Testimony of

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Before the

Senate Judiciary Committee

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Mr. Chairman, Members of the Committee:

I am honored by the Committee's request that I testify at this very important hearing on the role Congress can and should play in our shared national effort to defeat global terrorism without inadvertently succumbing to our own reign of terror.

Although many of our constitutional freedoms would be rendered meaningless without freedom from terrorist attack, they may be equally threatened by undue governmental limitations and intrusions imposed in the elusive pursuit of national security. The choice we face is not that of liberty versus security. Our challenge is to secure the liberties of all against the threats emanating from all sources--the tyranny and terror of oppressive government no less than the tyranny of terrorism.

In the days following September 11, our journalists, academics, and citizens wondered whether our government and our courts would have the wisdom and courage to avoid the terrible mistake they made in ordering and ratifying the detention of over 70,000 Japanese Americans in internment camps during the Second World War.1 Liberty from overreaching governmental power was central to the freedoms identified by President Bush in his address to Congress on September 20 as the very target of the terrorist attack.2 I share with the President the belief that civil liberty includes liberty from terrorism. I hope we share the belief that the war against terrorism does not require us to sacrifice constitutional principles on the altar of public safety, We know what is the result of that sacrifice--in Korematsu v. United States, 323 U.S. 214 (1944), the Supreme Court permitted the government to intern American citizens purely on the basis of their ancestry in the name of national security. But liberty, properly understood, requires both protection from government and protection by government.3 We must not permit ourselves to repeat the same mistake and, by pitting liberty against security, erase our freedom and equality in security's name. We are at the "Korematsu" crossroads. Congress can determine which path we

take. And Congress has a special responsibility to act. No other branch of government can be relied on to perform that task as well. Congress alone can see the problem whole; courts necessarily see but one case at a time and in wartime tend to defer to the executive's greater knowledge and expertise,4 and the executive tends to be blinded by the single-minded requirements of the military mission.

The real problem is not how much liberty to sacrifice to buy security; it is how properly to achieve freedom from the terrorism of all fanatics, foreign or domestic, who would challenge the living fabric of our society, including the constitutional compact that unites and gives it purpose. Fanatics have attacked the Pentagon and the Federal Building in Oklahoma and have toppled the towers of the World Trade Center, massacring thousands of innocent people. We must not allow them to tear down as well the structure of government, constituted by the separation of powers, that makes our legal and political system--and the liberties it embodies and protects--altogether unique. Our response to each threat must remain the same: a steadfast refusal to succumb to any attempt to force upon us a will, and a way of life, that offend the freedoms at our country's core. These freedoms, embodied in our Constitution, are our security against the fanatics' new tyranny of terror. To assert them here is to win at home the war we are waging so effectively abroad.

In the wake of the terrorist attack on the United States, the President has acted to ensure that the perpetrators of this crime against humanity are brought to justice--or, as he promised in his address to Congress, to bring justice to the terrorists. The terms of the November 13 Military Order represent the most dramatic Presidential step thus far in our effort to elaborate just what the content of this American justice is to be. The ostensible goal of the military tribunals to be instituted pursuant to that Order is to permit a "full and fair trial," §4(c)(2), while at the same time ensuring that the process is as expeditious and secure as possible. The need to provide sooner rather than later for the detention and trial of those responsible for the terrorist attacks of September 11 is apparent from the rapid pace of our, and our allies', military victories in Afghanistan. To Congress falls the task of charting our next steps by giving content to a vision of justice that responds fairly yet firmly to the fanatics' threat to our nation.

Congress alone can avoid the constitutional infirmities that plague the Military Tribunal Order of November 13 and must do so not only to protect the constitutional rights of those threatened by that Order but also to shield any resulting convictions from judicial reversal on appeal -- convictions which could properly be obtained by military tribunals constituted under a more narrowly drawn congressional statute.

As of two days ago, Secretary of Defense Rumsfeld had wisely sought to describe the Military Order issued by President Bush on November 13 as a blueprint made public, "so that... work could begin" designing the military tribunals and settling their jurisdiction and procedures. He insisted that the Order was announced simply because, in his words, "It may be that we will need that option" (NBC,"Meet the Press," Dec.2, 2001). This is not, however, a blueprint that the United States Government is free to follow. The structure of executive power instituted by the November 13 Order is so constitutionally flawed at its base that it cannot be saved by nimble TV spin or by altering a detail here and a detail there.

