

GUANTÁNAMO UPDATE

BY MICHAEL PRICE

Little Progress After Eight Months of Obama

After President Barack Obama ordered an immediate halt to the military commissions at Guantánamo Bay and pledged to empty the prison camps by this January,¹ attorneys for the John Adams Project quietly celebrated. Feeling the same sense of hope that propelled Obama into the White House, many military and civilian lawyers representing so-called “high-value” detainees in the war court believed the cases would soon be transferred to federal courts inside the United States. Sadly, that hope was short-lived.

Preventive Detention

In mid-May came the news that President Obama intended not only to revive the military commissions, but was also contemplating a system of “preventive detention” for detainees that his administration does not want to charge or release. Standing in front of the Constitution and Bill of Rights at the National Archives in Washington, D.C., President Obama made the jaw-dropping announcement that his administration would work with Congress to create a system of indefinite, “preventive detention” for current and possibly future detainees.² It was stunning to hear Obama — who had boldly declared that “we reject as false the choice between our safety and our ideals” — endorse such a plainly unconstitutional detention scheme. There is simply no room in a constitutional democracy for a system of indefinite detention that is not based on past crimes or proven violations of the law. The only precedents in this country for such a system — the Alien and Sedition Acts of 1798 and the Japanese internment during World War II — represent two of the lowest points in American history.

The good news is that in the months since the president’s National Archives speech, NACDL and a diverse coalition of civil liberties and human rights organizations succeeded in heading off the push for preventive detention legislation. News reports in late September indicated that

the Obama administration would not seek legislation or issue an Executive Order to establish a new, permanent system of preventive detention.⁴ The bad news is that the president may attempt to indefinitely hold terrorism suspects anyway, relying as President Bush did on the 2001 Authorization for Use of Military Force against al-Qaeda and the Taliban.

This would be a terrible mistake. It would bless the U.S. District Court for the District of Columbia, now hearing habeas petitions from Guantánamo prisoners, as a *de facto* national security court and continue to permit the noncriminal detention of terrorism suspects at Guantánamo Bay and elsewhere. NACDL maintains that the category of detainees who cannot be prosecuted or released is a null set and will continue to urge the president to empty the Guantánamo camps without recourse to an unconstitutional system of preventive detention.

Military Commissions

Also during his National Archives speech, President Obama sadly repeated the same hollow justifications offered by the Bush administration that military commissions are “an appropriate venue” for trying cases that require the safeguarding of intelligence sources and methods and involve battlefield evidence that “cannot be effectively presented in federal courts.”⁵ Although Obama also proposed five reforms that would provide commission defendants with slightly more due process, his rationales for reviving the military tribunal ran counter to the success that federal courts have had with trying terrorism suspects like 9/11 conspirator Zacarias Moussaoui and shoe bomber Richard Reid using the Classified Information Procedures Act (CIPA). Moreover, military commissions have historically been used in wartime during which the normal mechanisms of criminal justice are not operational.

Equally troubling, the military commissions have appeared to take on a life of their own over the past eight months, marching on in apparent defiance of



President Obama’s Executive Order to immediately halt all proceedings while his administration determines whether and in what forum to continue the prosecutions and while it pursues amendments to the Military Commissions Act of 2006. In the case against five alleged 9/11 conspirators represented or assisted by attorneys for the John Adams Project, the military judge held hearings in July and September over objections from the defense that doing so would violate the president’s order.

The first hearing, purportedly to address certain narrow discovery issues, quickly devolved into a renewed opportunity for the defendants to appear, dismiss their counsel, and seek their own swift execution. The scene unfolded after the government assembled a group of 9/11 family members to attend the proceedings and persuaded the military judge to coax the defendants from their cells with the promise of five minutes apiece to make statements to the court. Following an *ad hoc* rule change to accommodate the prosecutor’s request, the judge frankly acknowledged the lawlessness of the commissions, describing them as “a system in which uncertainty is the norm and where the rules appear random and indiscriminate.”⁶

Nonetheless, the judge proceeded to

schedule another hearing for the week of September 21 that would have purported to determine the competency of one defendant and led to the dismissal of standby counsel for at least three others. A third hearing was set for mid-October to determine the competency of the remaining defendant.

Following the denial of two defense motions for a continuance, military and civilian attorneys with the John Adams Project filed a pair of mandamus petitions with the Court of Appeals for the D.C. Circuit on behalf of defendants Ramzi Bin al Shibh and Mustafa al Hawsawi.⁷ The petitions ask the civilian court to assert jurisdiction over the commissions and compel a stop to all proceedings on the grounds that they (1) violate the president's Executive Order, (2) ex-

ceed Congress' constitutional powers to convene law-of-war commissions under the Define and Punish Clause, (3) violate the Fifth and Eighth Amendments, and (4) are not a "regularly constituted court" as required by the Supreme Court in *Hamdan v. Rumsfeld*.⁸ In asking the court to intervene, attorneys point to the systemic denial of even the most rudimentary resources necessary to provide an adequate defense, such as appointed, capably qualified counsel and access to medical and psychiatric records, as well as an official disregard for the rule of law that has infected the commissions from the beginning.

