with the House and Senate in other meaningful ways that provide oversight.

We firmly believe that Congress must move quickly to ensure that anti-terrorism efforts are carried out in a way that balances our national security with the constitutional freedoms that we cherish. We believe that the following goals should guide Congress in its actions:

- *Congress should insist that the administration restore to the judicial and legislative branches their rightful and constitutional roles.* Our Constitution

establishes a system of checks and balances. Through the years, these checks and balances have helped to curtail excesses on the part of the Executive Branch. Meaningful judicial review and oversight should not be short-circuited by the attorney general or other federal officials. Likewise, it has been disturbing to see this administration circumvent Congress' critical role, for example, in consenting to the establishment of military tribunals and the standards that would apply to these trials. Congress should put procedures in place that enable ongoing consultation with the attorney general and other law enforcement officials.

• *Congress should urge federal law enforcement officials to follow and respect existing legal avenues*. There are already sufficient legal avenues through which the attorney general and federal officials can seek authority for taking extraordinary actionssuch as detaining suspects for extended periods of time-in the interest of protecting the health and safety of Americans. For example, if they feel extraordinary circumstances justify the request, federal officials already have the ability to ask a judge to permit them to violate attorney-client privilege. Allowing the attorney general and the Department of Justice to delegate to themselves new and sweeping powers-on top of the immense new powers granted by recent legislation jeopardizes our constitutional liberties.

• *House and Senate leaders should develop a plan to provide sufficient oversight for the nation's anti-terrorism efforts*. In recent weeks, the chairs of various committees in both the House and Senate have claimed authority or expressed a desire to monitor the federal government's efforts to prevent and combat terrorism. To avoid duplicative efforts and ensure proper oversight, we urge the leadership in both chambers to determine, in a bipartisan spirit, the appropriate committees to fulfill this critical role.

• *A Congressional board of inquiry should be established to examine the events and environment within which the Sept. 11 tragedies occurred*. This inquiry should review the work of our nation's intelligence forces and law enforcement agencies, including what they knew and how they were operating and cooperating in the weeks and months before these terrorist attacks. This effort would closely resemble the government inquiry that was conducted to examine how and why the attack on Pearl Harbor occurred. These efforts should be conducted in the interest of learning lessons and preventing future catastrophes, rather than casting blame. Such efforts also could be valuable in determining whether there is truly a need for changes in federal investigative or police powers, rather than basing changes on the assumptions of the attorney generalwithout Congressional or judicial approval.

Finally, it is also worth noting that in today's Washington Post, eight former high-ranking FBI officials-including a former director-raise serious concerns about the arrest-and-detention campaign that has been waged by John Ashcroft and the Justice Department. Their criticism covered three areas: The Ashcroft approach hasn't worked in the past, it might undercut efforts to infiltrate terrorist cells, and it could lead to abuses of civil liberties. Former FBI Director William Webster said that during his tenure the agency used "good" and "lawful" investigative techniques, and he warned that the Ashcroft approach "carries a lot of risk with it."

Article by William Safire, New York Times, November 15, 2001

SEIZING DICTATORIAL POWER

WASHINGTON—Misadvised by a frustrated and panic-stricken attorney general, a president of the United States has just assumed what amounts to dictatorial power to jail or execute aliens. Intimidated by terrorists and inflamed by a passion for rough justice, we are letting George W. Bush get away with the replacement of the American rule of law with military kangaroo courts.

In his infamous emergency order, Bush admits to dismissing "the principles of law and the rules of evidence" that undergird America's system of justice. He seizes the power to circumvent the courts and set up his own drumhead tribunals—panels of officers who will sit in judgment of noncitizens who the president need only claim "reason to believe" are members of terrorist organizations.

Not content with his previous decision to permit police to eavesdrop on a suspect's conversations with an attorney, Bush now strips the alien accused of even the limited rights afforded by a court-martial.

His kangaroo court can conceal evidence by citing national security, make up its own rules, find a defendant guilty even if a third of the officers disagree, and execute the alien with no review by any civilian court.

No longer does the judicial branch and an independent jury stand between the government and the accused. In lieu of those checks and balances central to our legal system, noncitizens face an executive that is now investigator, prosecutor, judge, jury and jailer or executioner. In an Orwellian twist, Bush's order calls this Soviet-style abomination "a full and fair trial."

On what legal meat does this our Caesar feed? One precedent the White House cites is a military court after Lincoln's assassination. (During the Civil War, Lincoln suspended habeas corpus; does our war on terror require illegal imprisonment next?) Another is a military court's hanging, approved by the Supreme Court, of German saboteurs landed by submarine in World War II.

Proponents of Bush's kangaroo court say: Don't you soft-on-terror, due-process types know there's a war on? Have you forgotten our 5,000 civilian dead? In an emergency like this, aren't extraordinary security measures needed to save citizens' lives? If we step on a few toes, we can apologize to the civil libertarians later.

Those are the arguments of the phony-tough. At a time when even liberals are debating the ethics of torture of suspects—weighing the distaste for barbarism against the need to save innocent lives—it's time for conservative iconoclasts and card-carrying hard-liners to stand up for American values.

To meet a terrorist emergency, of course some rules should be stretched and new laws passed. An ethnic dragnet rounding up visa-skippers or questioning foreign students, if shortterm, is borderline tolerable. Congress's new law permitting warranted roving wiretaps is understandable.

But let's get to the target that this blunderbuss order is intended to hit. Here's the big worry in Washington now: What do we do if Osama bin Laden gives himself up? A proper trial like that Israel afforded Adolf Eichmann, it is feared, would give the terrorist a global propaganda platform. Worse, it would be likely to result in widespread hostage-taking by his followers to protect him from the punishment he deserves.

The solution is not to corrupt our judicial tradition by making bin Laden the star of a new Star Chamber. The solution is to turn his cave into his crypt. When fleeing Taliban reveal his whereabouts, our bombers should promptly bid him farewell with 15,000-pound daisy-cutters and 5,000-pound rock-penetrators.

But what if he broadcasts his intent to surrender, and walks toward us under a white flag? It is not in our tradition to shoot prisoners. Rather, President Bush should now set forth a policy of "universal surrender": all of A1 Qaeda or none. Selective surrender of one or a dozen leaders—which would leave cells in Afghanistan and elsewhere free to fight on—is unacceptable. We should continue our bombardment of bin Laden's hideouts until he agrees to identify and surrender his entire terrorist force.

If he does, our criminal courts can handle them expeditiously. If, as more likely, the primary terrorist prefers what he thinks of as martyrdom,, that suicidal choice would be his and Americans would have no need of kangaroo courts to betray our principles of justice.

Article by William Safire, New York Times, December 6, 2001

'VOICES OF NEGATIVISM'

WASHINGTON—Preparing to tell the Senate Judiciary Committee where to get off today, Attorney General John Ashcroft lashed out at all who dare to uphold our bedrock rule of law as "voices of negativism." (A nattering nabob, moi?)

Polls show terrorized Americans willing to subvert our Constitution to hold Soviet-style' secret military trials. No presumption of innocence; no independent juries; no right to choice of counsel; no appeal to civilian judges for aliens suspected of being in touch with terrorists.

President Bush had no political motive in suspending, with a stroke of his pen, habeas corpus for 20 million people; his 90 percent popularity needs no boost. The feebleness of the Democrats' response, however—with the honorable exception of Vermont's Senator Pat Leahy is highly political. Tom Daschle is waffling wildly be-

cause he is terrified of being slammed as "soft on terrorism," which might overwhelm his strategy of running against "the Bush recession" in the 2002 elections.

With most voters trusting the government with anything, and with an attorney general and his hand-picked F.B.I. boss having the publicity time of their lives, one might expect us negativists to be in disarray.

Here's why we are not: The sudden seizure of power by the executive branch, bypassing all constitutional checks and balances, is beginning to be recognized by cooler heads in the White House, Defense Department and C.I.A. as more than a bit excessive.

Not that they'll ever admit it publicly; Bush will stick to his shaky line that civil courts cannot be trusted to protect military secrets and, as fearful Orrin Hatch assures him, jurors will be too scared to serve. But his order asserting his power to set up drumhead courts strikes some of his advisers, on sober second thought, as counterproductive.

Set aside all the negativist libertarian whining about constitutional rights, goes his newest advice, and forget about America's moral leadership. Be pragmatic: our notion of a kangaroo court is backfiring defeating its antiterrorist purpose.

At the State Department, word is coming in from Spain, Germany and Britain where scores of Al Qaeda suspects have been arrested—that the U.N. human rights treaty pioneered by Eleanor Roosevelt prohibits the turning over of their prisoners to military tribunals that ignore such rights. That denies us valuable information about "sleepers" in Osama bin Laden's cells who are in the U.S. planning future attacks. (Those zealots who cited F.D.R.'s saboteur precedent forgot about Eleanor.)

At the C.I.A., data about China, Russia and other closed societies is gleaned from debriefing returning travelers. But U.S. kangaroo courts would legitimize harsh proceedings overseas against U.S. business executives, academics and tourists—thereby shutting down major intelligence sources. (Interviewing 5,000 Muslim students and visitors, however, is seen by our spooks as an excellent opportunity to recruit Arabicspeaking agents.)

At Justice, those not in the Ashcroft-Mueller axis view the tribunals as giving priority to punishment for past attacks rather than helping to prevent future attacks. Thus Ashcroft undermines Justice's justification for its nationwide dragnet.

At Defense, the hastily drawn order must be translated into a system of trials that would not be invalidated by a Supreme Court. Secretary Donald Rumsfeld has refused to follow lockstep behind Ashcroft in deriding strict constructionists as negativist. On the contrary, Rumsfeld calls the informed outcry "useful" in refining the order The hopeful news is that Rumsfeld has reached outside the Pentagon to get advice legal minds not conflicted by administration ties. Lawyers inside the armed services are also determined to resist the subversion of the Uniform Code of Military Justice by Bush's diktat.

Many attorneys friendly to this White House know that order was egregiously ill drafted. The White House counsel, Alberto Gonzales, defended the order on this Op-Ed page by denying or interpreting away its most offensive provisions. That's his signal to the Pentagon general counsel, William Haynes, to give the broadest interpretation to the order's five words promising non-citizens "a full and fair trial."

Otherwise, our Constitution would be set aside by Cicero's ancient inter arma silent leges—in time of war, the law falls silent.

Editorial in St. Louis Post-Dispatch, November 12, 2001, Monday Five Star Lift Edition

INVADING A CONFIDENCE

CIVIL LIBERTIES

THE LAWYER-CLIENT—privilege is to the law what the seal of confession is to religion. Just as a priest can only tend to the penitent who can confess his sins, the attorney can only defend a person with whom he can communicate freely.

This privilege is ancient, sacrosanct and virtually inviolable. It is a cornerstone of an adversary system that accords a suspect the presumption of innocence and a lawyer to defend him. A lawyer cannot disclose anything the client says unless the information involves an ongoing crime, imminent death or serious bodily harm. If a murderer discloses the location of a victim's body, for example, the lawyer shouldn't tell the police. The privilege is so durable, in fact, that it survives the cli-

ent's death; Kenneth Starr di scovered that when he tried unsuccessfully to pry into what Vincent Foster told his lawyer before his suicide.

For all of these reasons, civil libertarians and many lawyers were shocked by Attorney General John D. Ashcroft's recent order allowing agents to snoop on communications between terror suspects and their lawyers. Robert Hirshon, president of the American Bar Association, said it ran "squarely afoul" of the right to counsel. Sen. Patrick Leahy, Democratic chairman of the Senate Judiciary Committee, questioned Mr. Ashcroft's authority to authorize the surveillance.

The attorney general issued the rule on an emergency basis, without allowing the normal public comment period. It allows the Justice Department to monitor conversations and intercept mail between suspects and their lawyers for up to a year, without court order. Mr. Ashcroft must certify that there is a "reasonable suspicion" that a inmate is using communications with his lawyers to "facilitate acts of terrorism."

The Justice Department said it would protect the suspects' rights by notifying them that the government is listening. The monitoring will be conducted by a "taint" team that will only turn over information to prosecutors or investigators if there is an imminent threat of violence or with the approval of a federal judge. None of the information could be used in court.

One troubling aspect of Mr. Ashcroft's order is that it covers people who have not been convicted of crimes, but are being held as material witnesses or on allegations of minor immigration or law violations. The government has detained more than 1,100 people on these grounds since Sept. 11. It won't release their names, where they are detained or the charges against them. The surveillance of these detainees' conversations with their lawyers deepens their isolation.

Irwin Schwartz, president of the National Association of Criminal Defense Lawyers, says that the Ashcroft rule would deny a suspect of the right to a lawyer. "If we can't speak with a client confidentially, we may not speak with him at all," he said.

One of the great challenges of Sept. 11 is to protect America's safety without sacrificing important rights. Mr. Ashcroft failed to achieve that balance when he invaded the legal confessional.

Editorial in St. Louis Post-Dispatch, November 27, 2001, Tuesday Five Star Lift Edition

ASHCROFT OVERREACHES

CIVIL LIBERTIES

KEY U.S.—senators are complaining, and rightly so, that Attorney General John D. Ashcroft is overreaching his mandate to fight terrorism with unilateral plans to listen in on lawyers' conversations with their clients and to try suspected terrorists in front of military tribunals.

