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December 3, 2001

To: Judiciary Committee, U.S. Senate  
Attn: Sen. Patrick Leahy, Chair  
Sen. Dianne Feinstein, Member  
United States Senate  
Washington, D.C. 20510

**Re: International Law and Constitutional Law Ramifications of the President's  
Military Order of November 13, 2001**

Dear Senator Leahy, Senator Feinstein and Other Members of the Judiciary Committee:

The Human Rights Committee of the American Branch of the International Law Association writes to express its views concerning the November 13, 2001 Military Order on The Detention, Treatment, and Trial of Certain Non-Citizens In The War Against Terrorism ("Order"). For the reasons that follow, we consider the Order to be in violation of long-standing principles of international law and to raise significant and troubling United States constitutional law concerns.

The Human Rights Committee of the American Branch of the International Law Association ("Human Rights Committee") has a longstanding interest in the progressive development of the international legal order, the rule of law and the protection of fundamental human rights. It is comprised of individuals from the academic, public and private sectors who have extensive experience in the field of international law and, specifically, human rights law. Members of the Human Rights Committee have taught subjects such as international law, foreign relations law, human rights law and constitutional law and have written extensively in these fields. They have participated extensively at the trial and appellate court levels, including the United States Supreme Court, and have litigated cases involving the rights of aliens under domestic and international law. In the past, members of the Committee have testified before the Foreign Relations Committee of the United States Senate on a variety of issues, including human rights treaties.

The Human Rights Committee would like to express its serious concerns regarding the Order. While the Committee recognizes the importance of the struggle against terrorism, we have substantial concerns that the Order violates the United States' obligations under international law and the Constitution.

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## I. INTERNATIONAL LAW

Military tribunals are generally suspect under human rights treaties, international criminal law, and under established human rights law. We consider the Order to be in clear violation of each of those bodies of law.

### A. Human Rights Law

#### 1. Due process

The Order fails to comply with Article 14 of the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party and which sets forth a minimum set of customary and treaty-based human rights to due process guaranteed to all persons by customary international law, the ICCPR, and thus also by and through Articles 55(c) and 56 of the United Nations Charter. This treaty has become increasingly important as a source of human rights and the United States should, as a matter of policy, and must, as a matter of legal obligation, follow it.

The rights guaranteed by the ICCPR include the right to a fair hearing by an independent and impartial tribunal, the right to know the charges, the right to have defense counsel of choice, the right to examine and cross examine witnesses, the right to present witnesses and other evidence, and the right to an appeal to a higher tribunal. The Order fails to meet the ICCPR's minimum due process requirements in virtually all respects.

The Order is also defective as it is overly broad and open-ended, with no defined standards of uniform application. Under this Order, the Secretary of Defense is empowered to be the sole authority to decide if there is reason to believe that **any** non-United States citizen (including long-time United States lawful permanent residents) **anywhere** in the world might have committed or attempted to commit "violations of the laws of war and other applicable laws." Individuals who are deemed subject to this Order include any non-citizen who has "aided or abetted, or conspired to commit acts of international terrorism... that threaten to cause or have as their aim to cause... adverse effects on the United States foreign policy or economy."

Under the language of the Order, a long-term United States permanent resident who has written articles and made speeches criticizing the foreign policy of the United States and calling for a worldwide boycott of American-made products and for other forms of direct action might be subject to prosecution before a military court. It is not enough to say that no United States Secretary of Defense would be so rash or foolish enough to pursue such a prosecution. The fact that such an act could be treated as a terrorist act subject to the jurisdiction of the specially created military tribunal proves the point that such a system lacks the checks and balances necessary to prevent such an injustice.

