Testimony of

Mr. Timothy Lynch

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I. Introduction

The horrific attacks of September 11th have made it painfully clear that a technologically sophisticated band of medieval barbarians have declared war on America. In my view, these barbarians hold a nihilist philosophy and have nothing but contempt for human life. They attacked America because our nation is seen as a symbol for respect for individual rights. America is a unique nation in all of world history because it is founded upon a Constitution that is designed to acknowledge and enhance the importance and dignity of human beings.

We must respond to this new threat without losing sight of what we are fighting for. Our troops are not simply defending the property and occupants of some geographical location. They are defending the fundamental American idea that individuals have the right to life, liberty, and the pursuit of happiness. Our government must fight any foreign or domestic enemy who would destroy the rights of our people.

That said, I am disturbed by some of the actions taken by our government in response to the September 11th attacks. And I sincerely thank you for your invitation to come here and share my concerns with you.

II. Bush Order Violates Separation of Powers

On November 13, 2001 President George Bush signed an executive order with respect to the detention, treatment, and trial of persons accused of terrorist activities. The president declared a national emergency and claimed that Article II of the Constitution and the recent Joint Resolution by Congress Authorizing the Use of Military Force (Public Law 107-40) empowered him to issue the order.

In my view, the president cannot rely upon the Joint Resolution as a legal justification for his executive order. That resolution simply did not give the president carte blanche to write his own legislation on whatever subject he deemed necessary. And because Article I of the Constitution vests the legislative power in the Congress, not the Office of the President, the unilateral nature of this executive order clearly runs afoul of the separation of powers principle.

As I understand it, the primary purpose of this hearing is to explore the question of whether Congress can "codify" or "ratify" the substance of President Bush's executive order. Thus, the remainder of my statement and legal analysis will focus on other constitutional issues raised by the substantive content of that executive order.

III. Executive Arrest Warrants Violate Fourth Amendment

The Fourth Amendment of the Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The arrest of a person is the quintessential "seizure" under the Fourth Amendment. See Payton v. New York, 445 U.S. 573 (1980). In many countries around the world, police agents can arrest people whenever they choose, but in America the Fourth Amendment shields the people from overzealous government agents by placing some limitations on the powers of the police. The primary "check" is the warrant application process. By requiring the police to apply for arrest warrants, an impartial judge can exercise some independent judgment with respect to whether sufficient evidence has been gathered to meet the "probable cause" standard set forth in the Fourth Amendment. See McDonald v. United States, 335 U.S. 451 (1948). When officers take a person into custody without an arrest warrant, the prisoner must be brought before a magistrate within 48 hours so that an impartial judicial officer can scrutinize the conduct of the police agent and release anyone who was illegally deprived of his or her liberty. See County of Riverside v. McLaughlin, 500 U.S. 654 (1988).

It is important to note that while some provisions of the Constitution employ the term "citizens" other provisions employ the term "persons." Thus, it is safe to say that when the Framers of the Constitution wanted to use the narrow or broad classification, they did so. Supreme Court rulings affirm this plain reading of the constitutional text. See Zadvydas v. Davis, 121 S.Ct. 2491, 2500-2501 (2001); Yick Wo v. Hopkins, 118 U.S. 356 (1886); Wong Wing v. United States, 163 U.S. 228 (1896). Noncitizens have always benefitted from the safeguards of the Fourth Amendment. See Au Yi Lau v. INS, 445 F.2d 217 (1971); Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (1976).

President Bush would like to be able to issue his own executive arrest warrants. Under his executive order, once the president makes a determination that a noncitizen may be involved in certain illegal activities, federal police agents "shall" detain that person "at an appropriate location designated by the secretary of defense outside or within the United States." See Executive Order, Section 3, Detention Authority of the Secretary of Defense. Under the order, the person arrested cannot get into a court of law to challenge the legality of the arrest. The prisoner can only appeal to the official who ordered his arrest in the first instance, namely, the president. The whole purpose of the Fourth Amendment is to make such procedures impossible in America. Thus, Congress cannot authorize the use of executive warrants with mere legislation. See Lynch, "In Defense of the Exclusionary Rule," 23 Harvard Journal of Law and Public Policy 711 (2000).

