Testimony of Neal Katyal
Visiting Professor, Yale Law School (2001-02)
Professor of Law, Georgetown University
(neal.katyal@yale.edu; (203) 432-4832)

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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*.

<u>The Military Order</u>

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] 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

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1 E.g., Johnson v. Eisentrager, 339 U.S. 763 (1950).

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); Parklane 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).

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 country 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.

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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").

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,

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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 considered 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 once 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 . . . . Every repetition embeds that principle more deeply in our law and thinking and expands it to new purposes. . . . 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.

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 lacking.[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

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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 . . . Offences 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") .

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 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

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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 no 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

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 underenforce certain constitutional rights. See Sager, *Fair Measure: The Legal Status of Underenforced 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 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

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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.

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 theatre 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 offences, 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.

> . . . . 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]

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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 contend that the facts in *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 War 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 its original sanction. Its authority is thus the same as the authority for

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 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

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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.").

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 USCS § 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

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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

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

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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 cases. 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. See *Averette*, at 365 ("We emphasize our awareness that the fighting in Vietnam qualifies as a war as 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* ruling 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.

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.

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 "s*ilently 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

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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 that 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 unconstitutional because it "was a job for the Nation's lawmakers, not for its military authorities. . . . In the framework 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*,

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 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]

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at 587 (majority op. 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 Youngstown, 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 than 250 occasions. Finally, Hitler persuaded President Von Hindenberg to suspend all such rights, and they were never restored.").

21 The *Pentagon Papers Case, N.Y. 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 stated "[t]he war power stems from a declaration of 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*. at 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 an 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 individual, 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

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 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

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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 or 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.

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*, Findlaw, 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.'" 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

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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).

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.