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The Order denies the accused the basic international human right to appellate review. The Order dispenses with the need for a unanimous verdict by providing that a conviction and sentence, including the death penalty, may be imposed upon only a two-thirds vote. This is in sharp contrast to the procedures followed not only by our federal and state courts, but also by our military courts under the Uniform Code of Military Justice. We note that Section 836 of the United States Code, relied upon by as authority for the Order, requires that military commissions shall, if practicable, apply the principles of law and the rules of evidence recognized in the trial of criminal cases in the United States district courts. Nowhere does the Order articulate a basis why it is not practicable to apply the principles of law and rules of evidence followed in the district courts. Indeed, the recent successful prosecution in the Southern District of New York of the perpetrators of the African Embassy bombings demonstrates that the principles and rules followed in the United States district courts can most certainly be applied to other terrorists as well.<sup>1</sup>

## 2. Non-derogation

Major human rights treaties contain “derogation” clauses that govern the suspension of rights during states of emergency that threaten the life of the nation. The Article 4 of the ICCPR limits derogation as follows:

*1. Rights may be suspended only during a state of emergency that threatens the life of the nation.* To justify a suspension of fair trial rights guaranteed by the ICCPR, the United States must prove that it faces a threat to the life of the nation. This is a very high threshold. An on-going risk of terrorist violence is a permanent condition for contemporary democratic states. The “life of the nation” is not imperiled by the United States military action in alliance with the Afghan Government.

*2. Certain rights are non-derogable and may not be suspended even if the life of the nation is at stake.* These include, most relevantly in the current context, the right to life; the prohibition on torture and cruel, inhuman and degrading treatment or punishment; the prohibition on retroactive criminal penalties; the right to recognition as a person before the law; and freedom of thought, conscience, and religion.

*3. Derogation measures may not be applied in a discriminatory manner.* Where rights are suspended during a genuine state of emergency, derogation measures may not be applied in a manner that discriminates on the basis of race, color, sex, language, religion, or social origin.

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<sup>1</sup> Further, with respect to prisoners of war, the Order is violative of the 1949 Geneva Prisoner of War Convention, especially articles 102 and 130.

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*4. Any derogation measures must be strictly required by the exigencies of the situation.*  
The ICCPR and regional human rights treaties establish a very strict rule of proportionality to emergency measures taken in derogation of human rights. Only measures that are vital to preserving the life of the nation are permitted.

*5. Measures in derogation of the right to fair trial and the right to take judicial proceedings to determine the lawfulness of detention are strictly limited and largely forbidden.*  
It has been suggested that his military commissions are necessary to protect jurors. However, there is no evidence that jurors in prior cases against Al Qaeda operatives have been menaced in any way. Successful prosecutions for Al Qaeda crimes have recently been completed both in Los Angeles and in New York. The federal courts are actively processing charges against persons arrested in the post-September 11 dragnet. The United States Government may find these prosecutions to be inconvenient, especially where it lacks evidence of the detainee's guilt. This is why the derogation clause of the ICCPR is narrowly written.

The Administration has also suggested that one purpose of the commissions is to permit the use of coerced testimony inadmissible under the Fifth Amendment. The desire to use secret evidence is also cited, although the ordinary federal courts have provisions for use of classified information in carefully delineated circumstances.

Decades of practice under the derogation clauses of human rights treaties have resulted in the emergence of important principles that apply to the Order. The Human Rights Committee, the UN treaty body that implements the ICCPR, issued an interpretive "General Comment" on the derogation clause in August 2001. Relevant passages of General Comment No. 29 state:

Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature ....

Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation ....

It is inherent in the protection of [non-derogable] rights that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.... Thus, for example, as article 6 [on the right to life] is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 [fair trial] and 15 [prohibition on retroactive criminal penalties].

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Safeguards related to derogation ... are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.

The United Nations Human Rights Committee, the European Court of Human Rights, and the Inter-American Court of Human Rights have examined many situations involving purported emergencies. A recurring issue has been the trial of civilians, suspected of terrorist offenses, by secret military tribunals. For example, Peru has been condemned by the Inter-American Court for this practice. An American citizen, Lori Berenson, was convicted of terrorist offenses by Peruvian "faceless judges" in a proceeding criticized by the United States Government as a deprivation of fundamental human rights. When Turkey obtained custody of Abdullah Öcalan, the notorious leader of the PKK with a "terrorist" reputation to rival that of Osama Bin Laden, it placed him on trial before a National Security Court, but quickly amended its legislation to provide that only civilian judges could preside and held the trial in public. International human rights officials were given access to Öcalan in order to insure that he was not subjected to torture or cruel treatment. The legality of Öcalan's trial remains under consideration by the European Court of Human Rights.