IV. No Person Can be Deprived of Liberty Without Due Process

The Fifth Amendment to the Constitution provides that no person can be "deprived of life, liberty, or property, without due process of law." While no alien has a right to enter the United States, once an alien makes an entry into our country, his constitutional status changes. Any person threatened with deportation has a constitutional right to a fair hearing. See Landon v.

Plasencia, 459 U.S. 21 (1982). See also Ludecke Watkins, 335 U.S. 160 (1948) (Black, J., dissenting).

President Bush would like to be able to seize and deport people without any hearing whatsoever. As noted above, under the executive order, the president can have people arrested outside of the judicial process and held incommunicado at military bases.
Another section of the order provides: "I reserve the authority to direct the secretary of defense, at anytime hereafter, to transfer to a governmental authority control of any individual subject to this order." This means that any person arrested could be flown to another country at any time. The President can choose the time and country. The prisoner is barred from filing a writ of habeas corpus. The problem, as Justice Robert Jackson once noted, is that "No society is free where government makes one person's liberty depend upon the arbitrary will of another." Shaughnessy v. Mezei, 345 U.S. 206, 217 (1953) (Jackson, J., dissenting). Thus, Congress cannot enact a law that would let the President override the due process guarantee.

One should not forget that the power to deport has been abused. American citizens have been (intentionally or unintentionally) deported. See, for example, "Born in U.S.A. -- But Deported," San Francisco Chronicle, October 22, 1993. Some people have become pawns in political machinations. Six Iraqi men who fought against Saddam Hussein are fighting bogus deportation charges that are tantamount to a death sentence should they be forced back to Iraqi territory. See Woolsey, "Iraqi Dissidents Railroaded--by U.S.," Wall Street Journal, June 10, 1998.

The federal government has great leeway in establishing the various grounds for deportation, but the only check on possible arbitrary and capricious action is the due process guarantee. That guarantee should not be nullified.

V. Congress Cannot Suspend the Trial by Jury Guarantee

Article III, section 2 of the Constitution provides, "The Trial of all Crimes, except in Cases of Impeachment; shall by Jury." The Sixth Amendment to the Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." To limit the awesome powers of government, the Framers designed a system where juries would stand between the apparatus of the state and the accused. If the government can convince a citizen jury that the accused has committed a crime and belongs in prison, the accused will lose his liberty and perhaps his life. If the government cannot convince the jury with its evidence, the prisoner will go free. In America, an acquital by a jury is final and unreviewable by state functionaries.

During the Civil War, the federal government set up military tribunals and denied many people of their right to trial by jury. To facilitate that process, the government also suspended the writ of habeas corpus--so that the prisoners could not challenge the legality of their arrest or conviction. The one case that did reach the Supreme Court deserves careful attention.

In Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866), the Attorney General of the United States maintained that the legal guarantees set forth in the Bill of Rights were "peace provisions." During wartime, he argued, the federal government can suspend the Bill of Rights and impose martial law. If the government chooses to exercise that option, the commanding military officer

becomes "the supreme legislator, supreme judge, and supreme executive." It is very important to recall that that legal stance had real world consequences during that period of our history. Some men and women were imprisoned and some were actually executed without the benefit of the legal mode of procedure set forth in the Constitution--trial by jury.

The Supreme Court ultimately rejected the legal position advanced by the Attorney General. Here is one passage from that ruling:

"The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right to trial by jury was fortified in the organic law against the power of attack. It is now assailed; but if ideas can be expressed in words, and language has any meaning, this right--one of the most valuable in a free country--is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,' language broad enough to embrace all persons and cases ..." Milligan, pp. 122-123 (emphasis in original).