"We all agree that there should be justice here, but let's be a little bit careful how we do it," Sen. Patrick J. Leahy, D-Vt., said Sunday on NBC's "Meet the Press."

Mr. Leahy, chairman of the Senate Judiciary Committee, and some of his colleagues were upset to read in newspapers of "ad-hoc, outside-the-justice-system methods," for combating terrorism. In particular, Mr. Leahy said he was dismayed by a surprise rule change that will allow the government to eavesdrop on privileged conversations between lawyers and defendants charged with terrorism-related crimes. He also disagrees with the administration's decision that some suspected terrorists could be tried by a military tribunal, with less stringent rules on evidence and public accessibility.

Mr. Leahy's comments about the failure to consult Congress were echoed by the ranking Republican on the Judiciary Committee, Sen. Orrin Hatch of Utah. The two promised to grill Mr. Ashcroft in December on his actions, and suggested the attorney general set aside "several hours" for this appearance.

"I think the attorney general owes the country—certainly owes the Congress—an explanation," Mr. Leahy said.

He's right. Apart from questions of constitutionality, it is important that the administration consult congressional leaders in both parties because they are essential allies in the war on terrorism. Mr. Leahy, himself the target of an anthrax-laden letter, shepherded the administration's anti-terrorism legislation, with sweeping new legal authority, through the Senate last month. Instead of blind-siding bipar-

tisan allies with surprise announcements of draconian tactics (which may be constitutional, but not necessarily desirable), Mr. Ashcroft should be consulting them closely. That would not only build unity, but might also help avoid blunders.

As Mr. Leahy said, "I don't know why all this has to be done by fiat at the White House. . . .Why not trust the normal process of our government?"

Indeed. The eyes of the world are on America, and the normal process of our democratic government. If we wish to be perceived as a nation that believes in liberty and justice for all, we must behave like one.

Statement of David J. Scheffer, Senior Fellow, U.S. Institute of Peace, Washington, D.C., Former U.S. Ambassador at Large for War Crimes Issues (1997-2001)

(Views expressed in this statement are solely those of the author.)

REALITY CHECK ON MILITARY COMMISSIONS

President George W. Bush's order of November 13, 2001, authorizing U.S. military commissions to prosecute international terrorists in truncated judicial proceedings was a predictable option for him to activate in the campaign against global terrorism. Circumstances no doubt will arise where having this option available will facilitate the dual needs of justice and deterrence when particular terrorists or their operatives fall into U.S. custody. But Bush Administration officials, with some mixed signals, have largely marketed the military commissions as the primary option for prosecution. In reality, military commissions should be the exception, not the rule. When used, they should be properly constituted and subject to rules that protect the due process rights of defendants and uphold American adherence to the rule of law. Our ability to achieve extradition of terrorist suspects to U.S. jurisdiction hangs in the balance.

There is no legitimate target, civilian or military, for an international terrorist. If a terrorist attacks a military target and kills only military personnel, that act is still criminal. That is what recent international anti-terrorism conventions and the hefty U.S. criminal statutes enacted to prosecute terrorists provide. Keeping terrorists in the terrorist box has its advantages for prosecutors and for achieving justice. Using antiterrorism laws in federal courts, prosecutors have demonstrated their ability to nail terrorists to the wall in successful trials, respectful of due process rights, for the 1993 World Trade Center bombing and the 1998 U.S. Embassy bombings in Africa (involving al Queda defendants).

In contrast, once a terrorist suspect is categorized as an alleged war criminal or combatant and prosecuted before a military commission for violations solely of the law of war, his successful prosecution can be impeded. Even if the individual is regarded as an unlawful belligerent because of the character of his warfare, the military commission would be pressed to concede that under certain circumstances that alleged war criminal may have had or his colleagues may have future theoretical rights to attack legitimate military targets in the armed conflict already recognized by the United States, particularly if they take simple steps to transform into lawful belligerents. The defendant, particularly an aloof leader or conspirator, may try to make the case that he was indeed a lawful belligerent in his particular case and that military targets, like the Pentagon, Khobar Towers, and the USS Cole, were legitimate strikes. Why would we want to risk conceding any belligerent status, lawful or unlawful, to a terrorist?

Military commissions have limited jurisdiction over violations of the law of war and, if authorized by statute, other offenses. But currently the Uniform Code of Military Justice only establishes jurisdiction over the law of war. Article 21 of the Uniform Code of Military Justice and the Rules of Court Martial (201(g)) establish that for a military commission to extend its jurisdiction beyond the law of war, Congressional action is needed. Absent a new Act of Congress, a U.S. military commission would lack authority to enforce anti-terrorism laws or even crimes against humanity that do not overlap with the law of war. Reliance only on the law of war would deny military prosecutors potent laws that have proven their worth in federal trials of al Queda defendants. The law of war is not as well adapted to the prosecution of terrorists as are the anti-terrorism laws. For example, conspiring to plan or participate in an act of terrorism is easier to prosecute under federal criminal law than would be the same conduct under the law of war, which is weak on conspiracy charges and probably would require a higher threshold of proof for conduct more egregious than that found in the anti-terrorism laws.

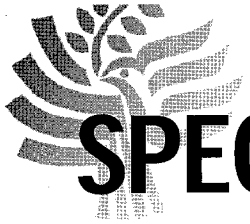
Most terrorist suspects who survive lethal force likely will be apprehended by foreign rather than U.S. authorities. Hundreds reportedly already have been detained this way. In Afghanistan, thousands of non-Afghan Taliban fighters and al Queda suspects currently face the prospect either of a fight to the death or of their surrender to predictably merciless Islamic trials staged by the Northern Alliance and over which the United States may exercise little if any control. U.S. military commissions may be largely irrelevant under these circumstances.

Beyond Afghanistan, foreign officials will not ponder long about whether to extradite terrorist suspects in their custody to U.S. control. The president's military order is drafted so broadly and leaves so many doubts about due process rights that it is improbable foreign authorities would extradite terrorist suspects to stand trial in any U.S. court. Foreign governments will balk at the paucity of guaranteed due process rights in the military commission and refuse to take the predictable heat for transferring a terrorist suspect into the black hole promised by the executive order. Already, Spain has indicated that it will not extradite key al Queda suspects to the United States because of the prospect of trial by military commission and of the death penalty.

Other anti-death penalty governments also will prohibit extraditions to military commissions less inclined to waive the death penalty than would U.S. federal courts. Even if a foreign government contemplated extraditing a terrorist suspect to a federal court, the military order (Section 2(B)(c)) could require that court to transfer the suspect to a military commission that would exercise exclusive jurisdiction, operate in a free-fire zone for due process, and aggressively seek the death penalty.

Ironically, foreign (particularly European) jurisdictions that hold terrorist suspects and know they could be tried domestically with due process protections falling short of those available in U.S. federal courts, will look at American requests for extradition and conclude that Washington's abandonment of credible trial procedures and defendants' rights makes the United States a poor choice for a fair trial. In any event, foreign officials may consider it their own responsibility to bring to justice individuals who engaged within their own country to plan or commit terrorist attacks against U.S. targets. In terms of constructing a robust international legal architecture for dealing with terrorism, the optics and the practical consequences of having prosecutions in both U.S. and foreign courts is significant.

The best course now would be to clean up President Bush's military order with U.S. Congressional action that makes military commissions more user friendly for foreign authorities holding terrorist suspects and that casts the order as an exceptional option for use only when U.S. federal courts truly cannot assume their rightful role in prosecuting international terrorists.



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SPECIAL REPORT

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David Scheffer

Options for Prosecuting International Terrorists

About the Report

One of the critical issues in the campaign against terrorism is how international terrorists will be prosecuted if they surrender or are apprehended. This report examines many of the options for prosecution that will confront policymakers.

The report was prepared by David Scheffer, a senior fellow at the United States Institute of Peace and formerly U.S. ambassador at large for war crimes issues (1997–2001). Scheffer was deeply engaged from 1993 to 2001 in the negotiation and establishment of international criminal tribunals for the former Yugoslavia, Rwanda, and Sierra Leone, as well as the Extraordinary Chambers in Cambodia. He also led the U.S. delegation to UN talks on the permanent International Criminal Court.

The views expressed in this report do not necessarily reflect those of the United States Institute of Peace, which does not advocate specific policies.

November 14, 2001

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Briefly . . .

- During the campaign against terrorism, the United States and the international coalition are using both armed force and criminal investigative tools to exercise their right of self-defense and, if circumstances permit, to bring the perpetrators to justice. The latter goal has been instrumental in building the international coalition against terrorism.
- Grounds for criminal prosecution of the al Qaeda terrorist suspects include outstanding U.S. indictments, UN Security Council resolutions, the violations of U.S. criminal laws and crimes against humanity that occurred on September 11, 2001, and the political commitment to criminal justice demonstrated by the United States Government, the United Nations, and coalition governments.
- The terrorist suspects should not be granted prisoner of war status if apprehended, although officially organized forces of the Taliban in Afghanistan probably would qualify for prisoner of war status.
- The options for prosecution of the terrorist suspects include nine judicial forums that need not be mutually exclusive. There may well be occasion to prosecute different terrorist suspects in different courts in different jurisdictions simultaneously. The options include U.S. federal courts, military courts, or a military commission; foreign national courts; a UN Security Council ad hoc international criminal tribunal; a UN General Assembly ad hoc international criminal tribunal; a coalition treaty-based criminal tribunal; a special Islamic court; and UN-administered courts in Afghanistan.
- At least for the near future, key options for prosecution of terrorist suspects will be U.S. federal courts—where so many of them already have been indicted for pre–September 11 crimes—and foreign national courts that will certainly play a key role in the investigation and prosecution of terrorist suspects. For the long term, much will depend on how many terrorist suspects are apprehended and how feasible and realistic any U.S., military, international, or Islamic law option for prosecution becomes. Nonetheless, discussion should commence on the feasibility of other options in terms of legal, political, and practical concerns.

- Ultimately the judicial system in Afghanistan will require major surgery, with international assistance, to instill the rule of law and bring to justice in a credible manner those al Qaeda terrorists or operatives who may not be prosecuted elsewhere.

Introduction

A primary objective in the long campaign against terrorism that was launched in the wake of the September 11, 2001, terrorist attacks on the United States is to bring the perpetrators of those crimes to justice. President George W. Bush and other U.S. officials have articulated this objective repeatedly since September 11. The justice objective has been a major premise for the international coalition against terrorism, which would not have come together as quickly and successfully as it did without the integrity of a U.S. intention to bring the suspects to justice in courts of law. But U.S. officials have emphasized the possibility that suspects might be killed in self-defense if circumstances so require during the military campaign against the al Qaeda terrorist network and the Taliban regime in Afghanistan. This appears to be particularly the case if suspects are located in and thus exposed to the legitimate targeting of command and control centers pursuant to the laws and customs of war. On October 21, 2001, the chairman of the Joint Chiefs of Staff, General Richard B. Myers, confirmed that if the prime suspect, Osama bin Laden, were to be found, U.S. forces would not necessarily shoot him on sight. He said, "It depends on the circumstances. If it's a defensive situation, then, you know bullets will fly. But if we can capture somebody, then we'll do that." In short, during the campaign against terrorism the United States and the coalition are using both armed force and criminal investigative tools to exercise their right of self-defense and to bring the perpetrators to justice, if circumstances permit.

The number of terrorist suspects around the world, including within the United States, is large and growing. Already, 22 suspects of terrorist crimes committed against U.S. targets have been indicted by U.S. courts and are publicly listed as the FBI's "Most Wanted." As of early November 2001, more than 1,000 suspects have been detained in the United States, although only a small number of those individuals appear to be suspected of direct involvement with the al Qaeda network and the September 11 attacks. Much may be ascertained about the reach of the al Qaeda network and its future possible targets through the investigation and prosecution of terrorist suspects, a prospect that will fade quickly if the suspects are killed in military actions. The long-term goal of dismantling al Qaeda and of deterring international terrorism could depend greatly on what is learned through judicial processes with live suspects. A great deal about the al Qaeda network was learned from U.S. federal criminal trials of terrorists who have been convicted of prior terrorist attacks, such as the 1993 World Trade Center bombing and the 1998 U.S. embassy bombings in Africa. Therefore, it is important to consider the options for prosecution that will confront authorities as suspects are apprehended and governments consider the pro's and con's of various forums for trial. This Special Report sets forth some of those options and explains their advantages and disadvantages, particularly from the perspective of U.S. interests.

Grounds for Criminal Prosecution

There are several legal and political grounds for pursuing the criminal prosecution of certain terrorists associated with the al Qaeda network as well as any other possible suspects implicated in the September 11 attacks on the United States.

- Osama bin Laden and 21 other suspects have long been indicted by U.S. federal courts for terrorist crimes occurring prior to the September 11 attacks. These individuals

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already are indicted fugitives from U.S. justice. Even though the current military operations leave open the real possibility of lethal targeting of some of the suspects, the fact remains that some of the same individuals are indicted for prior terrorist crimes for which they are expected to stand trial. Their deaths now would leave those prior crimes open to much speculation as to who planned or committed them. When several prime suspects in the 1995 Khobar Towers bombing were beheaded by Saudi authorities prior to FBI questioning, the FBI was not able to obtain evidence that probably would have helped solve that terrorist crime and perhaps pointed towards measures to deter future terrorist crimes.