As promulgated, the Military Order, by its express terms, is a direct threat to some 20 million lawful resident aliens in the United States. Almost any act by a resident alien, anywhere, could in

some circumstances lead the President to believe the alien has or had some form of involvement with a terrorist organization.4 The resident alien need not even know that he was involved with terrorists. All that is required is "aid[ing] or abet[ing]" terrorists "or acts in preparation [ ]for" terrorism. Hiring a car for a friend could be a terrorist act subject to trial by military tribunal, if it turned out that your friend is--or was--a terrorist. How many contributors to the African National Congress who supported sanctions against South Africa under apartheid in the face of government opposition "ha[d] as their aim to cause[ ] injury or adverse effects on . . . United States . . . foreign policy... "? §2(a)(1)(ii). How many supporters of Irish nationalism contributed, for reasons of political conscience, funds that "aided or abetted" the Irish Republican Army before it began disarming on September 11?5 The Military Order decrees that any such supporter might at any moment be turned over to the Defense Department for trial by a military tribunal on the mere stroke of the President's pen certifying that the President had "reason to believe" that the named individual was, or at one time had been, helping or harboring some organization that the President saw fit to regard as an example of "international terrorism."

Of course, as Secretary Rumsfeld must have recognized, any such threat, made in a manner that necessarily hangs like a Sword of Damocles over millions of lawful residents of this nation, cannot possibly be defended under our Constitution.6 As Justice Marshall once wisely observed, such a sword does its work by the mere fact that it "hangs--not that it drops." Arnett v. Kennedy, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting). The Secretary's attempt to wish the sword away--to persuade us all that, until we feel the edge of its blade upon our necks, we need not worry--is no substitute for replacing that sword with a solid framework for the judicious use of executive force in bringing justice to the terrorists.

The next steps are for Congress to take--not in the direction of so flawed a blueprint, but towards a constitutionally sound regime that will withstand judicial review--if it hopes to obtain swiftly and to defend from embarrassing judicial invalidation, convictions by military tribunal of the leaders of Al Qaeda, or indeed of anyone else. For it is not within our government's power simply to threaten to detain and commit to a military tribunal or commission anyone who associates with agents of terror. After all, even today's hardly "liberal" Supreme Court not long ago held that the City of Chicago's response to terror gangs7--enacting legislation that threatened to arrest and prosecute anyone who, loitering near a known gang member, did not disperse upon police command--was flatly unconstitutional in essentially delegating to those who enforce the law the vaguely bounded power to make it on the spot. City of Chicago v. Morales, 527 U.S. 41, 62-63 (1999).

The November 13 Military Tribunal Order is the same sort of response and has the same kind of infirmity. Like terrorism itself even though far less violently, a threat of arrest and possible conviction, even in our fully protective civil courts, for offenses not clearly defined in advance but to be defined by the executive as events unfold, instills fear far beyond the ground zero of its actual implementation. The Supreme Court in Morales recognized as much by striking down on its face the ordinance that announced that threat and refusing to wait until particular individuals were convicted or even charged. Id. at 55. The judicial response to the November 13 Order, despite Bush administration efforts to describe it as more like a mere press release, than a real order, could be even harsher. For at least the Chicago threat carried with it the assurance that nobody would be arrested pursuant to its terms without first receiving a clear and individualized

warning--and that anyone could assuredly avoid arrest and prosecution simply by heeding that warning and dispersing when ordered to do so. The November 13 Order is a threat that carries no such corresponding assurance: all those subject to it are exposed to prosecution, conviction, and possible execution for conduct they may have engaged in years ago--and the Order suffers from the compounding vice that it violates the separation of powers required by our Constitution of the federal government (although not of states and municipalities) by proceeding without the congressional authorization clearly required for any creation of a system of trials, military or otherwise.8 It installs the executive branch as lawgiver as well as law enforcer and law interpreter and applier,9 leaving to the executive branch the specification, by rules promulgated as it goes along, of what might constitute "terrorism" or a "terrorist" group, what would amount to "aiding and abetting" or "harboring" such terrorism or such a group, and a host of other specifics left to the imagination of the fearful observer. This "blending of executive, legislative, and judicial powers in one person or even in one branch of the Government is ordinarily regarded as the very acme of absolutism." Reid v. Covert, 354 U.S. 2, 11 (1957); Federalist No. 47 (James Madison).