The Milligan ruling is sound. The Constitution does permit the suspension of habeas corpus in certain circumstances and Congress does have the power "To make Rules for the Government and Regulation of the land and naval Forces;" and "To provide for organizing, arming, and disciplining, the Militia." To reconcile those provisions with the provisions pertaining to trial by jury, the Supreme Court ruled that the jurisdiction of the military could not extend beyond those people who were actually serving in the army, navy, and militia. That is an eminently sensible reading of the constitutional text.

President Bush would like to be able to deny noncitizens on U.S. soil of the benefit of trial by jury. Under his executive order, he will decide who can be tried by jury and who will be tried by a military commission. The only case in which the Supreme Court has explicitly upheld the constitutionality of using military tribunals in America to try individuals who were not in the military is Ex Parte Quirin, 317 U.S. 1 (1942). Because the Quirin ruling carved out an exception to the Milligan holding, it must be scrutinized carefully.

The facts in Quirin are fairly straightforward. In June, 1942 German submarines surfaced off the American coast and two teams of saboteurs landed on our shores--one team in New York, the other team in Florida. Those teams initially wore German uniforms, but the uniforms were discarded after they landed on the beach. Wearing civilian clothes, they proceeded inland to accomplish their mission. They were all subsequently apprehended by the FBI.

President Franklin Roosevelt wanted these men to be tried before a military commission so he ordered that the men be turned over to the military authorities. FDR set up a military commission and decreed that these prisoners would not have access to the civilian court system. The prisoners were tried before the military commission and found guilty. Although the Attorney General of the United States strenuously argued that the Supreme Court had no jurisdiction over the case, the Court did grant a writ of habeas corpus that had been filed with the court by the attorneys for the prisoners.

The attorneys that had been assigned to defend the prisoners contended that the military proceedings were inconsistent with the Milligan precedent and that the Supreme Court ought to order a new trial. The Supreme Court rejected that argument and sought to distinguish the Milligan ruling from the circumstances found in Quirin. The Court ruled that the jurisdiction of military commissions could extend to people who are accused of "unlawful belligerency." Under the rationale of Quirin, anyone accused of being an unlawful belligerent can be deprived of trial by jury. Even an American citizen who is found out on U.S. soil can be tried and presumably executed by U.S. military authorities as long as he or she is charged and convicted of "unlawful belligerency."

In my view, the Quirin ruling cannot be reconciled with the constitutional guarantee of trial by jury. The flaw that I see in Quirin (and in the writings of those who defend Quirin) is circularity. We are told that a prisoner is not entitled to trial by jury because he is an unlawful combatant. The prisoner denies the charge and demands his constitutional rights so that he can establish his innocence. The government responds by diverting the case to a military tribunal. And, we are told, the subsequent conviction confirms the fact that the prisoner is ineligible to appeal his sentence to the civilian court system. That is like saying that a convicted rapist should not be given a DNA test because he is a convicted criminal.

Because of the hastiness of Quirin proceedings, the record in the case is (intentionally or unintentionally) incomplete. The case does not disclose the circumstances under which the prisoners were detected and captured by the FBI. That omission obscures the legal issues that are being debated presently.

For what it is worth, here is my own legal analysis of the circumstances presented by Quirin. When the German u-boat surfaced off of the American coast, our country was in a declared state of war against Germany. Thus, our military forces would have been perfectly entitled to destroy the u-boat and its occupants. Similarly, when the saboteurs arrived on the beach, they could have been immediately shot by military personnel or by any American. However, once the saboteurs successfully made their way inland and infiltrated our society, their legal status changed.