- Prior to September 11, the United Nations Security Council adopted resolutions identifying Osama bin Laden and his associates as indicted fugitives from U.S. law and, acting under Chapter VII of the United Nations Charter, directing the Taliban authorities in Afghanistan to turn Osama bin Laden over "to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice. . ." [UN Docs. S/RES/1267 (1999) and S/RES/1333 (2000)]. In two resolutions, the Security Council called on states to bring the perpetrators, organizers, and sponsors of the September 11 attacks to justice [UN Docs. S/RES/1368 (2001) and S/RES/1373 (2001), invoking Chapter VII enforcement authority]. (See page 14 for excerpts.)

The terrorist crimes of September 11 violate a host of U.S. criminal laws.

- The terrorist crimes of September 11 violate a host of U.S. criminal laws, including laws that criminalize acts of international terrorism (specifically when such acts include homicide); destruction of aircraft, incapacitating any individual on an aircraft, performing an act of violence against any individual on an aircraft, or conspiring to do so; and forgery of passports or other immigration documents. The terrorist crimes also probably constitute crimes against humanity, namely, multiple acts committed as part of a widespread or systematic attack knowingly directed against any civilian population in furtherance of a state or organizational policy. The latter would be a novel charge to prosecute in a U.S. federal court, as it derives from customary international law and is not codified as such in the U.S. federal criminal code. But as a matter of international law, the attacks of September 11 could be characterized as crimes against humanity and could be charged against the perpetrators, if not in U.S. federal court then in a foreign jurisdiction or international tribunal that exercises personal jurisdiction over one or more suspects or recognizes such crimes as crimes of universal jurisdiction.

Law enforcement agencies in the United States and around the world are working intensively to investigate, track, apprehend, question, and consider indictments of terrorist suspects.

- The United States Government, the United Nations, and the governments that have joined the coalition against terrorism have publicly established an objective of bringing the perpetrators of international terrorism, including those associated with the September 11 attacks, to justice. Law enforcement agencies in the United States and around the world are working intensively to investigate, track, apprehend, question, and consider indictments of terrorist suspects. The Federal Bureau of Investigation's "Most Wanted" list has included leading terrorist suspects since September 11, 2001, for the purpose of apprehending and prosecuting such individuals in U.S. federal courts. The U.S. Rewards for Justice Program, enthusiastically promoted by the Bush administration, is directed toward apprehension and conviction of the terrorist suspects (and payments thereunder presumably would not be available if the suspects died prior to apprehension). Thus the political commitment to criminal justice is exceptionally high and could not be sidestepped without creating a credibility gap in governments' justifications for their actions. The commitment to criminal justice is joined, however, with the inherent right of individual and collective self-defense arising from the September 11 attacks, which has been affirmed by the United Nations Security Council [UN Docs. S/RES/1368 (2001) and S/RES/1373 (2001)]. The latter right can take precedence over criminal justice depending upon the circumstances

that arise during military operations and the imminent threat some of the suspects may pose with respect to future terrorist attacks, which could give rise to anticipatory self-defense against such a threat.

Terrorist Suspects or Prisoners of War?

The character of the campaign against terrorism has given rise to explicit invocations of war by President Bush and his cabinet and to the use of armed force by the United States and the United Kingdom in Afghanistan.

The character of the campaign against terrorism has given rise to explicit invocations of war by President Bush and his cabinet and to the use of armed force by the United States and the United Kingdom in Afghanistan. The question naturally arises whether the terrorist suspects are not only international terrorists but also belligerent combatants entitled to prisoner of war status if captured. Answering that question does not require us to answer the overriding factual question of whether an actual war has begun. That is a very different debate. The status of an individual as a prisoner of war under the 1949 Geneva Convention III Relative to the Treatment of Prisoners of War arises in "all cases of declared war *or of any other armed conflict* [italics added] which may arise between two or more of the High Contracting Parties [of the Convention], even if the state of war is not recognized by one of them." The question of status also may arise in "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Both Afghanistan and the United States are High Contracting Parties of the third Geneva Convention.

Terrorist suspects already are in custody in numerous jurisdictions, including the United States. None of them have been accorded prisoner of war status.

Terrorist suspects already are in custody in numerous jurisdictions, including the United States. None of them have been accorded prisoner of war status by law enforcement authorities. Achieving prisoner of war status may be difficult in any case. Article 4(A)(2) of the third Geneva Convention would have the effect of requiring that any al Qaeda terrorist must be a member of a militia or volunteer corps, including those of organized resistance movements, and he or she must have fulfilled each of the following conditions:

- that of being commanded by a person responsible for his subordinates;
- that of having a fixed distinctive sign recognizable at a distance;
- that of carrying arms openly; and
- that of conducting their operations in accordance with the laws and customs of war.

An al Qaeda terrorist suspect presumably would fail the final three requirements. Article 5 of the third Geneva Convention provides enough flexibility, particularly in the theater of operations, to grant a person prisoner of war status "until such time as their status has been determined by a competent tribunal." This may prove necessary with respect to military operations in Afghanistan in the event individuals are apprehended whose identity and background is not easily determined.

Even if the terrorist suspect were a prisoner of war, he or she could be investigated and prosecuted for the September 11 attacks, which were both U.S. and international crimes for which prisoners of war could be prosecuted.

But beyond this temporary situation, any erroneous permanent designation of a terrorist suspect as a prisoner of war could lead to some odd situations. In particular, any prisoner of war who is a chaplain or a minister of religion would be at liberty to minister freely to others in captivity, which could lead to some awkward albeit manageable situations with any captured leaders of al Qaeda who claim religious ministry. Also, a prisoner of war would be required only to give his surname, first name, rank, date of birth, and army, regimental, personal, or serial number, or failing that, equivalent information. Of course, no other person in custody could or should be forced to provide information, but prisoner of war status might encourage terrorists to withhold information. Furthermore, prisoners of war would be released and repatriated without delay after the cessation of active hostilities unless they were involved in criminal proceedings for an indictable offense, although that probably would be the case with a terrorist suspect. Even if the terrorist suspect were a prisoner of war, he or she could be investigated and prosecuted for the September 11 attacks, which were both U.S. and international crimes for which prisoners of war could be prosecuted.

The designation of terrorist suspects as prisoners of war would accord them and their operatives non-combatant belligerent status, an identity that could give rise to arguable justifications for some of the targets (such as military or government facilities) al Qaeda may select for its terrorist attacks. Such status would afford defense counsel arguments in defense of a terrorist suspect that would not be credible if delivered with respect to an individual who does not have prisoner of war status.

If military personnel of the Taliban or any other officially organized military force are captured during the campaign against terrorism, then it would be prudent to treat them as if they were prisoners of war for the moment, as is the usual U.S. practice. After examination, some of the fighters or top leadership who have collaborated with al Qaeda might be disqualified for prisoner of war status, but one would expect that the bulk of such forces would be treated as prisoners of war until the end of hostilities and their release pursuant to the third Geneva Convention.

Options for Prosecution

This report briefly examines nine possible options for prosecution of terrorist suspects. These options are not intended to be mutually exclusive. There may well be occasion to prosecute different terrorist suspects in different courts in different jurisdictions simultaneously. The simple reality is that terrorist suspects who are apprehended or surrender voluntarily will doubtless be prosecuted in numerous jurisdictions.

Terrorist suspects who are apprehended or surrender voluntarily will doubtless be prosecuted in numerous jurisdictions.

The forthcoming permanent International Criminal Court is not considered as an option since its jurisdiction applies only with respect to crimes committed after the entry into force of its treaty-based statute, and that has not yet occurred. Therefore, it would not be empowered to investigate any of the terrorist crimes associated with the current campaign against terrorism. Any change in temporal jurisdiction would require an amendment to the statute of the International Criminal Court, and no amendments are permitted until the review conference that will be convened seven years after the court is established. Any protocol to the statute of the International Criminal Court on this issue probably would require consensus support, which is highly unlikely among all of the 139 signatories of the statute.

The International Criminal Court's subject matter jurisdiction also does not extend to crimes of international terrorism, although it is entirely possible that once the court is established, certain crimes of international terrorism may also meet the definition of crimes against humanity, war crimes, or genocide. UN Security Council action seeking to broaden the International Criminal Court's temporal and subject matter jurisdiction to encompass the September 11 attacks and perhaps other prior terrorist actions in defiance of the court's temporal and subject matter jurisdiction doubtless would be challenged on significant legal grounds. Such a Security Council resolution also would establish a precedent that might be used in other circumstances to modify the temporal and subject matter jurisdiction of the International Criminal Court in ways that would be profoundly disturbing to many signatories to the court's statute. The negotiations leading to the statute of the International Criminal Court were firmly grounded on the principle of prospective jurisdiction and on an initial limiting of the court's subject matter jurisdiction to three categories of crimes until proposed additional crimes could be reviewed seven years after establishment of the court and in the context of formal amendment to the statute.

1. U.S. Federal Court

Several trials of individuals associated with the al Qaeda network already have taken place in U.S. federal courts in connection with the 1993 World Trade Center bombing and the 1998 U.S. embassy bombings in Kenya and Tanzania. Convictions have been

rendered in all of these trials, which produced significant evidence implicating al Qaeda and Osama bin Laden in terrorist crimes. These jury trials were seen as fair (at least in the West) and complied with due process requirements.

In addition, Osama bin Laden and other terrorist suspects have been indicted by U.S. federal courts for pre-September 11 crimes and thus would stand trial in federal court if apprehended and brought to the United States. The advantages of a U.S. federal prosecution of these terrorist suspects are considerable:

The United States has enacted comprehensive anti-terrorism laws that greatly facilitate the investigation and prosecution of terrorist suspects who fall within U.S. federal jurisdiction.

- For several decades the United States has led the world in the negotiation and implementation of anti-terrorism conventions that require states either to prosecute terrorists in national courts or to extradite terrorists to jurisdictions that are willing and capable of prosecuting them. The United States has enacted comprehensive anti-terrorism laws that greatly facilitate the investigation and prosecution of terrorist suspects who fall within U.S. federal jurisdiction. A purposeful denial of U.S. prosecution of apprehended terrorist suspects in deference to an alternative foreign or international forum of prosecution could undermine the objective of national prosecutions of terrorist suspects so vigorously sought by the United States for so many years. Prosecution in U.S. federal courts would demonstrate to the world that the United States takes its obligations under the anti-terrorism conventions seriously.

Federal prosecution would enable prosecutors to use sensitive information that probably would not be available for any foreign or international prosecution.

- Federal prosecution would enable prosecutors to use sensitive information that probably would not be available for any foreign or international prosecution. A great deal of evidence in terrorism cases is classified, and the procedures available under U.S. law for the use of that information in federal criminal trials can make the difference between pursuing a prosecution or dropping it.
- A U.S. federal criminal trial would guarantee the defendant due process rights that might not exist in a foreign or international trial. Those due process rights help ensure that a fair trial can take place, even if a U.S. trial may appear politically unfair to some foreign observers.
- The thousands of American families, friends, and colleagues of the victims of the September 11 terrorist attacks and of the other terrorist attacks for which suspects have been indicted probably would expect the criminal trials to take place in U.S. federal courts. Their interests and rights are considerable and might prove difficult to accommodate if trials took place outside of the United States.
- The United States has been a strong supporter of the principle of complementarity (deferral to national courts) that is found in the statute for the International Criminal Court. U.S. federal trials of the terrorist suspects would demonstrate U.S. willingness and capability to pursue national prosecutions of terrorist actions that probably constitute crimes against humanity within the jurisdiction of the International Criminal Court had the Court been established prior to September 11, 2001. American reluctance to prosecute could be used by those who argue that the International Criminal Court is needed to respond to the inability or unwillingness of national justice systems to deal with such matters, an argument that may have merit with respect to other jurisdictions but should not justified with American non-performance.

Given the due process rights of a defendant in a federal trial, the terrorist suspect may reach acquittal and freedom more easily in a federal courtroom than in a foreign or international courtroom.

The disadvantages of U.S. federal prosecution include the following:

- The burden of proof in a terrorist trial in U.S. federal court is high (beyond a reasonable doubt) and thus may hinder efforts to bring terrorist suspects to justice. Federal prosecutors may be unwilling to use sensitive information that is incriminating but derived from sources and methods that could be jeopardized by the disclosure requirements of a federal trial. Given the due process rights of a defendant in a federal trial, the terrorist suspect may reach acquittal and freedom more easily in a federal courtroom than in a foreign or international courtroom (although the same information almost certainly would not be made available to any non-U.S. prosecution).