Several days before Secretary Rumsfeld's attempted recasting of the November 13 Order, White House Counsel Alberto Gonzales opined in the pages of The New York Times that the order would not reach any but "foreign enemy war criminals," Alberto R. Gonzales, "Martial Justice, Full and Fair," The New York Times, Nov. 30, 2001, §A at 27,10 and that each military tribunal's proceedings, which the Order had said could be conducted in secret at the President's option, §4(c)(4), would of course be conducted in the open with exceptions only for "the urgent needs of national security." It is, to be sure, nice to have White House Counsel's promise that this is so, but "trust me" has never been enough for the American people. Our whole constitutional tradition is predicated on the proposition that not even the best intentions of the most benevolent leaders can substitute for the positive legal protection and preservation of freedom. Ours is "a government of laws, not men."11 It is offensive to our founding values to have the powers of drafting the laws, and then prosecuting and adjudicating violations of those laws, embodied in one agency--here, one man. "Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." Reid v. Covert, 354 U.S. 2, 38-39 (1957).12
It is just not good enough for the executive branch to put a benign spin on this Order and to assure the nation that it will not mean in practice what it says on its face. Yet this is precisely what Mr. Gonzales sought to do when he "explained" in The New York Times that the Military Order's explicit bar of any judicial relief whatsoever for any person detained and tried pursuant to it13 would, of course, not mean what it said, inasmuch as the Supreme Court half a century ago had refused to take identical language at face value in its Ex parte Quirin decision condemning the Nazi submarine saboteurs to death--but only after according them a judicial hearing of sorts.14 What seems essential is less spin and more action--here, concrete legislative action to build a sound but narrow legal platform on which to construct the military tribunals and conduct the military trials that the President believes may prove essential in extraordinary cases where our civil justice system may be insufficient to the task of coping with the terrorist threat that became manifest with the monstrous events of September 11. That legal platform must make clear that its scope cannot be extended (a) to American citizens; (b) to individuals linked, however closely, to acts of terror wholly unrelated to September 11 (unless Congress affirmatively and expressly chooses to add such acts, or the specific organizations responsible for

them, to the list of targets it empowers the President to pursue and try militarily); to individuals not closely linked to a specific terrorist event whose responsible agents Congress has authorized the President to pursue by force and try by military tribunal; or to mere foot soldiers captured on the field of battle and entitled, under the Geneva Convention, to treatment as prisoners of war rather than as war criminals.

Substantive limits must be established by law to constrain on the President's power to determine which aliens are to be subjected to the jurisdiction of a military tribunal or commission, and procedural guidelines must be established to ensure that defendants' due process rights are protected by such commissions. Congress must set those limits and draft those guidelines, presumably in consultation with the President.

At the forefront of our new agenda abroad, at least so far, has been an effort to help establish transparent, accountable, and hopefully democratic institutions with which to govern Afghanistan. The policy appears to rest upon the belief that democracy is the best check on terrorist activity, which requires a culture of respressive intolerance in order to thrive. Yet that same accountability must prevail at home as well. We are in the end more, not less, secure when we practice the democracy at home that we preach abroad.

The Military Order confronts Congress with two distinct problems to resolve. The first is the set of substantive limitations to be placed on the jurisdiction afforded military tribunals: who is to be subject to the tribunals, and for what wrongs? The second is the set of procedures that is to govern these tribunals. We must ensure the open and fair hearings witnessed in "A Few Good Men," not the kangaroo court seen in "Paths of Glory." It is especially troubling that even our extant system of courts martial has been besmirched by careless comparison with the far less protective military tribunals that the order plainly contemplated. See William Glaberson, "A Nation Challenged: the Law; Tribunal v. Court-Martial: Matter of Perception," The New York Times, Dec. 2, 2001, §1B at 6 ("the proposed tribunals are significantly different from courts-martial, [military] lawyers say, adding that confusion between the two has distorted the debate over the tribunals and unfairly denigrated military justice").