*6. No derogation is valid unless the state proclaiming the emergency provides official notification of the provisions from which it has derogated and of the reasons why it imposed these specific emergency measures.*

## **B. Humanitarian Law**

Military commissions may be established in the aftermath of international armed conflict to try persons who have committed war crimes or crimes against humanity in connection with the conflict. The Nuremberg Tribunal is one example. Military commissions were also established under Control Council Law No. 10 to try Nazi war criminals, some of whom were civilians who had committed crimes against humanity, such as enslavement, as part of the Nazi war effort. Trial by such military commissions was approved in *In re Yamashita*, 327 U.S. 1 (1946). The defendant in *Yamashita* was a Japanese general charged with war crimes – a combatant enemy alien in a declared international armed conflict. It is noteworthy that *Yamashita* appears in the same volume of the United States Reports as *Duncan v.*

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*Kahanamoku*, which struck down trials by military commissions of civilians charged with common crimes committed in the “theater of war.”<sup>2</sup>

The United States could request the United Nations Security Council to establish an *ad hoc* international criminal tribunal to try crimes against humanity and other crimes of international significance committed by members of Al Qaeda or other suspected terrorists. Such trials would be conducted in compliance with principles of international law relating to fair trial, as described below. The United States may not create its own *ad hoc* commissions, lacking guarantees of fundamental fairness, as an alternative, simply because terrorist crimes are perceived as unusually grave or difficult to prosecute. The United States should apply to Al Qaeda the policies it has willingly and successfully advocated for other groups that have committed gross violations of human rights. The International Criminal Tribunals for Former Yugoslavia and Rwanda have performed valuable services both in bringing violators of international criminal law to justice and in setting standards for the proper trial of suspected violators. A similar tribunal for suspected terrorists would serve the same salutary function.

## II. CONSTITUTIONAL LAW

The Order raises serious constitutional concerns. Those concerns include:

*Whether the President may, without the approval by Congress, suspend habeas corpus?* In *Ex parte Milligan*, 71 U.S. 22 (1866) the Supreme Court ruled that the military lacks any constitutional power even in a time of war to substitute its tribunals for civil courts that are open and operating, and held that only Congress may declare martial law. The Court subsequently reaffirmed this bedrock constitutional principle in the World War II era case of *Duncan v. Kahanmoku*, 327 U.S. 304 (1946), when it invalidated the Governor of Hawaii’s suspension of the writ of habeas corpus and the implementation of military tribunals:

Only when a foreign invasion or civil war actually closes the courts and renders it impossible for them to administer criminal justice can martial law validly be involved to suspend their functions. Even the suspension of power under those condition is of a most temporary character.

*Whether the President can create military commissions for use in a non-war context for prosecution of nonbelligerents for crimes other than war crimes?* Case law indicates that whatever powers the President may have as Commander in Chief to order trial by a military commission, such

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<sup>2</sup> One of the habeas corpus petitioners in *Duncan* was convicted of assaulting military police at a shipyard; the other was convicted of fraud. The Court recognized that Hawaii was in the “theater” of the Second World War, but held this fact did not justify trial by military commission where the civil courts were capable of functioning.

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powers do not extend beyond wartime or a war context. The Order is open-ended and contains no such limitations. Indeed by the President's own admission, the "war" on terrorism is without apparent end and is envisioned to last for the indefinite future. Without a formal declaration of war, there can be no official declaration of peace, and the Order might remain in effect for generations to come.

