

# FROM THE PRESIDENT

JIM E. LAVINE

## Unconstitutional Policies Coming Around Again

**O**n March 7, 2011, President Obama issued an executive order directing the secretary of defense to resume military commission prosecutions at Guantánamo Bay, Cuba, and institutionalizing a regime of indefinite detention for detainees the administration would prefer not to prosecute at all.<sup>1</sup> The order comes just over two years after the president decreed an immediate halt to all military commission proceedings and vowed to empty the prison camps by January 2010. The president's decision to breathe new life into military commissions and pursue a formal indefinite detention policy is profoundly disappointing and cause for deep concern by the criminal defense bar.

Military commissions continue to fall far short of American principles of fairness and due process. Despite improvements over the Bush-era commissions, the current system still permits the government to introduce hearsay and statements obtained through coercion. The commissions also assert jurisdiction to prosecute conspiracy and material support offenses, neither of which are recognized as violations of the law of war. Significantly, the commissions lack rules governing capital proceedings despite widespread reports that one of the first cases to be prosecuted will be that of Abd al-Rahim al-Nashiri, an alleged conspirator in the 2000 USS Cole bombing against whom the government has previously sought the death penalty.<sup>2</sup>

Military commissions as constituted are simply no sub-

stitute for federal courts, both U.S. district courts and U.S. courts-martial, which have safely and capably handled hundreds of national security and terrorism trials since September 11, 2001.<sup>3</sup> In a statement accompanying this month's executive order, President Obama recognized, at least nominally, the importance of using a tested and constitutional forum for terrorism prosecutions, calling the American system of justice "a key part of our arsenal in the war against al Qaeda and its affiliates" and pledging, once again, "to draw on all aspects of our justice system — including Article III Courts — to ensure that our security and our values are strengthened."<sup>4</sup> But of course, actions speak louder than words. To date, only one Guantánamo detainee has been tried in federal court and, shortly after encountering political resistance, the White House quashed Attorney General Holder's plan to bring the alleged 9/11 conspirators to trial in Manhattan. The administration has also consistently failed to mount any credible opposition to recent congressionally imposed funding restrictions prohibiting the transfer of detainees to the United States for trial. If President Obama believes that we must "bring terrorists to justice consistent with our commitment to protect the American people and uphold our values,"<sup>5</sup> he has yet to truly demonstrate the courage of his convictions.

Perhaps even more distressing is the president's decision to craft a formal system of indefinite detention for the remaining detainees whose continued imprisonment is deemed "necessary to protect against a significant threat to the security of the United States,"<sup>6</sup> including those who were subject to so-called "enhanced interrogation techniques" and prolonged secret CIA detention prior to their arrival at Guantánamo. The executive order envisions a Periodic Review Board (PRB) that will review the status of indefinite detainees every three years and abide by the Geneva Conventions and the Convention Against Torture. There has been some debate about whether this scheme offers detainees (particularly those who have lost their habeas petitions) greater procedural rights, or whether the president is asserting greater detention authority. This discussion misses the mark. Regardless of the detention theory or the rights that detainees might have under the new PRBs, the end result will surely be many more years of unlawful indefinite detention without charge or trial — except now under a false veneer of legitimacy. Contrary to the president's familiar refrain that he "remains committed to closing the detention facility at Guantánamo Bay,"<sup>7</sup> this policy will ensure that Guantánamo will remain open for business for the foreseeable future. More significantly, it raises the serious concern that indefinite detention in the Guantánamo context, once institutionalized, will seep into the criminal justice system and open the door to indefinite detention in other areas of the law.



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At a time when the administration should be focused on restoring the rule of law and leading the world by example, the president has revitalized the same unconstitutional policies that have defined Guantánamo for the past nine years. NACDL will continue to oppose military commissions and indefinite detention, however repackaged, as an affront to the Constitution and basic principles of democracy and due process. We wish the president would do the same.

### Notes

1. Exec. Order No. 13,567, 76 Fed. Reg. — (Mar. 7, 2011) ("Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force"), available at <http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guantamo-bay-nava> (last visited Mar. 8, 2011).

2. Yochi J. Dreazen, *Alleged Cole Mastermind Will Be First at Guantánamo to Face Charges*, NAT'L L.J. (Mar. 8, 2011), available at <http://www.nationaljournal.com/suspected-mastermind-in-cole-attack-faces-first-new-trial-at-guantanamo-20110308> (last visited Mar. 8, 2011).

3. There are really only two acceptable options: individuals accused of terrorist activity or crimes related to terrorism should be tried in federal courts, and individuals certified to have violated the Laws of War as unprivileged belligerents should be charged and prosecuted under the Uniform Code of Military Justice, consistent with the Geneva Conventions. See NACDL Board Resolutions of October 26, 2008 and February 28, 2009 (<http://www.nacdl.org/public.nsf/26cf10555dafce2b85256d97005c8fd0/4db9e7ed0ea451eb852575a5005087b3?OpenDocument>; <http://www.nacdl.org/public.nsf/26cf10555dafce2b85256d97005c8fd0/03c2f9aef7377d75852575ad00782f38?OpenDocument>).

4. Statement by President Barack Obama, *New Actions on Guantánamo Bay and Detainee Policy* (Mar. 7, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/07/new-actions-guantanamo-bay-and-detainee-policy> (last visited Mar. 9, 2011).

5. *Id.*

6. Exec. Order No. 13,567, *supra* note 1.

7. Press Release, *The White House, Fact Sheet: New Actions on Guantánamo and Detainee Policy* (Mar. 7, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy> (last visited Mar. 9, 2011). ■