Jurisdiction

1. As a preliminary matter, Congress should note that we already have a system of justice under which to try terrorists: we successfully tried in criminal court the last members of Al Qaeda who attempted to bomb the World Trade Center. In the rush to convict and punish the perpetrators of the attacks on the World Trade Center and the Pentagon, it would be a mistake, although not necessarily a violation of the Constitution, to rely on military courts as a substitute for the intelligence agencies' ability to track terrorists and accumulate convincing evidence of their activities. Using a court designed to convict even when a weak case has been presented by the government--using it, in fact, to cover the failures of the executive--is hardly the way to fight terrorism in the long run.

Indeed, the entire plea for secrecy and anonymity--from concealing from the accused and/or the public the identity and nature of the witnesses and other sources behind the government's case, to keeping confidential the methods of investigation employed by the government to track down and identify the accused, to hiding the identity of jurors and judges who might reasonably fear

reprisal from an accused terrorist's associates in terror who are still at large--can so easily become a cover, whether deliberate or not, for ineptly unreliable or otherwise unconscionable behavior by the executive, that it would seem wise for Congress to institute some sort of independent check on the President's assertion that the presumptively open and public civil trial system, which has had to cope often with needs for witness protection and informer anonymity and the like, is intrinsically ill-adapted to the task at hand.

Congress's goal should therefore be to channel as many suspected terrorists as feasible away from, rather than towards, military tribunals. Among the reasons justifying a military tribunal will of course be considerations of national security that may require closed proceedings to protect classified information from dissemination; concerns of overwhelming danger to the court, to jurors, or to witnesses that might require secure proceedings of a sort precluded even by the usual methods of witness or court protection; or circumstances surrounding the accused's capture while prosecuting a military action on behalf of an enemy nation or group in a manner that allegedly violates the laws of war.

2. Although much of the current debate proceeds on the premise that these two should be treated differently, where these reasons are present there seems little principled basis to distinguish between an unlawful belligerent who is a resident alien, blending in with and hiding among the United States population, and one who is a non-resident alien, openly engaging in warfare on United States civilians from beyond our borders. Indeed, the reasons for favoring military tribunals do not appear to distinguish between citizens and non-citizens. As the Court held in Ex parte Quirin, 317 U.S. 1 (1942), when a citizen disavows his homeland and sides with the enemy, he may become an enemy belligerent. See id., 317 U.S. at 16 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war"). Indeed, being a traitor as well as an unlawful belligerent, the citizen who wages such warfare on his homeland may well be regarded as more culpable than the alien, not less.15

In sum, it seems wisest in practice to limit military tribunals--as the Bush Administration has all but promised it would likely do in practice--to a relatively small group of enemy alien leaders, captured abroad, of terrorist groups clearly identified by Congress, and an even smaller group of their colleagues who are reasonably believed to have played similar roles while concealed among our people. In theory, however, the two criteria essential to establishing military, as opposed to civilian, jurisdiction should not rest upon any such difference in status.

The first is that the person to be tried by a military tribunal or commission must be an enemy, see Johnson v. Eisentrager, 339 U.S. 763, 776 (1950)--that is, someone acting at the behest of a nation or other entity warring against the United States; the second is that the enemy must be charged with unlawful belligerency, or any other established offense against the laws of war, sufficiently serious to warrant such disfavored treatment. See Ex parte Quirin, 317 U.S. at 11.

Strikingly, the November 13 Military Tribunal Order extends the range of offenses that it subjects to military tribunals so as to include "any and all offenses triable by military commission," §4(a), not just those that offend the laws of war, based, evidently, upon an unexplained finding that "prevention of terrorists attacks" requires the detention for, and trial by, military commissions not only "for violations of the laws of war" but also for "violations of . . .