*Whether the proposal to subject civilians to trial by military commission violates the text of the Fifth Amendment?* The amendment reads: "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by 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*, nor be deprived of life, liberty, or property, without due process of law" (emphasis added). The argument is made that if United States military personnel are subject to military justice, then foreign terrorist suspects can expect no better. This argument fails for two reasons: (1) the Constitution itself authorizes courts martial for United States service personnel and does not authorize military trials for civilians suspected of terrorist or other common crimes<sup>3</sup>; (2) the military commissions envisioned in the November 13 Order lack the protections guaranteed to military defendants in courts martial.

*Whether proposed defendants who are not "enemy aliens" may be subject to military trial?* *Ex parte Quirin*, 317 U.S. 1 (1942), provides no support for the Order. The defendants in *Quirin* were enemy aliens tried for war crimes. "Enemy aliens" is a technical legal term that denotes citizens of a state with which the United States is at war. They are subject to special treatment under international law and United States statutes dating back as early as 1798. The Supreme Court based its finding of legality in *Quirin* squarely upon the international law of war, as it then existed. The Court emphasized the status of the defendants as enemy combatants, in a declared international armed conflict, who had forfeited their status as prisoners of war by removing their uniforms and engaging in acts of sabotage.

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<sup>3</sup> "Common crimes" is a legal term denoting criminal offenses that are not war crimes or political offenses. "Common crimes" may of course be unusual or extraordinary, as were the attacks of September 11. Some crimes committed by terrorists are "international," in one of two respects: (1) crimes such as airplane hijacking are the subject of treaties obligating states parties to prosecute or extradite suspects, regardless of the location where the crime was committed (universal jurisdiction and the principle of *aut dedere aut judicare*); (2) deliberate and systematic or widespread attacks against civilians by organized non-state entities may be "crimes against humanity" as defined in Article 7 of the Statute of the International Criminal Court (ICC Statute). These crimes are not "war crimes," however. "War crimes" are only those *committed in the context* either of international armed conflict (a conflict *between* two or more states) or an internal armed conflict. Article 8 of the ICC Statute defines a long list of war crimes and explicitly states that it "does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."

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None of the proposed *defendants* in the Commissions is an “enemy alien.” Nor is the Order limited to those enemy aliens charged with war crimes committed in the context of any armed conflict, either international or internal.<sup>4</sup> Indeed, Zacarias Moussaoui, reportedly a prime target of the Order, is a citizen of France.<sup>5</sup> He was admitted to the United States and was detained in August 2001 in Minnesota for suspected violations of the immigration laws. He is not a combatant in any armed conflict. According to news reports, it appears that the Administration lacks sufficient evidence to try him in federal court for any crime.

The United States is not at war *with* Afghanistan. United States military action in Afghanistan is being undertaken *in alliance with* the recognized Government. The United States has for many years recognized the Rabbani Government, and never recognized the Taliban as the lawful regime. The consistency of this United States position is reflected in the fact that the United States never placed Afghanistan on the State Department’s list of “state sponsors of terrorism.” Even after the imposition of UN sanctions against the Taliban for harboring Osama Bin Laden following his indictment for the 1998 embassy bombings, the Secretary of State refrained from adding Afghanistan to the list of state sponsors of terrorism because the Taliban did not wield “state” authority in Afghanistan.

As was the case with Panama at the time of the United States invasion, the *de jure* Rabbani regime in Afghanistan lacked control over most of the nation’s territory at the time the United States intervened militarily. Acting in concert with elements allied with the *de jure* regime, the United States altered the situation on the ground so as to take control from a *de facto* regime (Manual Noriega, in the case of Panama; the Taliban, in the case of Afghanistan). Once seized, Panamanian General Noriega was tried by a federal district court, receiving the full protection of the Bill of Rights. He was not charged with “war crimes” and was not tried by a military commission. The use of military force to effect his arrest had no impact on his treatment, other than certain details concerning his conditions of detention (Noriega claimed to be a “prisoner of war”). The fact that Noriega’s prosecution took place in the context of a metaphorical “war on drugs” was of no legal significance.