- The imposition of the death penalty on a convicted terrorist in a U.S. federal trial could transform the defendant into a martyr for their cause. But the mere availability of the death penalty also may prevent certain foreign jurisdictions, particularly in Europe, that have prohibited the death penalty from extraditing terrorist suspects to U.S. courts. The United States may have to waive the death penalty in certain cases in order to obtain custody of terrorist suspects, and federal prosecutors may decide to seek life imprisonment as an alternative to the death penalty in order to avoid the martyrdom issue.
- The certainty of a jury trial in a federal prosecution gives rise to the question of whether any such trial could be fair given the impact of the terrorist attacks on the American psyche and the U.S.-led campaign against terrorism. Jury trials have been successfully and fairly held (at least as far as most westerners are concerned) for terrorist suspects of the 1993 World Trade Center bombing and the 1998 U.S. embassy bombings. It would be a severe setback for the principle of jury trials in the United States if U.S. authorities assumed that such trials could not be fair for the most heinous crimes ever to be committed on U.S. soil. The alternative in a foreign or international court almost certainly would rely exclusively on judges to examine the evidence and render verdicts.
- A federal criminal trial, particularly of the leaders of al Qaeda such as Osama bin Laden and Dr. Ayman al-Zawahiri, could turn into a political firestorm sparking political demonstrations against the United States in Islamic countries, more acts of terrorism against U.S. targets, and significant security risks for the trial itself. The location of the federal trial and of the prisons where terrorist suspects are held could become magnets for disturbances and security threats. It could also be argued, however, that no matter where al Qaeda leaders are prosecuted, the U.S. role in that prosecution will be so dominant that the political firestorm will ignite anyway.

The certainty of a jury trial in a federal prosecution gives rise to the question of whether any such trial could be fair.

2. U.S. Military Court

A fundamental issue arises whether U.S. military courts or commissions (see next option) would have jurisdiction under U.S. law over crimes committed in the United States outside the context of an ongoing armed conflict. Without attempting to answer that very difficult question, if one assumes that U.S. military courts might indeed have such jurisdiction, then it should be recognized that U.S. military courts offer the procedures, constraints, and secrecy under the Uniform Code of Military Justice that may be desirable with respect to the terrorist suspects. The crimes that were committed on September 11 were unique in character and execution, and the prosecution of terrorist suspects may require the unique attributes of a military trial. An overriding advantage of a military trial is the degree of control that the United States could exercise over the process. Notwithstanding the September 11 attacks, U.S. military courts or commissions certainly may prove useful with respect to any crimes committed by terrorist suspects or the Taliban or other regular enemy forces during the military operations in Afghanistan or elsewhere.

However, military trials in the United States would present exceptionally negative optics to international audiences, particularly in the Islamic world. A U.S. military trial could embolden extremists to lash out at the militaristic character of the trial. While it may be determined that it is possible to prosecute the terrorist suspects for terrorism crimes outside of an ongoing armed conflict, they would be likely to raise defenses as prisoners of war and as belligerents that would deflect the anti-terrorism prosecution and seek to refocus the trial on the struggle between two belligerents rather than on crimes of terrorism.

Military trials in the United States would present exceptionally negative optics to international audiences, particularly in the Islamic world.

3. U.S. Military Commission

U.S. federal law permits the establishment of "military commissions" to exercise concurrent jurisdiction with courts-martial in order to prosecute violations of the laws of

war or other offenses (such as perhaps terrorism) that may be authorized by statute. There is considerable flexibility associated with this authority, although it has rarely been used. On November 13, 2001, President Bush signed a presidential directive declaring an "extraordinary emergency" and empowering him to establish military commissions to prosecute non-U.S. citizens arrested in the United States or abroad. This tilt towards military trials no doubt arises from their utility in adopting specifically tailored procedures for the extraordinary prosecutorial challenges that probably will arise with the al Qaeda terrorist suspects and perhaps senior Taliban officials who collaborated with the terrorist suspects.

The military commission could be established outside the United States on occupied foreign territory or on foreign territory with the consent of local de facto authorities (such as perhaps in Afghanistan or in Northern Iraq). Such a location would have the advantage of not having to transfer captured suspects to U.S. territory, either through rendition or through extradition proceedings. This might also minimize the degree to which extremists and al Qaeda itself would seek to direct further attacks against U.S. targets in retribution. However, the fact that the court remains a U.S. forum could stoke the flames of anti-American hatred and retaliatory actions regardless of where the military commission is located. Again, the optics of a U.S. military commission prosecuting the terrorist suspects, particularly on their own territory, might project images of a special victor's court and ignite far more opposition to the United States than would other alternatives for prosecution.

4. Foreign National Courts

Prosecution in foreign national courts may prove to be the more likely alternative to U.S. prosecution in a number of cases.

Prosecution in foreign national courts may prove to be the more likely alternative to U.S. prosecution in a number of cases. British prosecution of the Lockerbie (Pan Am 103) defendants (albeit in a special courtroom established in The Netherlands and adjudicated under Scottish law by Scottish judges) proved in the long run to be a much more attractive option than U.S. prosecution for that particular terrorist crime. Foreign prosecutions may also have important political advantages. In terms of constructing a robust international legal architecture for dealing with terrorism, the optics and the practical consequences of having prosecutions in both U.S. and foreign courts is significant. This may prove crucial to the long-term campaign, and American victims should take comfort from a scenario in which the United States does not have to go it alone; rather a variety of countries, through rigorous prosecutions, would treat the September 11 attacks and their fallout as attacks against all civilized nations. Foreign trials may also prove essential in dealing with persons in the al Qaeda network who cannot be prosecuted for U.S. crimes but are still important parts of the overall terrorist threat to us.

Terrorist suspects may be investigated and prosecuted in one or more foreign courts regardless of U.S. interests or desires, and this is already happening. A foreign government may refuse a U.S. extradition request, for example. This could well be the case if the United States declines to waive the death penalty with respect to a terrorist suspect held in an anti-death penalty jurisdiction. Also, foreign officials may consider it their own responsibility to bring to justice individuals who engaged within their jurisdiction in the planning or commission of terrorist attacks either on their own soil or elsewhere. And the United States may find it preferable for certain low- or mid-level terrorist suspects to be prosecuted before foreign courts, particularly in highly developed jurisdictions where we have confidence in the judicial system.

Foreign trials of terrorist suspects indicted by the United States for crimes committed against the United States could lead to far more unpredictable outcomes.

However, foreign trials of terrorist suspects indicted by the United States for crimes committed against the United States could lead to far more unpredictable outcomes, including acquittals. Addressing the needs of U.S. victims, including access to the trials, would be far more difficult. The availability of U.S.-generated evidence may be greatly constrained because of the sensitivity and sources and methods associated with that evidence. The applicable law in the foreign jurisdiction may prove troublesome, as the

charges that could be prosecuted in some foreign courts may not encompass the totality of the crimes committed on U.S. soil and which are so clearly identified under U.S. law. Many foreign governments may balk at local trials, recognizing that they could invite violent internal disturbances that can threaten their own stability and survival. But their reluctance to prosecute domestically may also manifest itself in a reluctance to extradite terrorist suspects to the United States, an action that could generate a comparable degree of internal violence from supporters of al Qaeda or the individual terrorist suspects who have been extradited.

5. UN Security Council Ad Hoc International Criminal Tribunal

As it did in 1993 with the establishment of the International Criminal Tribunal for the Former Yugoslavia and in 1994 with the creation of the International Criminal Tribunal for Rwanda, the UN Security Council could establish an international criminal tribunal on terrorism that would operate under UN Charter Chapter VII enforcement authority to investigate, indict, detain, and prosecute terrorist suspects. All things considered, this would be the most potent legal option that could be selected at the international level. The blueprints for such a tribunal already exist with the Yugoslav and Rwanda tribunals. The terrorism tribunal presumably would exercise primary jurisdiction over any individual suspected of perpetrating the crime of international terrorism. It could request the cooperation of any member state of the United Nations to obtain evidence and to apprehend and transfer to the tribunal any indicted suspect. A member state's failure or refusal to cooperate with the terrorism tribunal probably would trigger the Security Council's powers to compel cooperation through diplomatic, economic, military, or other means. The judges of the tribunal probably would be elected by the UN General Assembly and be drawn from an international roster of candidates representing the major legal systems of the world. The prosecutor probably would be selected by the UN Security Council. One would expect the location of the terrorism tribunal to be in a very secure jurisdiction, but one not directly targeted yet by international terrorists or heavily involved in the military campaign against terrorism.

A variation on this option would be Security Council action under Chapter VII of the UN Charter to expand the jurisdiction of the existing International Criminal Tribunal for the Former Yugoslavia (ICTY) to include the entirely separate terrorist crimes of September 11, 2001, and perhaps other terrorist crimes, and place one or more Islamic judges on the bench for political balance. The chief prosecutor of the ICTY has indicated her willingness to shoulder this additional responsibility. Expansion of the ICTY's jurisdiction has been proposed in the past for other atrocities, and each time such proposals failed for lack of adequate political and financial support. Most of the problems identified below with respect to a free-standing ad hoc tribunal also would apply to an expanded ICTY.

Although a UN Security Council ad hoc tribunal is an attractive option because of its legal authority and the support it would generate from the international community, any effort to establish it would be exceptionally challenging. Security Council members, both permanent and non-permanent, suffer from "tribunal fatigue." This has been true for many years now. Although Chapter VII ad hoc international criminal tribunals were recently proposed for Cambodia (regarding prosecution of senior Khmer Rouge leaders for crimes committed during the Pol Pot regime of 1975–79) and Sierra Leone (regarding prosecution of perpetrators of heinous crimes in Sierra Leone during its civil war), the Security Council balked each time, instead preferring hybrid arrangements that minimized council engagement.

Although a UN Security Council ad hoc tribunal is an attractive option because of its legal authority and the support it would generate from the international community, any effort to establish it would be exceptionally challenging.

The Security Council's fatigue derives from several sources. First, ad hoc international criminal tribunals are very costly to establish and operate. The annual budget of each of the Yugoslav and Rwanda tribunals hovers around $100 million, and their budgets increase each year. Given the always precarious condition of the UN general

budget, any proposal that would impose such a significant additional cost to the budget could fail unless, perhaps, the United States were prepared to make huge voluntary contributions to the cost. Second, the imminent establishment of the permanent International Criminal Court (ICC), which will be financed largely by states that sign the ICC treaty, makes many council members wary of creating a separate judicial bureaucracy that could undermine the authority or stature of the ICC. Third, the inability of UN member states to define international terrorism and its criminal attributes, as most recently evidenced in General Assembly debates and ongoing UN talks about drafting an international convention on terrorism, indicates there is not sufficient international consensus to give such a tribunal the legitimacy it would require.

Fourth, there probably would be a long and perhaps futile effort to define the personal jurisdiction of such a tribunal, namely, who precisely could be targeted for investigation and indictment. Given the uncertainty in the definition of international terrorism and the political interests of different sectors of the international community, reaching agreement on who qualifies as a terrorist suspect for the tribunal would be exceedingly difficult. There would be enormous pressure from certain governments to extend the jurisdiction of the terrorism tribunal to all coalition military actions in the campaign against terrorism and to the conduct of Israel in the Middle East.

Fifth, the Security Council itself is an unpopular entity among many Arab states and among many other member states of the United Nations, including some which have challenged the legitimacy of the Yugoslav and Rwanda tribunals. Moreover, relations between the UN General Assembly and the Security Council are strained, particularly with respect to how the Security Council has handled the campaign against terrorism. Under these conditions, the willingness of the General Assembly to approve a hefty budget for such a tribunal would be very problematic.

Finally, given the sensitive character of so much of the evidence implicating terrorist suspects, it could prove extremely difficult to make that evidence available to any international court, even one established by the Security Council and empowered with the same rules on protection of sensitive information that are used by the existing Yugoslav and Rwanda tribunals. Without such information, prosecutions may fail.

6. UN General Assembly Ad Hoc International Criminal Tribunal

The General Assembly has no power to create an international tribunal that would have any authority to deprive an individual of his or her freedom while awaiting trial, or any authority to convict an individual and incarcerate that person.

The alternative to action by the Security Council might be action by the General Assembly to establish an ad hoc international criminal tribunal. This approach is popular with the critics of the Security Council as it presumably would demonstrate a broader international consensus for the creation of an international court. However, the idea is fraught with difficulties. The General Assembly cannot exercise Chapter VII enforcement authority under the UN Charter. That authority is reserved exclusively to the Security Council. Therefore, the General Assembly has no power to create an international tribunal that would have any authority to deprive an individual of his or her freedom while awaiting trial, or any authority to convict an individual and incarcerate that person. Only the Security Council can compel a member state to cooperate with such a tribunal, and in the absence of Security Council action to establish the tribunal, there would be no basis for using the council to take any such enforcement action.

Further, the politics of the General Assembly are such that reaching agreement about the personal and subject matter jurisdiction of the tribunal would be extremely difficult and probably unachievable. Attempts would be made to expand the jurisdiction of the tribunal to encompass coalition military operations, and thus to sit in judgment of the legality of the military campaign against al Qaeda and the Taliban forces in Afghanistan, and anywhere else the United States and participating coalition partners choose to strike in the future. The United States and other permanent members of the UN Security Council likely would oppose any attempt by the General Assembly to create such an international criminal tribunal.