Within a week, the government requested a 60-day continuance from the military judge on grounds similar to those cited by the defense in its two failed motions. On the morning of the September 21 hearing, the D.C. Circuit *sua sponte* ordered all parties to file status reports on the tribunal's handling of the prosecution request — a less-than-subtle reminder to the war court that a decision to proceed further would not go unnoticed.

When the hearing began, none of the defendants were present, much to the dismay of the lead prosecutor and a group of 9/11 families who had been shuttled to Guantánamo to see the five accused from behind four inches of soundproof glass. The defendants had declined to attend after consenting to the continuance, but in an attempted repeat of the July proceeding, the government urged the military judge to forcibly extract the accused from their cells and grant pending motions to dismiss military and civilian standby counsel from the case. The judge denied the request and eventually asked whether there was a conflict between the prosecution's written motion for a continuance

— asking the commission to "refrain from taking actions" that would disturb the *status quo* — and its oral request to dismiss defense counsel. Less than halfway through a justification that produced audible laughs from the gallery, the chief prosecutor conferred with an official from the Department of Justice and returned to the podium only to say, "I'll backtrack."

The hearing came to a close in a matter of minutes with a 60-day continuance in effect and the military judge refusing to issue even a scheduling order until the Obama administration decides whether it will transfer the case to federal court. It took eight months and two appeals to the D.C. Circuit for commission officials to finally heed the Commander-in-Chief's order to halt the tribunal proceedings. The president now has until November 16, 2009, to decide how and where the case will proceed.

Close Guantánamo and End The Military Commissions?

While some officials have suggested that the 9/11 case is likely to end up in either a New York or District of Columbia-area district court, the future of Guantánamo and the military commissions remains uncertain. In early October, the House of Representatives passed a nonbinding resolution against transferring Guantánamo detainees to the United States, even for the purpose of prosecution or continued detention in a maximum security prison.⁹ Legislation to amend the Military Commissions Act is also pending in Congress, a sign that the administration plans to try at least some detainees in a modified version of President Bush's military commissions.¹⁰

To be sure, there have been some limited bright spots over the past eight months, including the release and transfer of four ethnic Chinese Uighurs to Bermuda and the proposed transfer of several others to Palau. The Supreme Court has also decided to review *Kiyemba v. Obama*, a case involving whether a federal court has the power to order the release of the remaining Uighurs where release into the continental United States is the only possible effective remedy.¹¹ NACDL was among the *amici curiae* on a brief in support of certiorari.

Nonetheless, the failure to close Guantánamo combined with specter of preventive detention and the likelihood of military commissions continuing in earnest under the Obama administration is a far cry from the promise of hope and change. Preventive detention is unconstitutional. The Guantánamo military com-

Youssef Megahed Freed Again

Youssef Megahed, the 23-year-old Egyptian national whose case was featured in the June 2009 issue of *The Champion*, won his immigration hearing on August 21, 2009, and was released from custody that evening. Megahed was acquitted on federal terrorism-related charges in April, only to be re-arrested and detained three days later pursuant to removal proceedings alleging the same underlying conduct. He has returned to the University of South Florida. His lawyer, Charles Kuck, has asked the government to put Megahed back on the path to U.S. citizenship.

Ethics Hotline

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missions are anathema to the rule of law. It is time for the president to deliver: close Guantánamo and end the military commissions.

Notes

1. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009) ("Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities").

2. *Id.*; Sheryl Gay Stolberg, *Obama Is Said to Consider Preventive Detention Plan*, N.Y. TIMES, May 21, 2009, at A18.

3. President Barack Obama, Inaugural Address (Jan. 20, 2009).

4. Peter Finn, *Administration Won't Seek New Detention System*, WASH. POST, Sept. 24, 2009, at A10.

5. President Barack Obama, Remarks by the President on National Security (May 21, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/) (last visited Oct. 5, 2009).

6. D-126 Military Commission Order Regarding Defense Motion for Appropriate Relief: Delay of Any Further Proceedings at 3, *United States v. Khalid Sheikh Mohammed, et al.*, (July 13, 2009), available at <http://www.defenselink.mil/news/commissionsCoconspirators.html> (last visited Oct. 5, 2009).

7. Both petitions are available on NACDL's National Security Web site at <http://www.nacdl.org/public.nsf/freeform/nationalsecurity?OpenDocument> (last visited Oct. 5, 2009).

8. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631-32 (2006) (plurality); *Id.*, at 642-43 (Kennedy, J., concurring).

9. Andrew Sullivan, *U.S. House Votes to Block Guantanamo Transfer*, REUTERS, Oct. 1, 2009, available at <http://www.reuters.com/article/topNews/idUSTRE5905EQ20091001> (last visited Oct. 5, 2009).

10. S. 1390, 111th Cong. (2009).

11. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), petition for cert. filed, 77 U.S.L.W. 3577 (Apr. 3, 2009) (08-1234); cert. granted, 2009 WL 935637 (U.S. Oct. 20, 2009).

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November 20

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