WASHINGTON NATIONAL OFFICE
Laura W. Murphy
Director

122 Maryland Avenue, NE Washington, D.C. 20002 (202) 544-1681 Fax (202) 546-0738

MEMORANDUM

To: Interested Persons

From: Timothy H. Edgar, Legislative Counsel

Date: November 29, 2001

Re: President Bush's Order Establishing Military Trials in Terrorism Cases

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 a provision purporting to preclude all judicial review. Such military commissions would not follow the same process as courts-martial under the Uniform Code of Military Justice, and would afford few, if any, of the protections available in the ordinary military justice system.

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 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 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 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.

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

[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.

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.

Yet 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 Quirin, 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 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

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[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).

[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.

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 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.

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, non-violent 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. § 2339B. 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]

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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 Quirin. In addition, Ex Parte Milligan makes clear that only Congress, not the President acting alone, has the power to suspend habeas corpus. Furthermore, the Supreme Court has made clear just this

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 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.

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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.

[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, 223-25 (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.

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 government 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 anti-terrorism legislation have greatly "streamlined" the death penalty appeals process, even at the expense of full and fair review of death sentences.[12]

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[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).

[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.

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 "[v]iolation 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 distinguished 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 Milligan, 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

[13] See Daniel J. Danelski, *The Saboteurs' Case*, 1 Journal of Supreme Court History 61 (1996).

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.

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

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[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.

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 Saro-Wiwa 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

[17] *See* T.R. Reid, *Europeans Reluctant to Send Terror Suspects to U.S.*, Washington Post, Nov. 29, 2001, at A23.

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 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 non-citizens 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]

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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).

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]

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 II, 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.

[20] *Id.* at 124-25.