7. A Coalition Treaty-Based Criminal Tribunal

The de facto coalition that has formed to wage the campaign against terrorism on numerous fronts, including diplomatic, economic, and military efforts, could negotiate among all or some of its members a multilateral treaty that would create a criminal court for the purpose of investigating and prosecuting terrorist suspects. The jurisdiction of such a court might be constrained to the territories of the states that are parties to such a treaty and to terrorist suspects located in such territories as well as to terrorist suspects who also are citizens of such states. The coalition court would be powerless to compel cooperation by non-states parties, particularly with respect to the production of evidence and the apprehension and delivery into the custody of the court of indicted terrorist suspects.

A coalition court may have an easier time arriving at an acceptable definition of international terrorism and determining who are the targets of investigation, especially if such a court focuses only on terrorist crimes that have led to U.S. federal indictments of a large number of terrorist suspects. The judges for a coalition court could be uniquely selected to suit the political requirements of coalition members. For example, one or more Islamic law judges could be chosen by coalition members to sit on the court. The prosecutor's staff could include Islamic lawyers.

The costs of the coalition court would have to be borne by the parties to the treaty establishing the court. If the United States were to offer to shoulder a large and disproportionate share of that cost, other coalition members might show greater interest in the proposal. Nonetheless, the time required to negotiate a coalition treaty-based criminal court could be significant and cause unacceptable delay in bringing perpetrators to justice. Given the ebb and flow of the anti-terrorism coalition, and its admittedly fluctuating composition depending on the particular mission, it might prove difficult to establish a broad-based group of states willing to enter into a treaty to establish such a special court. Some of the difficulties that would confront the UN General Assembly, such as defining the crimes and the targets of investigation, could burden a coalition effort as well. Islamic states, whose participation in a coalition court would be preferable to enhance its legitimacy and political acceptability, might prove to be troublesome partners if their vision of a coalition court diverges too greatly from American and other western plans.

The time required to negotiate a coalition treaty-based criminal court could be significant and cause unacceptable delay in bringing perpetrators to justice.

The precedents for a coalition criminal court are few in number, but they do offer some experience. The Independent Special Court for Sierra Leone will be a treaty-based court created by international agreement between the United Nations and the government of Sierra Leone, with the option of drawing in more governments if the court needs to locate outside of Sierra Leone for security purposes. The Nuremberg and Tokyo tribunals established after World War II were uniquely tailored courts located on former enemy territory and administered by the victors of the war. Their unusual circumstances do not offer a legal or political model for prosecuting terrorist suspects in the campaign against terrorism.

8. A Special Islamic Court

Given the fundamentalist Islamic underpinnings (however distorted and misguided) of al Qaeda and of various terrorist cells implicated in international terrorism, some observers have suggested that a special Islamic court be established to investigate and bring terrorist suspects of Islamic faith to justice. It is argued that such a court would be more acceptable to the Islamic world and thus quell the anti-American demonstrations and acts of retribution that are occurring and would likely increase if trials are held in U.S., international, or foreign courts.

Some observers have suggested that a special Islamic court be established to investigate and bring terrorist suspects of Islamic faith to justice. . . . The proposal raises many difficult questions, however.

The proposal raises many difficult questions, however. First, how would such an Islamic court be created and in what jurisdiction? Would it be a treaty-based court formed by certain Islamic governments and, if so, which ones? Would Islamic law have enough scope to require full investigation and prosecution of the terrorist crimes that have been committed against U.S. targets? In other words, is Islamic law sufficiently flexible to confront

the challenge of international terrorism? How could the international community, and particularly the United States and non-Islamic coalition partners, be assured that terrorist suspects would be vigorously pursued and prosecuted by a special Islamic court? What defenses could be raised by defendants before such a court? Would a special Islamic court seek to exercise jurisdiction over the coalition military campaign or seek to examine Israeli actions? How could a special Islamic court satisfy the demands of the families, friends, and colleagues of the victims of the terrorist crimes committed in the United States or against U.S. targets globally, particularly if the trials are held in relatively inaccessible locations and using law that falls far short of what is available under U.S. federal law, the laws of other coalition partners, or international anti-terrorism conventions?

Finally, while the sentencing guidelines of an Islamic court might indeed include the death penalty, they might also include measures that would be regarded under international standards of due process, and certainly in the United States, as cruel and unusual punishment. European governments probably would not endorse any Islamic court that could render the death penalty, and the United States probably would not endorse any Islamic court that could render a sentence with punishment that would be viewed as cruel and unusual under U.S. constitutional law (notwithstanding the views of some that the death penalty itself is cruel and unusual punishment).

A sub-option might be the prosecution of certain terrorist suspects in, for example, U.S. federal courts or foreign national courts for crimes committed against U.S. citizens, U.S. military targets, or non-Islamic foreign nationals, followed by trials of the same terrorist suspects before a special Islamic court (or perhaps an existing Islamic law court in a foreign jurisdiction) for crimes committed against Muslims. This would include the Muslim victims of the September 11 attacks. However, it might prove difficult if not impossible to extradite any terrorist suspect convicted in a U.S. or foreign court to a special Islamic court or even an Islamic law court in another foreign jurisdiction. It also might not prove attractive to prosecutors in the United States or a foreign jurisdiction to exclude the murder of Muslims from their indictments.

9. UN-Administered Courts in Afghanistan

UN authorities could establish one or more courts on Afghan territory that would exercise jurisdiction over terrorist suspects.

In the event the United Nations assumes administrative authority in Afghanistan in the wake of the coalition military campaign against al Qaeda and the Taliban, UN authorities could establish one or more courts on Afghan territory that would exercise jurisdiction over terrorist suspects apprehended in Afghanistan for crimes they are charged with committing anywhere in the world. Precedents for UN courts are found in Kosovo and East Timor in recent years, albeit under different circumstances and with varying degrees of success. The UN courts would have the advantage of exercising personal jurisdiction and of applying international norms of investigation and prosecution on the territory where the suspects are located. In any event, assuming deployment of some UN peacekeeping force and the erection of a UN temporary administration in Afghanistan, there likely will be UN-administered courts and they presumably will have to deal with ongoing crimes related to terrorist suspects or their operatives. The real question will be what crimes these courts will be empowered to handle and what will be adjudicated in other forums.

Many other questions and issues arise with respect to this option. What would be the applicable law, a question that has bedeviled UN initiatives elsewhere in the world? Would the Security Council be willing to invest authority in such courts, and would the General Assembly be willing to pay for them? There would be significant security concerns for such courts on Afghan territory, and large associated costs with ensuring their security. Staffing such courts with competent judges, prosecutors, defense counsel, and administrators would prove daunting given the infrastructure of Afghanistan and the risks associated with any assignment there for such individuals (who typically do not work under such conditions). Finally, the United States and other key states probably

would be very reluctant to provide UN courts situated in Afghanistan with the sensitive information that likely would be required for successful prosecutions.

There could be variations on this option, however, that may prove desirable and even essential in the months ahead. There might be national Afghan courts under some form of UN authorization or sanction. Another variation would be a mixed tribunal in Afghanistan negotiated by the United Nations and tailored roughly along the lines of the Extraordinary Chambers in Cambodia that will investigate and prosecute senior Khmer Rouge leaders from the Pol Pot era. But this option would have to assume a far more accommodating government in Kabul and enough of a judicial infrastructure to establish the most basic requirements for a court using both international and national personnel and laws.

There might be national Afghan courts under some form of UN authorization or sanction.

There might simply be national Afghan courts under a new government that would be given general recognition and international assistance. Whether or not these courts are turned to for prosecution of al Qaeda personnel, there will be a need for credible courts in Afghanistan. So the international community still will have reasons to incur the burdens of providing legal resources and personnel to courts in Afghanistan (after the military campaign and an acceptable governmental transition). Even if such courts are not suitable for trial of the September 11 attacks, they may still be important means for dealing with al Qaeda operatives who cannot be prosecuted in U.S. courts, or whose trial here would be an administrative and political liability.

Conclusion

The criminal justice objective of the campaign against terrorism is well established and indeed the strongest pillar of the international coalition that has been forged by the United States since September 11, 2001. There are clear advantages to bringing terrorist suspects to justice, including the evidence that would be derived from criminal trials and might help to further uncover the al Qaeda terrorist network, as well as the simple fact that justice is a lynchpin of American society. Thousands of victims look to courts of law for punishment and closure. The United States was not founded on the principle of summary execution. It is likely, however, that at least some terrorist suspects will perish as the United States and the coalition exercise their inherent rights of individual and collective self-defense against terrorist threats and actions. Nonetheless, law enforcement authorities around the world as well as the U.S. and UK militaries are intensively seeking out terrorist suspects and already apprehending many of their suspected accomplices to stand trial.

The criminal justice objective of the campaign against terrorism is well established and indeed the strongest pillar of the international coalition that has been forged by the United States since September 11, 2001.

At least for the immediate future, key options for prosecution of terrorist suspects will be U.S. federal courts—where so many of them already have been indicted for pre–September 11 crimes—and foreign national courts that have custody of terrorist suspects and are willing and capable of bringing them to justice. The stark reality that so many terrorist crimes have been directed at U.S. targets (including many on U.S. territory), the U.S. commitment to international anti-terrorism conventions that require national prosecution or extradition for trial of terrorist suspects, and the comprehensive character of U.S. anti-terrorism laws—all these factors point toward U.S. trials where custody can be obtained. The United States should demonstrate its determination to prosecute terrorist suspects without being intimidated by threats of Islamic demonstrations and retributions. Certain highly developed foreign national courts, in jurisdictions of the coalition where many of the terrorist suspects and their accomplices have been and will continue to be found, also will play a key role in investigations and prosecutions.

Whichever of the options is ultimately used, it will be beneficial if the current military campaign incorporates the goal of preservation of relevant evidence where possible, so that it may be effectively used in prosecutions.

Much will depend on how many terrorist suspects are apprehended and how feasible and

For the long term, there is little doubt that a viable and credible judicial system will need to emerge in Afghanistan, and that substantial internal assistance will be required to help instill the rule of law.

realistic any military, international, or Islamic law option for prosecution may become. Nonetheless, the debate should begin now on what combination of U.S., military, foreign, and/or international courts might prove most useful for the effective prosecution of international terrorists. For the long term, however, there is little doubt that a viable and credible judicial system will need to emerge in Afghanistan, and that substantial international assistance will be required to help instill the rule of law in that country and perhaps to bring to justice those al Qaeda operatives who are not extradited or otherwise removed from Afghanistan.

Related UN Security Council Resolutions

Resolution 1267 (1999)

The Security Council, . . .

Recalling the relevant international counter-terrorism conventions and in particular the obligations of parties to those conventions to extradite or prosecute terrorists,

Strongly condemning the continuing use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and planning of terrorist acts, and reaffirming its conviction that the suppression of international terrorism is essential for the maintenance of international peace and security,

Deploring the fact that the Taliban continues to provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations,

Noting the indictment of Usama bin Laden and his associates by the United States of America for, inter alia, the 7 August 1998 bombings of the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania and for conspiring to kill American nationals outside the United States, and noting also the request of the United States of America to the Taliban to surrender them for trial (S/1999/1021),

Determining that the failure of the Taliban authorities to respond to the demands in paragraph 13 of resolution 1214 (1998) constitutes a threat to international peace and security, . . .

Acting under Chapter VII of the Charter of the United Nations,

1. *Insists* that the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan, comply promptly with its previous resolutions and in particular cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice;

2. *Demands* that the Taliban turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice; . . .

5. *Urges* all States to cooperate with efforts to fulfil the demand in paragraph 2 above, and to consider further measures against Usama bin Laden and his associates; . . .

7. *Calls upon* all States to act strictly in accordance with the provisions of this resolution, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any licence or permit granted prior to the date of coming into force of the measures imposed by paragraph 4 above. . . .

Resolution 1333 (2000)

The Security Council, . . .

Recalling the relevant international counter-terrorism conventions and in particular the obligations of parties to those conventions to extradite or prosecute terrorists,

Strongly condemning the continuing use of the areas of Afghanistan under the control of the Afghan faction known as Taliban, which also calls itself the Islamic Emirate of Afghanistan (hereinafter known as the Taliban), for the sheltering and training of terrorists and planning of terrorist acts, and *reaffirming* its conviction that the suppression of international terrorism is essential for the maintenance of international peace and security, . . .

Deploring the fact the Taliban continues to provide safe haven to Usama bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations,

Noting the indictment of Usama bin Laden and his associates by the United States of America for, inter alia, the 7 August 1998 bombings of the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania and for conspiring to kill American nationals outside the United States, and *noting also* the request of the United States of America to the Taliban to surrender them for trial (S/1999/1021), . . .

Determining that the failure of the Taliban authorities to respond to the demands . . . in paragraph 2 of resolution 1267 (1999) constitutes a threat to international peace and security, . . .

Acting under Chapter VII of the Charter of the United Nations,

1. *Demands* that the Taliban comply with resolution 1267 (1999) and, in particular, cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with international efforts to bring indicted terrorists to justice;

2. *Demands also* that the Taliban comply without further delay with the demand of the Security Council in paragraph 2 of resolution 1267 (1999) that requires the Taliban to turn over Usama bin Laden to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice;

3. *Demands further* that the Taliban should act swiftly to close all camps where terrorists are trained within the territory under its control, and *calls* for the confirmation of such closures by the United Nations, inter alia, through information made available to the United Nations by Member States in accordance with paragraph 19 below and through other means necessary to assure compliance with this resolution; . . .

