

December 5, 2001

The Honorable Patrick J. Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Bldg.
United States Senate
Washington, DC 20510

Dear Senator Leahy:

We, the undersigned law professors and lawyers, write to express our concern about the November 13, 2001, Military Order, issued by President Bush and directing the Department of Defense to establish military commissions to decide the guilt of non-citizens suspected of involvement in terrorist activities.

The United States has a constitutional court system of which we are rightly proud. Time and again, it has shown itself able to adapt to complex and novel problems, both criminal and civil. Its functioning is a worldwide emblem of the workings of justice in a democratic society.

In contrast, the Order authorizes the Department of Defense to create institutions in which we can have no confidence. We understand the sense of crisis that pervades the nation. We appreciate and share both the sadness and the anger. But we must not let the attack of September 11, 2001 lead us to sacrifice our constitutional values and abandon our commitment to the rule of law. In our judgment, the untested institutions contemplated by the Order are legally deficient, unnecessary, and unwise.

In this brief statement, we outline only a few examples of the serious constitutional questions this Order raises:

- The Order undermines the tradition of the Separation of Powers. Article I of the Constitution provides that the Congress, not the President, has the power to “define and punish . . . Offenses against the Law of Nations.” The Order, in contrast, lodges that power in the Secretary of Defense, acting at the direction of the President and without congressional approval.
- The Order does not comport with either constitutional or international standards of due process. The President’s proposal permits indefinite detention, secret trials, and no appeals.
- The text of the Order allows the Executive to violate the United States’ binding treaty obligations. The International Covenant on Civil and Political Rights, ratified by the United States in 1992, obligates State Parties to protect the due process rights of all persons subject to

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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,