Those who resist that conclusion need to recognize the dilemma posed by imperfect knowledge. A primary function of the trial process is to determine the truth. Anyone who assumes that a person who has merely been accused of being an unlawful combatant is, in fact, an unlawful combatant, can understandably maintain that such a person is not entitled to our constitutional safeguards. The problem, once again, is that that argument begs the question under consideration. And the stakes here are not trivial. The lives of human beings are potentially on the line.
The basic rule ought to be that if the government wants to execute or imprison anyone on U.S. soil, the government must proceed according the procedures set forth in the Constitution. There are, to be sure, some very limited exceptions. For example, if our Navy planes had discovered and attacked the German u-boat off the coast of Florida, and some German sailors abandoned their vessel and swam for shore. Reaching the beach would not, in my view, trigger constitutional protections for the sailors. Enemy personnel can be taken into custody as POWs. The legal distinction that I have drawn--whether a person has made an "entry"--is not new; it is a sensible distinction that also happens to run throughout U.S. immigration law. See Zadvydas v. Davis, 121 S.Ct. 2491, 2500 (2001).

To conclude, Congress should not attempt to exploit the misguided Quirin ruling and suspend the guarantee of trial by jury for people here in the United States. Note, however, that policymakers may have choices beyond criminal indictment and sheer helplessness. The federal government, for example, already has the power to deport people who may pose a threat to our national security. And the burden of proof in a deportation proceeding is properly much lower than the standard of proof in criminal trials.

VI. Forums for War Criminals Captured Overseas

There appear to be four possible legal forums to try suspected war criminals that are captured overseas: (1) trial in a civilian court here in America, according to our normal federal rules of criminal procedure; (2) trial by a non-Article III court; (3) trial in a international forum; (4) trial before a an ad hoc court based upon Nuremberg principles. Let me briefly address these possibilities in turn.

A criminal trial in a civilian court here in America does not require extended discussion. This procedure was used to try the Panamanian leader Manuel Noriega, the terrorists who bombed the World Trade Center in 1993, and the bombers of the Oklahoma City federal building in 1995.

A criminal trial in a non-Article III court here in America or overseas has precedent. After World War II, some German and Japanese POWs were accused of war crimes and were tried before military tribunals. See Application of Yamashita, 327 U.S. 1 (1946).

In recent years there has been much discussion surrounding the creation of an "International Criminal Court" (ICC). The idea here is to establish a permanent court that can try individuals for war crimes, genocide, and other crimes against humanity. To become effective, the ICC Treaty requires 60 nations to ratify its provisions. Thus far, only 43 nations have signed off on the treaty. However, even if the ICC treaty were ratified tomorrow, it provisions are not retroactive and could not be applied against terrorists for the vicious attacks on the World Trade Center. Thus, on closer examination, this is not a feasible possibility. There are, in any event, many good reasons to withhold U.S. support for such a tribunal. See Dempsey, "Reasonable Doubt: The Case Against the Proposed International Criminal Court," Cato Institute Policy Analysis no. 311 (July 16, 1998).

A temporary, ad hoc, tribunal based upon Nuremberg principles is another possibility. After World War II, the Allied Nations tried Nazi war criminals in Nuremberg. At present, the former dictator, Slobodon Milosevic, is being tried before the International Criminal Tribunal for the Former Yugoslavia, which is also based on Nuremberg principles.

Because a regular criminal trial in the United States is straightforward and the ICC seems unrealistic, let me briefly explain why I think a trial by an ad hoc tribunal based upon Nuremberg principles may be the best forum.

First, government prosecutors can avoid habeas corpus appeals in the U.S. court system, which absent congressional action, will almost certainly develop post-trial.

Second, a reasonable argument can be made that bona fide intelligence information should not have to be disclosed in a public forum. A non-Article III court proceeding must still comport with due process and intelligence sources likely would have to be disclosed in order to counter meritorious objections from defense counsel, and, thus, the possibility of a lengthy retrial.

VII. Conclusion

In sum, my view is that war criminals captured on U.S. soil must be tried in our civilian court system. War criminals captured overseas can be tried in a civilian court here in the United States or by a Nuremberg-type tribunal.