16. *Requests* the Committee to fulfil its mandate by undertaking the following tasks in addition to those set out in resolution 1267 (1999): . . . (b) To establish and maintain updated lists, based on information provided by States and regional organizations, of individuals and entities designated as being associated with Usama bin Laden. . . .

Resolution 1368 (2001)

The Security Council, . . .

Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,

1. *Unequivocally condemns* in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and

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regards such acts, like any act of international terrorism, as a threat to international peace and security; . . .

3. *Calls* on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and *stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;

4. *Calls also* on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 (1999) of 19 October 1999;

5. *Expresses* its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations. . . .

Resolution 1373 (2001)

The Security Council, . . .

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts, . . .

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts, . . .

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism, . . .

Acting under Chapter VII of the Charter of the United Nations, . . .

2. *Decides* also that States shall: . . . (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts; (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings; . . .

3. *Calls* upon all States to: . . . (b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts; (c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts; (d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999; (e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001). . . .

United States Institute of Peace
1200 17th Street NW
Washington, DC 20036

AMNESTY INTERNATIONAL—U.S.A.
December 3, 2001

The Honorable George W. Bush
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear President Bush:

We are writing to express our grave concern over your order authorizing military commissions to try suspected terrorists.

Unless it is rescinded, we fear that dictators and tyrants around the world will invoke the Bush Administration's actions for decades to come when they imprison people seeking to stand up for freedom of religion, free speech and other rights enshrined in the United States Bill of Rights and championed by the United States worldwide. The trials conducted by such commissions will come and go, but the damage that this precedent will cause will continue fox many years and may represent one of the lasting legacies of your Administration.

We understand that the details of the trials remain to be established and that the order does not place a ceiling on the procedures that may be applied by the military commissions. But the fact remains that there is very little "floor" established by the order. It permits—even if it does not require—the use of secret evidence and secret hearings, fails to establish an adequate burden of proof or to mandate the right to counsel or a privilege against self-incrimination, and allows the death penalty without unanimous verdicts. These and other problems render the order itself fundamentally flawed, especially as a precedent, even if the procedures ultimately established by the Defense Department are better than the order requires.

Moreover, certain aspects of the order cannot be remedied no matter what procedures are subsequently adopted. The order permits the President to designate any non-citizen, including legal United States residents, to be subjected to these procedures without any established standards or the check of independent judicial review of such designation. Likewise, although the order directs the Secretary of Defense to establish post-trial procedures, it plainly bars any independent review of the trials outside of the Executive branch.

Many nations have argued that the rule of law and due process rights must be set aside in order to defend national security. Indeed, American citizens have been deprived of their rights abroad based on such arguments. The United States has rightly rejected such restrictions and the arguments for them. Thus, when the United States, which has been at the forefront of developing and defending minimum standards of due process, issues an order which does not require that the Department of Defense satisfy those standards, the damage done is enormous. We fear that many nations will issue identical orders but will then implement them in ways that takes full advantage of the inadequate "floor" established by the order. The credibility and effectiveness of the United States in opposing such repressive procedures will be seriously harmed by this precedent.

We also believe that it is beyond dispute that the order, and any trials conducted under it, will be seen as illegitimate by the vast majority of nations. To this point, the United States has had the overwhelming support of the world community in responding to the crimes committed against United States citizens and the citizens of more than 60 other nations on September 11th International law has provided and continues to provide ample scope for the United States to respond to these attacks, to bring the perpetrators to justice and to obtain convictions. We believe that your order will do great harm to the United States efforts to maintain the strong support of the world community in its pursuit of the perpetrators of the September 11th attacks.

We respectfully urge you to rescind the order.

Sincerely.

WILLIAM F. SCHULZ
Amnesty International—U.S.A.

KENNETH ROTH
Human Rights Watch

GAY MCDOUGALL
International Human Rights Law Group

CATHERINE A—FITZPATRICK
International League for Human Rights

MICHAEL POSNER
Lawyers Committee for Human Rights

LYNN THOMAS
Minnesota Advocates for Human Rights

LEN RUBENSTEIN
Physicians for Human Rights

TODD HOWLAND
Robert F—Kennedy Memorial Center for Human Rights

Statement of Herman Schwartz, Professor of Law, American University, Washington, D.C.

PRESIDENT BUSH'S MILITARY COMMISSIONS

President George W. Bush's order establishing military commissions to try "international terrorists" without our normal due process guarantees has been defended with the claim that, in Vice President Dick Cheney's words, "they don't deserve the same guarantees and safeguards that would be used for an American citizen." To find and dispose of these terrorists, Attorney General John Ashcroft plans to question some 5000 young recent male immigrants and others, in addition to the more than 600 currently being detained.

But who among these people, or among the other 20 million non-citizens in the United States, all of whom could potentially be considered not "deserving" full due process, is in fact an "international terrorist?" We can't know that until we try them, since whether they are such people is exactly what has to be proved in a trial. Yet the use of these secret special tribunals, with their denial of due process right from the moment they are detained, presupposes that these people fit that category. Instead of being presumed innocent, they are presumed guilty.

In fact, we may never really know if a person subjected to these trials by commission is guilty of anything. For the process to be triggered, all that the Order requires is that the Attorney General and the President be persuaded by some FBI or CIA agent that there is "reason to believe" that a resident noncitizen—someone who may have lived in this country peacefully and honorably for many years—has committed, aided, conspired or prepared something called "acts of international terrorism" that have some connection with "injury to or adverse effect on the United States, its citizens, national security, foreign policy or economy," or "harbors" a terrorist, not even knowing the person harbored is one.

And what is an "act of international terrorism? " It is the essence of legality that an offense be carefully defined so that people can avoid violating it and prosecutors will not be free to define it as they wish. Yet, "acts of international terrorism, " which carries the death penalty, is nowhere defined in the order. It is certainly not just violations of the "laws of war" as White House Counsel Alberto R. Gonzales claims, for that term does not appear anywhere in the order. Nor does the order cover only "foreign enemy war criminals" or "members or active supporters of A1 Qaeda," as Mr. Gonzales also claims, but any non-citizen, including long-term permanent residents of the United States, who the President has "reason to believe" has engaged in "international terrorism." The category may well be defined by the Secretary of Defense to include innocent or minor acts, such as contributing to a charity that secretly supports terrorists, even though the person doesn't know the true purpose of the charity. It is an indication of the vagueness and breadth of the possible offenses that can be created by this order that criminality can be based on

acts that in some perhaps insignificant way "adversely affect. . .foreign policy or [the] economy."

The order is equally indefinite with respect to how much evidence is required before someone may be detained as an "international terrorist." The law normally requires "probable cause" for an arrest or detention, with supervision by a judge either before or soon after the detention. But the order calls only for "reason to believe" and this can be very little, just a reason. It can, for example, be one of the unsubstantiated and untested near-rumors reported to the grand jury and now made widely available within the government under the USA-PATRIOT Act. Moreover, no judicial review of the justification for believing this reason is allowed, at any time. The Wen Ho Lee and other FBI and CIA fiascoes, as well as Ashcroft's own sorry record on civil liberties, offer little assurance that these provisions will be administered fairly.

And once the person is picked up and held, which may be done secretly, he may be charged with some "act of international terrorism," and will have to refute these charges without counsel of his choice or perhaps any lawyer at all. A short secret proceeding will be held under rules of evidence made up by the Secretary of Defense. He can choose to admit the most unreliable kinds of hearsay and other weak evidence, which can be kept secret even from the accused. Mr. Gonzales says these trial will not be secret but he can offer no assurances. After all, we still know almost nothing about the many hundreds kept in detention since September 11, which seems like a more reliable indication of what we can expect. And, as many have noted, this is the most secretive administration in recent memory, shown, for example, by the Bush Order keeping presidential papers secret despite congressional legislation intended to make them public.

This "trial" will be before three military personnel, not independent judges, only two of whom need to agree. They need not be convinced of guilt beyond a reasonable doubt, even if they impose a death sentence, and there is no right to appeal, even within the military system. And there will be no judicial review of the case against the accused. Mr. Gonzales claims that there will be "judicial review" in the civilian courts, but as he concedes, merely of "the jurisdiction" of the commissions. That only determines whether the commission has the authority to try the accused. Judicial review of the detention, the procedure, fairness, guilt or innocence, sentence or anything else about the case itself is barred by the order.

We are told we need not worry because the "American military justice system" is "the finest in the world." That may indeed be true but only when the proceedings are conducted under the Uniform Code of Military Justice. Nothing in the order requires these proceedings to be under the Code but only under such rules as the "Secretary of Defense shall issue," which can be made up on an ad hoc basis.

Attorney General John Ashcroft and other members of the Administration justify this drumhead justice because they allegedly fear that without such proceedings, we will not be able to convict these "alien terrorists," assuming that we have the real culprits. But we obtained convictions in the World Trade Center and Embassy bombings, and without the disclosure of sensitive information about intelligence "sources and methods," the other great fear—the carefully administered 1980 "graymail" statute has effectively disposed of many of these fears. Attorney General Ashcroft has also complained about lengthy trials but how can one justify "quickie" trials when death or long imprisonment is at stake?

Finally, the Administration relies on the Supreme Court's approval of trial by military commission in the 1942 German saboteur case, Ex parte Quirin. That reliance is misplaced. President Roosevelt's Order was expressly limited to "subjects, citizens or residents of any nation with whom we are at war." We are not "at war" with any nation. Rather, we are fighting an international organization of religiously motivated criminals. In an attempt to destroy their networks, the Bush Order targets not nationals of an enemy nation, but rather, in George Will's words, "alien terrorists held in the United States."

Furthermore, the saboteurs in that case, as to whose guilt there was no doubt at all because of the defection of two of their number, were charged with violations of the "law of war" and, as noted above, the Bush order is far broader and much more indefinite than that.

This order has already done much damage. Spain will not extradite the eight suspects in the September 11 hijacking whom it has arrested because they would face these military commissions, and it appears that other European Union members will do the same.

Some 75 years ago Justice Louis D. Brandeis warned us against "men of zeal, well-meaning but without understanding." We seem to have forgotten that.

Article by Anne-Marie Slaughter, New York Times, November 17, 2001

AL QAEDA SHOULD BE TRIED BEFORE THE WORLD

Cambridge, Mass.—On Tuesday President Bush signed an executive order allowing the government to try accused terrorists before military commissions rather than in federal court. No matter how tempting or expedient, trials by military commission will prove disastrous—to the war against terrorism, to the Constitution and to the rule of law.

The—administration favors such trials because they will allow sensitive evidence to be presented in secret. The rules governing the conduct of military commissions would be drawn up by the Pentagon, without regard to the safeguards and guarantees provided by the Constitution. And because they are likely to be held abroad, the trials would present no domestic security risk and would undoubtedly elicit less coverage from the American media.

But if the public relations war is as important as the military war, as our allies and the administration insist, such trials would give the enemy a victory of enormous proportions. President Mohammad Khatami of Iran denounced the Sept. 11 attacks, but said he needed evidence that Osama bin Laden was responsible. Presenting evidence in secret will convince no one and will only fortify Mr. bin Laden's propaganda. And military executions of convicted terrorists after such trials will create a new generation of martyrs.

Imagine how this looks to the rest of the world: Timothy McVeigh killed 168 of his fellow citizens. Yet he was entitled to all the constitutional protections and safeguards of a federal criminal trial—held in the United States, in public. Now, when the defendants are foreigners, most likely Muslims, the administration of justice is left to an ad hoc military commission acting in secret.

In a legal sense, too, such trials will hand the terrorists an important symbolic victory.Although the United States will claim that they are "nonprivileged combatants"—that is, soldiers who have violated the laws of war—it would still be acknowledging them as combatants rather than common criminals. The trials will thus dignify terrorists as soldiers in Islam's war against America. This is exactly the wrong message to send. Al Qaeda members are international outlaws, like pirates, slave traders or torturers.

At a deeper level, such trials challenge our identity as a people. Military commissions have been used rarely in the past, principally to try spies caught behind enemy lines. Now we are proposing them as a long-term mechanism to achieve one of our principal war aims—finding and trying terrorists. But we are also, according to President Bush, fighting for the values embodied in our Constitution, against an enemy that would destroy our way of life. How then can we violate those values in the process?

If we must depart from constitutional practices, then the United States should prosecute accused terrorists before an international tribunal. The United Nations war crimes tribunal for the former Yugoslavia, for example, tries cases before a panel of three judges, not a jury. It has developed numerous procedures for presenting key evidence in secret and protecting the identities of crucial witnesses. And when Slobodan Milosevic attempted to exploit the process and grandstand for a television audience, the chief judge shut him down. In addition, it would be easier politically for countries like Pakistan, Egypt or Jordan to extradite defendants to an international tribunal than to a secret court run by the United States military.

The difference between military commissions and an international tribunal is the sanction and legitimacy of the global community. An international tribunal would demonstrate the depth of international solidarity against terrorism.