*Whether non-citizens possess the same constitutional rights as citizens when subjected to criminal prosecution?* The Order is defended on the ground that it does not apply to United States citizens. Over a century ago, in the midst of the racist, anti-immigrant “Chinese exclusion” era, Congress enacted a statute subjecting undocumented Chinese immigrants to one year of imprisonment at hard labor, without providing a criminal trial with all the guarantees of the Bill of Rights. The United

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<sup>4</sup> The list of 93 persons charged with criminal offenses in the post-September 11 roundup, issued by the Department of Justice on November 27, 2001, reveals no charges relating to war crimes or linked to armed conflict of any type.

<sup>5</sup> Don van Natta, Jr., “Debate Centers on Which Court Will Decide Fate of Arab Man,” N.Y. Times, Nov. 22, 2001, B6.

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States Supreme Court invalidated this statute in *Wong Wing v. United States*, 163 U.S. 228 (1896), as a deprivation of the immigrants' constitutional rights. In the midst of the Cold War, the Supreme Court described *Wong Wing* as standing for the principle that "Under our law, the alien in several respects stands on an equal footing with citizens....[I]n criminal proceedings against him he must be accorded the protections of the Fifth and Sixth Amendments." *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). The Order cannot be sustained on any theory that foreigners who are not enemy aliens can be deprived of trial in the civil courts and subjected to military commissions, any more easily than citizens. The principle of equal protection under the Bill of Rights for non-citizen criminal defendants is deeply grounded in United States Constitutional law, and has been categorically affirmed by the Supreme Court during previous periods of harsh measures against perceived foreign threats to national security.

*Whether Article III forbids the president to send these criminal cases to military commissions?* Pursuant to Article III of the Constitution, Congress has the authority to establish the lower federal courts. Only Article III courts staffed by judges with lifetime tenure and protection against salary reduction may hear "Article III cases," which include prosecutions for federal crimes. There are only three exceptions to this principle: territorial courts, courts martial, and cases involving public rights such as federal benefits. The proposed military commissions are not courts martial; they provide far fewer guarantees of fairness than those established in the Uniform Code of Military Justice, and they are designed to exercise jurisdiction over civilians. *Quirin* suggests an exception for war crime trials of enemy aliens during international armed conflict, but as explained above that situation does not exist in the United States at the present time.

The Order is designed to strip the federal courts of their jurisdiction over certain federal crimes, and to commit these cases to trial by commissions established by executive fiat. The Order violates Article III in depriving the defendants of their constitutional right to be tried by Article III judges. Those judges have lifetime tenure precisely to insulate them from political pressure and to insure that unpopular defendants receive justice. The Order further violates Article III by invading the exclusive power of Congress to define the jurisdiction of the federal courts, and by invading the province of the federal judiciary to exercise the jurisdiction Congress has conferred upon it to try federal crimes.

*Whether the Military Commissions lack constitutional protections essential to protect against conviction and execution of the innocent?* Every single Constitutional guarantee intended to prevent the conviction and punishment of the innocent is deliberately sacrificed in the design of the Commissions. There is no indictment by grand jury, no jury trial, no presumption of innocence, no privilege against self-incrimination, no public trial, no right to counsel of the defendant's choosing, no right to confront the evidence against one, no right to trial by an independent and impartial judge, no right to be convicted only by proof beyond a reasonable doubt. Conviction and death sentence may be imposed by two-thirds of the hand-picked commission members. There is no appeal. There are no

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rules of evidence. It is unclear what substantive law of crimes the commissions will apply. If the commissions create their own criminal code and apply it retroactively to detainees, the United States Government will also violate the prohibition on *ex post facto* laws. Congress possesses the exclusive authority to define federal crimes.

For all of these reasons we believe that the Order to be in violation of international and constitutional law principles. We urge the President to rescind this order and to rely on the authority of the Federal court system to prosecute persons accused of terrorism.

Very truly yours,

Charles D. Siegal, Chair

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