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Welcome to the President's Private Prison

by Nat Hentoff

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Nat Hentoff is a nationally renowned authority on the First Amendment and the Bill of Rights. He is a member of the Reporters Committee for Freedom of the Press, and the Cato Institute, where he is a senior fellow.

A major part of a presidential press secretary's job is to cover up his boss's violations of our rule of constitutional law by denying they happened. Yet, on Dec. 25, Robert Gibbs actually said on CNN's *State of the Union* (reported the next day on *Politico Live*) that "it's unfortunate that some terrorist suspects at Guantanamo Bay need to be held indefinitely without trial."

Gibbs did say that some would be tried in federal courts, although, as he knows, Congress bipartisanly is dead set against that. "Some," he went on smoothly, "would be tried in military commissions, likely spending the rest of their lives in a maximum-security prison that nobody, including terrorists, have ever escaped from" (Gibbs-style due process).

But parts of the Constitution are excluded from military commissions. In any case, Gibbs continued, "Some, regrettably, will have to be indefinitely detained." If for life, then very regrettably.

Indeed, as the ever-vigilant *St. Petersburg Times* columnist Robyn Blumner had already reported (Dec. 23): Our constitutional-scholar president is preparing an executive order (bypassing

Congress) to create a periodic review procedure for the 48 detainees the administration intends to hold without trial — some of whom have already been in Guantanamo for up to eight years."

But then Blumner got to the real thrust of the executive order: "By turning Bush-era indefinite detentions into institutionalized policy, President Barack Obama is laying the foundation for future presidents to use preventive detention (imprisonment) as a tool."

Breaking this story of Obama's executive order on Dec. 21 ("White House Drafts Executive Order for Indefinite Detention" by Dafna Linzer on *ProPublica* cited the planned periodic reviews but added the crucial point that establishing "indefinite detention as a long-term Obama administration policy makes clear that the White House ALONE (emphasis added) will manage a review process for those it chooses to hold without charge of trial."

So in effect, Mr. President, would you now have your very own private prison?

This executive order, Linzer crucially noted, was set in motion in the spring of 2009. As of this writing, the executive order has yet to be signed by the president, but her story included this comment by the ACLU's expert litigator on presidential overreaching, Jameel Jaffer: "more review is better," but an "executive order would only normalize and institutionalize indefinite detention and other policies" that were set in place by the Bush administration."

What other policies? In "Obama walks back on Guantanamo" (*The Guardian*, Dec. 22, reprinted by *Common Dreams*), Karen Greenberg, the executive director of NYU Law School's valuable Center on Law and Security, reminds those of us who seem to care that:

"Indefinite detention was THE VERY HEART of the Bush policy. The idea that the United States could hold individuals, refuse to classify them in any recognized legal category, and thereby deny them their rights, was the doorway to a host of unacceptable policies, including enhanced interrogation techniques, excessive periods of solitary confinement (apart from interrogation), disappearances to (CIA) 'black sites,' and most of all, the refusal to confront squarely the distinction between guilt and innocence. The several dozen individuals whom the Obama administration intends to hold are among those they believe (where there is insufficient evidence to convict), then these men cannot be tried."

But they can be imprisoned indefinitely. Is this still America?

For a thorough study of the Bush-Obama separate Constitution, I suggest "Preventive Detention and Preventive Warfare: U.S. National Security Policies Obama Should Abandon" (*Journal of National Security Law & Policy*, Volume 3, 2009) by Jules Lobel, professor of law, University of Pittsburgh School of Law.

When you hear of President Obama actually signing his long-desired executive order for indefinite detention, it's worth remembering Lobel's reason why indefinite detention for suspected terrorists "poses grave dangers for the rule of law and constitutional governance:

"To deprive someone of their liberty for what could very well be their entire lifetime without charging them with any crime and without having the evidence necessary to convict them in a regular court strikes at the heart of our core constitutional values."

If the precedent for this Obama executive order is set in law, it could be extended — especially after a series here of terrorist attacks like the unsuccessful Times Square bombing — to those American citizens suspected of "material support" to terrorists. Obama already has one American citizen, jihadist Anwar al-Awlaki, on a targeted killing list in Yemen.

On CNN's *State of the Union* (Dec. 26), Retired Vice Adm. Mike McConnell said: "Both Gen. Hayden (former head of the CIA) and I served in the previous administration and we got a lot of criticism for being aggressive. ... My observation is that the new administration has been as aggressive, if not more aggressive, in pursuing these issues because they're real."

For how many Americans is our Constitution still real? If a Republican administration takes over in 2012, will that president cancel Obama's executive order? How many citizens will pressure him or her to do that?

How much do you care one way or another?

After the last two weeks of the lame-duck Congress, many believe that confidence in President Obama has been reborn. I don't hear any more talk of his facing a primary battle. If the American people re-elect him, they will re-elect his executive order.