Today we have the opportunity to devise common procedures among nations around the world, far beyond the West. President Bush has said repeatedly that we must bring terrorists to justice. Trial by military commission is not justice—at least not justice as we understand it and preach it to the world. Justice is on our side. We should not forsake it.

Anne-Marie Slaughter is professor of international law at Harvard Law School.

Statement of Anne-Marie Slaughter, William Burke-White, Commissioning Justice

George W. Bush has announced his intention to stand firm in the face of mounting criticism of his plan to try terrorists in military commissions. But the real question is whether these tribunals will hamper the international judicial cooperation so vital to the pursuit of terrorists over the longer term. Spanish judge Baltasar Garzon has already refused to extradite eight important terrorist suspects apprehended in Spain. Spanish Prime Minister Jose Maria Aznar saved national face by announcing that "if and when the United States requests . extradition" his government "will study the issue," but senior EU officials still maintain that judges across Europe will balk. Further, Egypt has now voiced its displeasure at the U.S. refusal even to provide the names of detained Eygptian citizens.

What is really at issue is the content of the actual rules that will govern the proceedings before military commissions, rules now being written by the Justice Department and the Pentagon. These rules may well be more liberal than the initial Executive Order. White House Counsel Alberto Gonzales has already announced that habeas corpus challenges to the tribunals' jurisdiction will be available in federal court for "anyone arrested, detained or tried in the United States," notwithstanding the provision in the order itself denying defendants access to any national, foreign, or international tribunal.

Secretary Rumsfeld said yesterday that the Administration is engaging in a dialogue with noted scholars and experts on how to make these rules as palatable as possible. He could start by talking to the Senate Judiciary Committee and the State Department, both of which are likely to be more sensitive to domestic and international concerns. For its part, the Senate Judiciary Committee can use its current hearings to identify a number of concrete changes that would greatly enhance the acceptability of the Administration's plan, at least regarding the trial of suspects apprehended and tried outside the United States.

The right to a free and fair trial is recognized by all major political, social, religious, and cultural systems. The Universal Declaration of Human Rights states that everyone "is entitled in full equality to a fair and public hearing by an independent and impartial tribunal." Even in times of war, Common Article 3 of the Geneva Conventions requires that anyone accused of a crime be afforded "all the judicial guarantees which are recognized as indispensable by civilized peoples." The International Covenant on Civil and Political Rights, the Inter-American Convention on Human Rights, the Cairo Declaration on Human Rights in Islam, the African Charter on Human and People's Rights and the European Human Rights Convention all contain similar guarantees of fair judicial process.

What emerges from these numerous international instruments are five core principles of international due process: the presumption of innocence; the right to a speedy trial; the right to counsel of choice; the right to confront evidence and witnesses in a public forum; and the right to an appeal. What the Administration may not realize is that these standards are more flexible than the specific strictures of our own Constitution. They allow considerable latitude in tailoring a judicial process to meet the challenges of pursuing global criminals.

Even tribunals created in extraordinary circumstances have complied with these five principles. Military commissions used in the Civil War explicitly provided for appellate review. The Nuremberg Tribunal allowed defendants to choose their counsel from a list of qualified attorneys. The Diplock Courts created by the UK in the 1970s to deal with terrorism in Northern Ireland embraced all five principles. The European Court of Human Rights upheld the right to a speedy trial by reversing the British Government when defendants were indefinitely detained. The ad hoc criminal tribunals for Rwanda and Yugoslavia have guaranteed the right to confront even the most sensitive evidence by redacting references to intelligence sources and methods and by providing the public with a transcript of proceedings when the courtroom must be closed to protect the anonymity of witnesses. And all these tribunals have started from a presumption of innocence.

President Bush's Order requires relatively little modification and elaboration to meet the international standards applied by these tribunals. The following commitments would have to be made explicit.

- All detainees must be presumed innocent until proven guilty. However, the-order need not specify the precise standard of proof.
- All those arrested or detained shall be brought to trial within a specific time period.

- All accused are entitled to qualified counsel of their own choosing, either from a specified list or after approval by a judge.
- Evidence will be made available to both prosecution and defense after redaction to protect classified sources and methods. Proceedings in which such evidence is presented will be open to the public or published in full soon after the fact.
- All convicted defendants can appeal their convictions. However, such appeal could be to a special appellate tribunal established for this purpose. Appellate judges, who are more removed from potentially classified evidence presented at trial, could include civilians and even international jurists in certain circumstances.

Military commissions can go wrong. Special courts restricting due process have largely failed in Egypt and Israel. The State Department has officially criticized the use of military commissions to try civilians in Burma, China, Columbia, Egypt, Malaysia, Nigeria, Peru, Russia, and the Sudan. The problems cited in each of these cases were not the use of military commissions per se, but rather the failure to comply with the five core principles of free and fair trials.

The costs of complying with standards of international due process are not high. The benefits are enormous, both in terms of encouraging cooperation from our coalition partners and upholding our own basic values. Working within the framework of the Military Order, the Administration should publicly commit itself to the five core precepts of basic justice.

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Editorial in the Wall Street Journal, December 4, 2001

TERRORISTS ON TRIAL—II

Supreme Court Justice Antonin Scalia didn't break any rule of judicial decorum when he told the Associated Press recently that "Nobody wants to capture Osama bin Laden and have him tried by Judge Ito for two years." But his quip does help cut through the hysteria that has arisen about the issue of military tribunals.

Justice Scalia was careful not to voice an opinion on tribunals, the constitutionality of which he may have to decide once President Bush puts the first captured terrorist on trial. But his comment grasps the essence of the White House argument that our regular criminal justice system isn't up to the job of trying terrorists. As Senate Democrats prepare to roast Attorney General Ashcroft this week, we thought you might like to know about the civilian system's recent and unhappy record in such cases.

Three recent cases have pertained to the first attack on the World Trade Center and one followed the bombing of the U.S. embassies in Africa. The good news is that the trials resulted in convictions; the bad news is they were protracted, expensive and dangerous to the participants. Worse, we'll never know what the cost of those convictions was to intelligence sources and methods.

This issue of secrecy looms largest, for both confidential and even nonclassified information. The first World Trade Center trial included lengthy testimony about the structure and stability of the Twin Towers; there's little doubt this data helped Mohamed Atta plan his horrific flights into those buildings.

In the embassy-bombing trial, Government Exhibit #1677–T was al Qaeda's terror manual. This how-to handbook was chock-a-block with counter-surveillance measures, encryption methods, storing explosives and other tricks of the terrorist trade. It offered some business-school-style case studies in what went wrong in failed assassinations, and provided a list of escape routes.

By entering the manual into evidence, the U.S. was telling al Qaeda that it knew its operating procedures and inviting it to change course. This was bad enough during peacetime, but in the middle of a war against terrorism it's akin to disclosing troop movements. Military tribunals, which could close the proceedings when sensitive information is discussed, would make sure this mistake isn't repeated.

Speedy justice is also not a hallmark of civilian courts. The first World Trade Center trial took six months in 1993–94. A second lasted four months in 1997. A third trial—that of Omar Abdel-Rahman, the blind sheik—took eight months in 1995. And the embassy-bombing trial last spring lasted three months, with sentencing

scheduled to take place on September 12 in the federal courthouse a few blocks north of the World Trade Center.

Which brings us to the fact that all of these trials were held under heavy security and at great risk to the participants. Federal courthouses are heavily trafficked public buildings in dense urban areas, and thus difficult to protect. Effective security requires more than installing metal detectors or closing off adjacent streets.

A military base is the safest venue for terrorist trials, but even then security isn't a simple matter. It took a year to prepare Camp Zeist in the Netherlands for the trial of those accused of bringing down Pan Am Flight 103. The Indian Ocean island of Diego Garcia, which has the double virtue of being home to a British military base and located in Afghanistan's neighborhood, could make sense for the U.S. tribunals. Geraldo would be able to fly in and out easily.

The usual rule in civilian terrorist trials is anonymity for the jurors. But it's hard to believe that jurors are going to consider that adequate protection after Sept. 11. Judges are even more at risk; two federal judges in New York remain under tight security to this day, long after the end of their terror trials.

The larger point here is that military tribunals aren't some Big Brother evasion past the normal rules of justice. They are a common sense, and historically well established, way to cope with the unusual demands of a war against terrorism. As recently as 1996, the Clinton Administration rejected Sudan's offer to turn over Osama bin Laden because it didn't think it had enough evidence to convict him in a criminal court. A military tribunal would certainly have come in handy then. Terrorists who would kill thousands of American civilians aren't ordinary criminal suspects and shouldn't be treated as such.

The Defense Department is working out rules and procedures for the tribunals, but we already know some reassuring details. The trials will be mostly open to the media, some civilian judges might well take part and suspects will have the right to counsel. They will not, thankfully, have the right to a two-year trial by Judge Ito.

Editorial in the Washington Post, Washington, D.C., Friday, November 16, 2001

END-RUNNING THE BILL OF RIGHTS

AFTER THE—attacks of Sept. 11, many predicted that the demands of domestic security would eventually clash with traditional American reverence for civil liberties. Few predicted that the clash would come so soon and so starkly, or that the government would come down so decisively on the anti-liberty side as would be permitted under President Bush's new executive order on military justice. The order allows the president to order a trial in a military court for any non-citizen he designates, without a right of appeal to the courts or the protection of the Bill of Rights.

We understand the temptation to jettison civilian justice and the shields against excessive government power that this country has nurtured for more than two centuries. The United States is, as Attorney General John Ashcroft said, at war, and with an implacable foe. There are potential terrorists, likely living in this country, who would do Americans great harm if they could—greater even than what their brethren accomplished at the World Trade Center, the Pentagon and the field in Pennsylvania. We can imagine cases in which the government might take custody of such a person, too dangerous to be released or deported, against whom the evidence came from sources too sensitive to reveal in open court, or was insufficient to win conviction in a normal court. We can also imagine cases in which fighters captured overseas might best be tried in military courts. But the potential damage is so great, to U.S. credibility abroad as well as U.S. liberty at home, that such courts should be viewed as an absolutely last resort, particularly in domestic cases.

Instead, Mr. Bush has authorized military justice as an option for the government in a far wider array of cases than could ever be necessary. Any non-citizen whom the president deems to be a member of al Qaeda, or to be engaged in international terrorism of virtually any kind, or even to be harboring such people, can be detained indefinitely under his order and tried. The trials could take place using largely secret evidence. Depending solely on how the Defense Department further refines the rules, the military officers conducting the trials might insist on proof of guilt beyond a reasonable doubt, or might use some far lesser standard. The accused can be convicted without a unanimous verdict but with a two-thirds majority. Those found guilty would have no appeal to any court; and if found guilty, they could be exe-

cuted. Such a process is only a hair's breadth from a policy of summary justice. The potential to imprison or execute many innocent people is large, the chances that such mistakes would become known much smaller. Mr. Bush is claiming for himself the authority to unilaterally exempt a class of people accused of particular crimes from the protections of the Constitution. In this as in other recent balancing acts between law enforcement and liberty—the roundup without accounting of more than 1,000 people, the authorization of government eavesdropping on conversations between imprisoned clients and their lawyers—it seems to us the president is not being well advised.

When Americans accused of terrorism are tried in secret courts by hooded judges in Peru or other nations, the U.S. government rightly objects. To authorize comparable trials in this country will erase any legitimacy of such objections. Worse, it will erode throughout the world the image of America as a place where certain freedoms cannot be compromised—freedoms that ultimately provide the most basic justification for this country to stake its claim to lead the world and wage the war on terrorism. And worse in turn than the blow to the U.S. image abroad will be the potentially irreversible injury at home if Mr. Bush proceeds, as his order would allow, to undermine the rule of law.

Article by Ruth Wedgwood, Wall Street Journal, Monday, December 3, 2001

THE CASE FOR MILITARY TRIBUNALS

U.S. Marines may have to burrow down an Afghan cave to smoke out the leadership of al Qaeda. It would be ludicrous to ask that they pause in the dark to pull an Afghan-language Miranda card from their kit bag. This is war, not a criminal case.

The president's executive order, providing for the detention and possible trial of terrorists in military courts, recognizes this. But some critics continue to argue that trials are better held in a federal district court, or in an ad hoc international criminal tribunal. Others have worried that the initial jurisdictional order does not fully specify the rules of trial procedure and evidence that would await prisoners. Yet others are concerned that Congress was not asked for authorizing legislation. These criticisms, though made in good faith, reflect a misunderstanding of how the law of war is enforced, as well as a dangerous naivete about the threat we face.

The detention of combatants is a traditional prerogative of war. We have all seen movies about captured soldiers in World War II. After surrender or capture, a soldier can be parked for the rest of the war, in humane conditions, to prevent him from returning to the fight. His detention does not depend on being charged with a crime. Though most al Qaeda members do not rise even to the level of POWs—they have trampled on the qualifying rules of wearing distinctive insignia and observing the laws of war—they can be detained by the same authority for the duration of the conflict.

Military courts are the traditional venue for enforcing violations of the law of war. The Sept. 11 murder of 4,000 civilians was an act of war, as recognized by the U.N. Security Council in two resolutions endorsing America's right to use force in self-defense. Osama bin Laden and his airborne henchmen disregarded two fundamental principles of morality and law in war—never deliberately attack civilians, and never seek disproportionate damage to civilians in pursuit of another objective. The choice to carry out the attacks during the morning rush hour reveals this to be a war crime of historic magnitude.

