

December 5, 2001

Honorable Patrick J. Leahy
*Chairman, Senate Judiciary Committee, 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:

1. 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.
2. 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.
3. 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 State 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,

PROCEDURAL SAFEGUARDS FOR MILITARY TRIBUNALS:

- (i) That the tribunal is independent and impartial
Sources: Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol II) Part II, Art. 6, No. 2;
International Covenant on Civil and Political Rights (ICCPR), Part III, Art. 14, No. 1;
Universal Declaration of Human Rights (UDHR), Art. 10;
- (ii) That the particulars of the offense charged or alleged against the accused are given without delay
Sources: Protocol II, Part II, Art. 6, No. 2(a);
ICCPR, Part III, Art. 14, No. 3(a) and (c);

Statute of the International Criminal Tribunal for former Yugoslavia (ICTY), Art. 20(3), 21(4)(a);
Additional Protocol I to the Geneva Conventions (Protocol I), Art. 75(4)(a);
U.S. Rules of Courts-Martial (RCM) 308; RCM 405(f)(1), (2), and (6);
and RCM 602;

- (iii) That the proceedings be made intelligible by translation or interpretation
Sources: ICCPR, Part III, Art. 14, No. 3(a) and (f);
ICTY, Art. 21(4)(a) and (f);
Geneva Convention 3, Art. 105;
Implicit in Protocol I, Art. 4(a);
- (iv) That the evidence supporting the conviction is given to the accused, with exceptions only for demonstrable reasons of national security or public safety
Sources: ICCPR, Part III, Art. 14, No. 1;
Geneva Convention 3, Art 105;
Protocol I, Art. 75(4)g);
Universal Declaration of Human Rights, Art. 11;
ICTY 21(4)(e);
RCM 308; RCM 405(f)(3) and (5); RCM 405(g)(1)(B); RCM 703(f);
Military Rules of Evidence (MRE) 401;

- (v) That the accused has the opportunity to be present at trial
Sources: Protocol II, Part II, Art. 6, No. 2(e);
ICCPR, Part III, Art. 14, No. 3(d);
ICTY, Art. 21(4)(d);
Implicit in Geneva Convention 3, Art. 99;
Protocol I, Art 75(4)(e);
RCM 804;
- (vi) That the accused may be represented by counsel
Sources: ICCPR, Part III, Art. 14, No. 3(b) and (d);
ICTY, Art. 21(4)(b) and (d)
implicit in Protocol II, Part II, Art. 6, No. 2(a);
RCM 405(d)(2); RCM 405(f)(4); RCM 506;
- (vi) That the accused has the opportunity to respond to the evidence supporting conviction and present exculpatory evidence
Sources: ICCPR, Part III, Art. 14, No. 3(e);
Geneva Convention 3, Art. 105;
RCM 405(f)(10) and (11);
- (vii) That the accused has the opportunity to cross-examine adverse witnesses and to offer witnesses
Sources: ICCPR, Part III, Art. 14, No. 3(e);
ICTY, Art. 21(4)(e);
Geneva Convention 3, Art 105;
Protocol I, Art. 75(4)(g);
Universal Declaration of Human Rights, Art. 11;
RCM 405(f)(8) and (9); RCM 703(a);
MRE 611(b);
- (viii) That the proceeding and disposition are expeditious
Sources: ICCPR, Part III, Art. 14, No. 3(c);
ICTY, Art. 20(1), Art. 21(4)(c);
implicit in Protocol II, Part II, Art. 6, No. 2(a);
Geneva Convention 3, Art 105;
Additional Protocol 1 to the Geneva Conventions, Art. 75(4)(g);
UDHR, Art. 11;
RCM 707(a) (calls for arraignment withing 120 days);

- (ix) That reasonable rules of evidence, designed to ensure admission only of material with probative value, are used
Sources: This is a suggestion made by Cass Sunstein in testimony before the Judiciary Cmte on 12/4/2001; it responds to section 4(c)(3) of the President's military order; *see also* Geneva Convention 3, Art 103; Protocol I, Art. 75(4)(a); MRE 401-403 (NOTE: protections are nearly equal to safeguards in federal civilian courts);
- (x) That before and after the trial, the accused is afforded all necessary means of defense
Sources: Protocol II, Part II, Art. 6, No. 2(a); ICCPR, Part III, Art. 14, No. 3(b);
- (xi) That conviction is based only upon proof of individual responsibility for the offense
Sources: Protocol II, Part II, Art. 6, No. 2(b); ICTY, Art. 21(4)(b); Geneva Convention 3, Art. 105;
- (xii) That conviction is not based upon acts, offenses or omissions which were not offenses under the law at the time they were committed
Sources: Protocol II, Part II, Art. 6, No. 2(c); UDHR, Art. 11(2); ICTY, Art 7; Protocol I, Art. 75(4)(b);
- (xiii) That the penalty for an offense is not greater than it was at the time that the offense was committed
Sources: Protocol II, Part II, Art. 6, No. 2(c); UDHR, Art. 11(2); ICTY, Art. 10; ICCPR, Art. 15; Protocol I, Art. 75(4)(c);
- (xiv) That the accused is presumed innocent until proved guilty
Sources: Protocol II, Part II, Art. 6, No. 2(d); ICCPR, Part III, Art. 14, No. 2; Art. 15; UDHR, Art. 11(1); ICTY, Art. 21(3); Protocol I, Art. 75(4)(c);

- (xv) That the accused is not compelled to confess guilt or testify against himself
Sources: Protocol II, Part II, Art. 6, No. 2(f);
ICCPR, Part III, Art. 14, No. 3(g);
ICTY, Art. 21(4)(g);
RCM 405(f)(7);
MRE 301;
Implicit in Geneva Convention 3, Art 99;
Protocol I, Art. 75(4)(d);
- (xvi) That the trial is open and public, including public availability of the transcripts of the trial and pronouncement of judgment, with exceptions only for demonstrable reasons of national security or public safety
Sources: ICCPR, Part III, Art. 14, No. 1;
ICTY, Art. 20(4) and 21(2);
Protocol I, Art. 75(4)(f);
RCM 806; RCM 922; RCM 1007;
- (xvii) That a convicted person is informed of remedies and appeals and the time limits for the exercise thereof
Sources: Protocol II, Part II, Art. 6, No. 3;
ICCPR, Part III, Art. 14, No. 5;
UDHR, Art. 10, 11;
Protocol I, Art. 75(4)(i);
RCM 1010;
- (xviii) That a convicted person is informed of remedies and appeals and the time limits for the exercise thereof.
Sources: Protocol II, Part II, Art. 6, No. 3;
ICCPR, Part III, Art. 14, No. 5.;
Geneva Convention 3, Art 106;
Protocol I, Art. 75(4)(j) [to be informed if available];
UDHR, Art. 14;
ICTY, Art 25.