other applicable laws," of all "individuals subject to this order," §1(e) (emphasis added). The law is settled, however, that an alien may be subjected to trial by a military tribunal only if he meets both of the criteria set forth above. See Yamashita, 327 U.S. at 26. Even though military rule is "properly applied . . . on the theatre of active military operations, where war really prevails," Milligan, 71 U.S. at 127, trying a captured soldier as a criminal for merely fighting in accord with the laws of war on behalf of the nation or other entity he represents appears to be universally condemned. Under the Geneva Convention and other international instruments, such soldiers must be held as prisoners of war, to be repatriated at the war's conclusion. This could pose a problem in a case such as that of Taliban foot-soldiers, captured while engaged in combat against the Northern Alliance, whom our military leaders suspect of harboring, or working in close concert with, Al Qaeda. Unless such combatants happen to be among Al Qaeda's leadership, they are most unlikely to have been sufficiently responsible for that group's terrorist acts to count as war criminals, but viewing them as entitled to treatment as prisoners of war would seem to require their repatriation in the eventually reconstituted Afghanistan, to Saudi Arabia, to Pakistan, or to their mother country whatever it might be--none of which nations might be willing to welcome them. Even though the indefinite and potentially permanent detention of deportable aliens residing in the United States may well be unconstitutional even if no other nation will accept them, see Zadvydas v. Davis, 121 S. Ct. 2491, 2500-02 (2001), that protection does not seem to extend to "aliens outside our geographic borders," id. at 2500 (and cases cited therein), much less to enemy aliens outside those borders, so it may well be that, since international law could hardly require the admission of such captured enemies into the United States, there is no alternative to their indefinite detention by the United States, at a suitable place outside our borders, unless and until their repatriation becomes possible.16

3. To enforce this basic jurisdictional boundary, Congress should provide for some form of tribunal--it need not be an Article III court in the first instance17--to review the President's threshold assertion of military jurisdiction, and should provide as well for some suitably expedited form of habeas corpus review in an Article III court if the initial review was by some lesser power. See, e.g., H.R.3162 (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001) (signed into law October 26, 2001) §412(b) (providing expedited habeas corpus review).18

4. In addition, of course, Congress would do well, acting under its Article I, §8, ch. 10 power to "define and punish... offences against the law of nations," to define more precisely those violations of the laws or customs of war which the military tribunals may hear,19 and to specify or otherwise monitor the penalties to be imposed. Punishments could perhaps be made proportionate to those meted out under the Federal Sentencing Guidelines.

Procedure

5. Domestic law of course imposes due process safeguards on military tribunals of every possible form. Thus, in Middendorf v. Henry, 425 U.S. 25 (1976), the Court took note of the traditional categorization of courts martial (general, special, and summary--i.e., non-adversarial.), and required Fifth Amendment due process protections to be extended to a defendant even at the lowest (summary) of the three levels of court martial.20 Id. at 43 ("plaintiffs, who have either been convicted or are due to appear before a summary court-martial, may be subjected to loss of liberty or property, and consequently are entitled to the due process of law guaranteed by the

Fifth Amendment"). The two higher levels (general and special) are adversarial, and accordingly require heightened due process safeguards.

6. The court martial provisions of the Uniform Code of Military Justice (UCMJ) provide the minimum procedural safeguards required by military law, and may usefully be considered by Congress as setting a template against which to measure possible legislative proposals for creating new types of military tribunal.21 "General courts-martial . . . have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." 10 U.S.C. §818. General courts-martial are, as noted, comprised of five judges. One of these must be a military judge--unless the defendant waives this requirement. 10 U.S.C. §816. At least one trained lawyer sits on the court, 10 U.S.C. §826, and, absent exigencies of war, the accused is entitled to counsel to defend him, §827; to know the charges proffered against him, §830; to be free from compulsory self-incrimination, §831; and to conduct a limited investigation of the facts surrounding the charge, §832.

7. A court martial also provides heightened protection for more serious charges. Section 852 of the UCMJ ensures that a defendant may be convicted of a crime punishable by death only where the commission's vote is unanimous. Any death sentence must be unanimous as well. While this would no doubt limit the number of death sentences that could be imposed--and the number of convictions that could be obtained in cases where that penalty was sought--if the military tribunals now being established were to follow the court martial model, the prosecution could keep the overall conviction rate from falling much by seeking a life sentence, and from falling at all by seeking a term of years less than life, which requires the same two-thirds vote that the November 13 Order would require. See §4(c)(6).