Why not try al Qaeda members in Article III federal courts, with a civilian judge and a jury? Federal judges have never been involved in the detention of POWs or unprivileged combatants. Only in 1996 did federal courts gain limited statutory jurisdiction to hear war crimes matters, and no federal court has ever heard such a case.

Moreover, just consider the logistics. It is hard to imagine assigning three carloads of federal marshals, rotated every two weeks, to protect each juror for the rest of his life. An al Qaeda member trained in surveillance can easily follow jurors home, even when their names are kept anonymous. Perhaps it is only coincidence that the World Trade Center towers toppled the day before al Qaeda defendants were due to be sentenced for the earlier bombings of East Africa embassies—in a federal courthouse in lower Manhattan six blocks away. But certainly before Sept. 11 no one imagined the gargantuan appetite for violence and revenge that bin

Laden has since exhibited. Endangering America's cities with a repeat performance is a foolish act.

If there are a sizeable number of al Qaeda captures, the sheer volume will also be disabling. At a rate of (at most) 12 defendants per trial, trying 700 al Qaeda members would take upwards of 50 judges, sequestered in numerous courthouses around the country.

In federal court, as well, there are severe limitations on what evidence can be heard by a jury. Hearsay statements of probative value, admissible in military commissions, European criminal courts and international courts, cannot be considered in a trial by jury. Historically, Anglo-American juries were thought incapable of weighing out-of-court statements, and the Supreme Court attached many of these jury rules to the Constitution. So bin Laden's telephone call to his mother, telling her that "something big" was imminent, could not be entered into evidence if the source of information was his mother's best friend. In a terrorist trial, there are few eyewitnesses willing to testify, because conspiracy cells are compartmentalized, and witnesses fear revenge.

There is also the problem of publishing information to the world, and to al Qaeda, through an open trial record. As Churchill said, your enemy shouldn't know how you have penetrated his operations. The 1980 Classified Information Procedures Act helped to handle classified secrets at trial, but doesn't permit closing the trial or the protection of equally sensitive unclassified operational information.

An international tribunal is even less practical. The ad hoc criminal tribunals created for Yugoslavia and Rwanda by the U.N. Security Council have not enjoyed the confidence of Western powers in obtaining intelligence intercepts for use at trial. Americans could not expect to fill the majority of slots in an ad hoc tribunal, and a trial chamber of three to five judges might have no Americans at all. Moreover, the tribunal for Yugoslavia has operated at a snail's pace, trying only 31 defendants in eight years, at a cost of $400 million.

It is even more fanciful to propose that a largely Muslim court should be delegated to try bin Laden and company. Arab and Muslim states will fear the reaction of their own local militants. And Israel might properly wonder why it could not also serve on such an international court, since bin Laden's fatwa called for the murder of Jews and Americans. No Arab state would participate, of course, if an Israeli judge served. This does not preclude offering into evidence, at a military tribunal, the works of international law by Muslim jurists that show that the standards of protecting innocents are universal.

Congress will want to consult on the nature of the military tribunals established by President Bush. Congress's input will be useful to the administration in crafting rules of procedure and evidence, as well as in thinking about added safeguards for alleged terrorists discovered within the U.S. Civilian judges can serve on military tribunals (civilians served at Nuremberg), and few hearings may be closed, except for sensitive portions. Habeas corpus review remains available for aliens arrested in the U.S.

But it is also plain that Congress long ago agreed to the president's power to convene military commissions (under U.S. Code, Title 10, Section 821). In addition, the president has inherent constitutional power as commander-in-chief to convene such tribunals, an argument acknowledged by Chief Justice Harlan Fiske Stone in a 1942 opinion. (Stone, writing for a unanimous Supreme Court, declined to set aside the military trial and execution of German saboteurs who had entered the U.S. to destroy war plants.) The president is also authorized by statute to write rules of procedure and proof for military commissions, and to decide whether or not it is "practicable" to adopt the ordinary rules of common law and evidence.

The thought of printing stationery for the "United States district court for the district of Afghanistan" sounds rather absurd. And for good reason. This danger is too serious to be left to the civilian courts.

Ms. Wedgwood, a former federal prosecutor, is a professor of international law at Yale and Johns Hopkins University.

(See related letter: "Letters to the Editor: In War, Tribunals Make Perfect Sense"—WSJ Dec. 10, 2001)

INDEX REFERENCES

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Article by Jodi Wilgoren, New York Times, December 4, 2001

THE INTERVIEWS

DEADLINE IS EXTENDED IN QUESTIONING OF FOREIGNERS

DETROIT, Dec. 3—Law enforcement officials here extended the deadline today for young Middle Eastern men to respond to letters sent last week requesting interviews about the Sept. 11 terrorist attacks, after only about 185 of the 550 people wanted for questioning called to schedule appointments.

The extension, from Tuesday to next Monday, came as Attorney General John Ashcroft, appearing here in the nation's largest Arab-American community, defended the Justice Department's interview plan and invited prominent local Arabs and Muslims to sit in on the meetings.

Two people who attended a half doxen interviews today said the conversations were professional, non-threatening and surprisingly short. Noel Saleh, an immigration lawyer, and Imad Hamad, Midwest director of the American-Arab Anti-Discrimination Committee, said the young men, a handful of the 5,000 temporary visa holders wanted for questioning nationwide, answered "yes" or "no" as investigators marked notes on a four-page Justice Department questionnaire.

"They asked about Sept. 11, if they were aware of people who acted differently or if they were aware of people who were happy or were celebrating what happened on Sept. 11," Mr. Hamad said. "They asked if they are aware of any terrorist group or if anybody is planning anything. They asked if they'd ever been part of an armed conflict in their own country, the form of a policeman."

At a news conference this morning, after a Sunday night meeting with five leaders of the local ArabAmerican community, Mr. Ashcroft angrily denied that his department was engaged in racial profiling and praised the leaders as "part of the solution."

"I find the American-Arab community to be a very helpful community," he said. "The people who hijacked the planes on Sept. 11 were not representative of the AmericanArab community."

Immigration lawyers and community leaders said they were pleased by Mr. Ashcroft's reassurances and by the tenor of the interviews so far, but still skeptical of the vast canvass and the continued detention of hundreds of people swept up in the investigation. The men that the Justice Department is seeking to interview range in age from 18 to 33 and have come to the United States since Jan. i, 2000, on student, business or tourist visas from countries suspected of links to terrorism.

"Sometimes there are gaps between what people say and what they do," said Yahya Mossa Basha, president of the American Muslim Council, who attended the meeting with Mr. Ashcroft on Sunday night. "Those gaps have to be covered in order for people to be satisfied."

ASHCROFT FINDS HIMSELF ON THE DEFENSIVE.

Mr. Saleh said Mr. Ashcroft's meeting with community leaders was an empty gesture. "The F.B.I. met with Martin Luther King numerous times but that didn't stop them from violating his civil rights," he said.

Osama Sibiani, editor of The Arab American News, a national weekly based in nearby Dearborn that published an editorial last week encouraging people to cooperate with the interviews, said he told Mr. Ashcroft that he resented any comparison of the treatment of Arab-Americans today to that of Japanese- and German-Americans during World War II because "the Arab world has not declared war on the United States."

It remains unclear what will happen to people here who do not respond to the letters, which law enforcement officials sent, rather than sending investigators out knocking on doors. Robert Cares, an assistant United States attorney who heads the

Detroit office's antiterrorism task force , said today that he would not pursue a conversation with the one person who responded to the letter but declined to be interviewed. Mr. Cares said nine federal agencies and 50 local police departments were involved in the interviews in eastern Michigan.

After sitting in as an Internal Revenue Service agent and Michigan State Police officer talked to three students from Henry Ford Community College and Wayne State University, Mr. Saleh said the questions were not "severe or adversarial" but that his clients were still nervous during the half-hour talks. "They all said, 'Since we got the letter we haven't been able to concentrate on study,'" he said.

Mr. Hamad, who attended the Sunday night meeting w3ih Mr. Ashcroft and today took him up on his offer to sit in on interviews, said the three men he watched being questioned a Jordanian student, a Lebanese student and a Lebanese engineer who has a green card—were asked to show their passports but not questioned about their visa status. The F.B.I. agent conducting the interviews, which lasted 10 to 15 minutes, asked if they had visited Afghanistan, whether they had been the subject of harassment because of their ethnicity and what they thought of airport security.

"It was very straightforward questions with straightforward answers and the agent did not even elaborate further," Mr. Hamad said. "He did not revisit the same question and try to get any answer beyond the 'no' answer that was given."

In Ann Arbor, Mich., today, Police Chief Daniel Oates and federal law enforcement officials met with eight Muslim leaders to discuss plans for interviews with about 80 young men there; including students at the University of Michigan, whose officers have declined to participate in the project.

Article by Byron York on National Review Online, NR White House Correspondent, December 3, 2001

DEMS CAVE ON TRIBUNALS?

A STAR WITNESS MAKES THE CASE FAR THE MILITARY COURTS.

While many in Congress and the press wait for Thursday's showdown between Senate Judiciary Committee chairman Patrick Leahy and Attorney General John Ashcroft over the Bush administration's antiterrorism measures, a key part of the Democrats' strategy will be previewed in another hearing, this one scheduled for Tuesday morning.

The session will focus solely on the issue of using military tribunals to try foreign terrorist suspects. The commissions, authorized by President Bush in a November 13 military order, dominated discussion at last week's committee questioning of top Justice Department official Michael Chertoff.

Tuesday's session will be chaired by New York senator Charles Schumer (it is one of four Judiciary Committee hearings this week, and Leahy apparently does not have time to chair them all). The witness list includes Democratic perennial Laurence Tribe, a Harvard Law School professor who is expected to criticize the president's order.

But anyone expecting a full-scale attack on Bush's plan will likely be disappointed. Rather, it appears that Democrats have conceded much of the president's position and will only ask to be consulted more as the rules for tribunals are written.

Much of the argument will focus on points made by Tribe in a recent article, "Trial by Fury," in The New Republic magazine. In it, Tribe begins by arguing that the military tribunal order "goes too far" in infringing civil liberties. But in the end, Tribe makes a convincing case that the tribunals are not only constitutional but necessary.

Tribe argues that Bush may have exceeded his authority by establishing tribunals without the approval of Congress. While lawmakers did pass a seemingly comprehensive use-of-force authorization giving the president wide discretion to conduct the war on terrorism, Tribe says the authorization lacks the "ritualistic solemnity of a declaration of war" and therefore "does not justify the same domestic deprivations that a formal declaration of war might." He then writes that the president's tribunal order is so flawed that it could theoretically lead to absurd results - suggesting that Bush might order the execution of someone acquitted by a tribunal, or that Ashcroft might use a tribunal to try someone accused of assisting suicides in Oregon.

"But just because the order is flawed doesn't mean it can't be mended," Tribe continues. Normally, he says, one might look to the Supreme Court for assistance, but Tribe argues that the justices would be little more than a "rubber stamp" for Bush's action. Tribe cites the majority opinion in Bush v. Gore, as well as the Court's approval of tribunals in the past, as evidence that the justices would be insufficiently critical. Tribe also hints that the Court might be vulnerable to intimidation by the president; he writes that there is evidence that "some nasty behind-the-scenes arm-twisting by the executive" was behind the Court's unanimous approval of Franklin Roosevelt's decision to try eight Nazi spies by tribunal in 1942.

With the Supreme Court on the sidelines, Tribe writes that Congress must take up the task of correcting the president's actions. Congress, Tribe argues, is the only body with the power to investigate the administration's detention of terrorist suspects and witnesses, as well as its "racial profiling" of Middle Eastern immigrants and "the array of other apparent incursions on traditional liberties and privileges ...that Attorney General Ashcroft has instituted."

At that point, however, Tribe makes an abrupt about-face. Addressing the "fundamental question of whether the core of the executive order, its gratuitous branches pruned, is consistent with the Constitution," he answers: "I think it may well be."

"In wartime," Tribe continues, "'due process of law,' both linguistically and historically, permits trying unlawful combatants for violation of the laws of war, without a jury or many of the other safeguards of the Bill of Rights," provided the tribunals are impartial. In addition, Tribe concedes that there is nothing to suggest that civilian juries in wartime will be any more fair than military tribunals. He also admits an uneasiness about lawyers in civilian courts using procedural arguments to free suspects who "belong to terrorist cells that slaughter innocent civilians." And lastly, Tribe worries that civilian trials would "grant an extended pulpit to an accused bent on claiming martyrdom and capable of stirring others to further acts of international terror."

Even his criticism of tribunals doesn't really amount to all that much, Tribe concludes. "This is not to suggest that those tribunals, at their core, offend any fundamental constitutional precept," he writes.

Tribe's argument is likely to get a friendly hearing from temporary chairman Schumer. At last week's hearing, he said, "I haven't made up my mind" about tribunals. "I think there is a need for secrecy," Schumer continued, "I think those who say we should just have a regular trial, as if it was someone who held up a candy store - that doesn't make much sense." It might turn out that the showdown over tribunals will be considerably less than advertised.