8. Suggestions that military tribunals must, either as a matter of constitutional necessity or as a matter of sound international diplomacy, follow evidentiary rules and burden-of-proof rules fully as onerous to the prosecution, and protective of the accused, as apply in ordinary criminal trials and in courts martial, have much to commend them, but Congress may properly keep in mind that at least some of those rules are designed mostly to protect lay jurors from being unduly impressed by categories of evidence whose reliability those inexperienced in such matters may overestimate, or unduly swayed by emotional appeals for vengeance, and that the need for such rules may be correspondingly reduced when trained professionals are the finders of fact and law.

In addition, the classic requirement of proof beyond a reasonable doubt is chosen to reflect the old adage that it is better to free 100 guilty men than to imprison, much less execute, one innocent--a calculus that neither the Constitution, nor conventional morality, necessarily imposes on government when the 100 guilty who are freed belong to terrorist cells that slaughter innocent civilians, and may well have access to chemical, biological, or even nuclear weapons. Due process has been held, for example, to permit incarceration of potentially indefinite duration of those found, upon proof by less than the "beyond reasonable doubt" standard, to pose a grave danger to the safety of others. See Addington v. Texas, 441 U.S. 418, 424-29 (1979) ("clear and convincing" evidence standard held constitutional). To be sure, there is a very significant difference between involuntary civil commitment or quarantine of someone deemed dangerous to the public for reasons that entail no moral opprobrium and imprisonment or, most extreme of all, execution, of someone convicted as a war criminal. But in a legal universe where the option of

permanent incarceration as a "probable once and future terrorist" is non-existent, to put decisive weight on the moral valence of the "war criminal" label may mean violating the maxim that our Constitution is not a suicide pact. For proof beyond a reasonable doubt--using those words in their criminal law sense and not with a wink--may be too much ever to expect in at least some categories of terrorism cases where intrinsic difficulties of gathering and presenting the needed evidence, particularly if the hearsay rule and other somewhat artificial obstacles are interposed, would predictably lead to the release of individuals likely to cause the avoidable loss of far more innocent life than would result from a somewhat softer standard of proof.

9. Congress should also ensure that an accuser not be given the final word as the court of last resort in the appeal of a conviction or sentence that the accuser obtained in his role as prosecutor or as the prosecutor's ultimate superior--a power currently granted the President by his Military Order. See §4(c)(8) (trial record submitted for President's "review and final decision"). It has been an axiom of Anglo-American law for nearly four centuries that a "person cannot be judge in his own cause," Dr. Bonham's Case, 8 Co. 114a, 118a (1610), a principle applicable to appellate no less than trial judges. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821-25 (1986). The fact that no appeal at all is constitutionally mandated from a criminal conviction rendered by a civil court, McKane v. Durston, 153 U.S. 684 (1894), has never been taken to imply that an "appeal" to the chief prosecutor himself can satisfy due process where the judgment appealed from was rendered by a body "whose personnel are in... the executive chain of command," Reid v. Covert, 354 U.S. 2, 36 (1957), as is true of courts martial, id., and of any other military tribunal drawn exclusively from the President's military subordinates.

Unless Congress opts for the novel alternative of having one or more members of each military tribunal drawn from the Article III judiciary--as Congress did in setting up the U.S. Sentencing Commission, see Mistretta v. United Sates, 488 U.S. 361 (1989), and in creating the panel charged with the task of appointing the independent counsels, see Morrison v. Olsen, 487 U.S. 654 (1988)--it follows that Congress must probably guarantee an expedited appeal to some entity independent of the executive branch, such as the Court of Appeals for the Armed Forces. Ultimate discretionary review by the Supreme Court on writ of certiorari would be an optional feature in such an arrangement. Whatever system of appeals is provided, it seems plain that, if considerations of national security or witness protection so require, Congress could provide that any appeal to a body independent of the President be conducted as a closed proceeding, with the record of the appeal to be kept confidential.

10. Although the UCMJ provides a useful model, the power to set out procedures in the first instance might instead be delegated to the Department of Defense, provided that, within a specified time before such procedural regulations go into effect, they are reported to Congress. Such a mandatory waiting period would give Congress an opportunity to reject or amend the regulations by joint resolution (not, of course, by a mere concurrent resolution, or by a one-house resolution, both prohibited under INS v. Chadha, 462 U.S. 919, 952 (1983)). Indeed, if military commissions or tribunals outside the UCMJ framework are to be as rare an occurrence as the administration insists they are meant to be, Congress might simply decide to require such tribunals to be individually authorized by the President after a statutorily mandated consultation with congressional leadership to explain why existing institutions, including the Article III courts, are inherently insufficient in the circumstances. Such congressional oversight of the

President's conduct of this war would draw in part, of course, on the War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§1541-1548 (2000)), as precedent--something to which the Bush administration, which invoked the War Powers Resolution as part of the foundation for the Use of Force Resolution that it proposed to, and obtained from, Congress on September 18, 2001, should have no objection. In any event, Congress would presumably want to require the President or his Secretary of Defense to submit regular periodical reports concerning the proceedings of the military tribunal, and the continued need for their existence.

Oversight

11. However, Congress could also ensure continued oversight of military tribunals in a variety of ways--for example, by controlling the manner in which the presiding officers are selected. It may require that presiding officers have certain minimum qualifications, and may permit civilians to serve. Alternatively, Congress may require the Secretary of Defense to submit a list of eligible candidates, from which Congress would select presiding officers to serve for a term of years. Congress could also establish procedures for the removal of such officers.

12. In addition, Congress should certainly provide for the "sunsetting," or automatic expiration after a relatively few years (three or four would seem prudent), of whatever authorization it enacts for special military tribunals to deal with suspected terrorists, just as was done in the USA-PATRIOT Act, see, §224, inasmuch as the war being waged against international terrorism, unlike a declared war against a sovereign nation, could go on indefinitely, with no plausible way of declaring it over at any given point.
Conclusion

13. Finally, it is worth noting that Congress occupies a privileged position not available to any court that may be asked to decide the constitutional issues arising from these tribunals. For Congress has before it questions concerning the prolonged and secret detention of aliens and the use of what appears to be a form of ethnic, or at least national-origin, profiling in the interrogation of immigrants; challenges to the conceded use of United States citizenship as a reward for providing information that might lead to the breakup of terrorist cells or the apprehension of terrorists; concerns going to possible abuses of prosecutorial discretion; issues regarding the alleged breach of the attorney-client privilege; worries triggered by Department of Justice indications that the FBI, now in a powerful new information-sharing arrangement with foreign intelligence agencies, may be on the verge of resuming practices, happily abandoned decades ago, involving keeping close tabs on, and even planting secret government informants in, political, religious, and civil rights-civil liberties groups; and, of course, all the fears and criticisms triggered by the November 13 Military Tribunal Order.

I believe Congress should seize this historic opportunity to investigate with care but with dispatch, and then to craft an integrated legislative package that protects individual freedoms while permitting, if truly necessary, a form of secure tribunal in which to try suspected war criminals who pose a particularly virulent threat. While I believe such tribunals may well be justifiable in extremely limited circumstances in which, among other things, the laws of war have been violated, we must be clear that facile distinctions between terrorists who kill our people with nefarious schemes incubated in caves located far across the seas, and those who do so by

carefully hatching plots in the comfort of our cities, concealing themselves as civilians while they plan monstrous acts of mass murder, are worth very little in the larger scheme of things. Bin Laden, and the leader of the terrorist cell of aliens living in our midst after gaining lawful entry to this country who proceeded to turn our world upside down on September 11, are cut from the same cloth.

We must keep in mind, too, that the vast majority of individuals who may be subjected to scrutiny because of their previous affiliation with or support for terrorist organizations are guilty of at most run of the mill crimes, crimes properly punished in civilian court. We must not make martyrs out of petty criminals. Far better to show our foes that American justice will survive their assault than to sacrifice our core values through hasty overreaction.

This, then, is our Korematsu: the choices we face now--as then--are difficult ones. But I believe that Congress can rise to the occasion, resist the undue consolidation of power within the executive branch, and secure our freedom and our safety alike, requiring no more compromise of our liberty than is genuinely essential--and then only in ways that respect equality. These are the better angels of our nature to whom I bid Congress listen today.