

Punishment Before Justice: Indefinite Detention in the US



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Physicians for Human Rights (PHR) is an independent, non-profit organization that uses medical and scientific expertise to investigate human rights violations and advocate for justice, accountability, and the health and dignity of all people. We are supported by the expertise and passion of health professionals and concerned citizens alike.

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Executive Summary

The United States government's reliance on indefinite detention in both national security and immigration contexts reflects an abdication of its legal and moral responsibility to treat those in its custody humanely, as well as an abdication of its responsibility to protect its military and civilians from retaliation on account of its continued refusal to honor the rule of law.

Non-governmental organizations (NGOs), activists, and lawyers have long raised concerns about the due process and human rights violations that indefinite detention causes as a matter of civil and political rights, and Physicians for Human Rights (PHR) and other NGOs have carefully documented the medical and psychological injuries detainees have suffered as a result of the torture and other cruel, inhuman, or degrading treatment and persecution to which they have been subjected. The effect on an individual's health caused by the indeterminacy of an indefinite detention, independent of the health effects of specific abuses, is less well-developed. This report attempts to fill that gap.

The medical literature provides convincing evidence that the indeterminacy of an indefinite detention creates a degree of uncertainty, unpredictability, and uncontrollability that causes severe harms in healthy individuals independent of other aspects or conditions of detention. The harmful psychological and physical effects of indefinite detention include:

- Severe and chronic anxiety and dread;
- Pathological levels of stress that have damaging effects on the core physiologic functions of the immune and cardiovascular systems, as well on the central nervous system;
- Depression and suicide;
- Post-traumatic stress disorder; and
- Enduring personality changes and permanent estrangement from family and community that compromises any hope of the detainee regaining a normal life following release.

Furthermore and most concerning, for national security detainees who have been traumatized by torture and for asylum seekers who have been traumatized by torture or persecution in their home countries, the harms associated with indefinite detention threaten to severely exacerbate existing severe physical and psychological symptoms, perpetuate mental suffering, and thereby foreclose any opportunity for healing.

Individuals who are indefinitely detained are, by definition, individuals against whom no charges have been brought and therefore against whom no conviction has been obtained. Unlike individuals convicted of crimes, whose sentences are a form of lawful punishment so long as it is not cruel or unusual, detainees may not, consistent with due process, be punished at all. The US government's obligation to ensure that detainees do not suffer severe mental and physical harm is accordingly greater than the government's obligation to protect prison inmates from such harms. This report demonstrates, however, that the harms endured by individuals held indefinitely are unconstitutionally punitive, thus violating detainees' rights to due process. Moreover, the serious harm that already traumatized populations face constitutes cruel, inhuman, or degrading treatment, in violation of domestic and international law.

Of added concern is the fact that indefinite detention operates primarily in the immigration and national security contexts, and consequently imposes hardships on individuals who have no vote, and hence, no voice. These policies therefore permit politicians to appear tough on national security and immigration matters while sidestepping political fallout they may fear would develop if they advocated solutions to these difficult problems that were grounded in the US Constitution and our international human rights and humanitarian obligations. Moreover, the

lines between these policy concerns may be intentionally blurred for political purposes by, for example, conflating questions of immigration and asylum with concerns about terrorism and economic refugees. Because the judiciary has historically been hesitant to intrude on legislative and executive decision-making in these areas, such policies are likely to remain as insulated from serious legal challenge as the policy-makers are from their affected constituents. In light of the harms indefinite detention causes, this deference is unwarranted.

Indefinite detention is an unconstitutional practice that represents a regrettable continued departure from the United States' traditional respect for the rule of law, and constitutes cruel, inhuman, or degrading treatment for those who have already been subjected to torture or other ill-treatment. Continued disregard for the rule of law must finally end for the United States to reestablish its global moral authority and democratic legitimacy.

Conclusions and Recommendations

This paper establishes that the profound uncertainty and lack of control characteristic of an indeterminate, indefinite, detention causes severe physical and psychological harm, regardless of the purported legal justification or conditions of a particular detention. In light of these unavoidable and serious health effects, policies mandating or permitting indefinite detention must be abolished.

While recognizing that these policies are attempts to respond to difficult questions of national security and immigration policy, Physicians for Human Rights nevertheless urges the US government to take the following affirmative steps to end indefinite detention:

Regarding National Security Detainees at Guantánamo and Other Sites, the United States Government Should:

- Reject solutions to national security problems that permit or rely on indefinite detention and take affirmative efforts to end its current practice.
- Support trials in Article III courts for individuals detained at Guantánamo and coordinate the various branches of government to ensure that civilian trials for detainees are a policy priority.
- Grant a request from the Special Rapporteur on Torture and Other Cruel, Inhuman, and Degrading Treatment to investigate the detention facility at Guantánamo.
- Encourage greater international cooperation for both prosecutions and repatriation of detainees at Guantánamo.
- Until the time that indefinite detention is abolished as a matter of policy, provide measures that mitigate the social, psychological, and physical harms such detention causes among detainees.
- Permit non-governmental, independent, medical and psychological experts to evaluate the mental and physical health of detainees.

Regarding Individuals In Immigration Detention, the United States Government Should:

- Strictly limit mandatory detention in the immigration setting to ensure that individuals who do not pose a security threat nor flight risk have the opportunity to pursue release from detention.
- Strictly limit the use of detention for asylum applicants.

- Make greater use of alternatives to detention, including community-based monitoring programs that have been proven effective, without increasing the total number of immigrants under active DHS supervision.
- Allow the American Bar Association and the United Nations High Commissioner for Refugees broad access to immigration detention facilities.
- Promulgate regulations that require the Department of Homeland Security to routinely update an individual in immigration detention about the stages of the detention process, including, whenever possible, time estimates regarding court proceedings. Congress should amend the Immigration and Naturalization Act to reflect the need for regular status updates for individuals in immigration detention.

President Obama issued an Executive Order on March 7, 2011, which reinstated military commission trials for individuals detained at Guantánamo Bay and established a periodic administrative review process to evaluate those who would continue to be detained.¹ The regular review of the continued detention of individuals represents a tacit acknowledgement that some of the hundreds of national security detainees will continue to be detained indefinitely.² While only 15 of these individuals have been designated “high value detainees,”³ many of these detainees have already spent roughly 7 to 9 years⁴ in the harshest, most restrictive and isolating conditions available⁵ and were subjected to torture (and possibly subjected to experimentation)⁶ by US personnel – some of which was meted out under the guise of the Bush Administration’s Enhanced Interrogation Techniques (EITs); some of which was pursuant to brutal tactics that lacked even that false imprimatur of legitimacy.⁷

The US government also indefinitely detains thousands of refugee and non-refugee immigrants, detentions whose purported justifications include national security, immigration and foreign policy concerns.⁸ Many asylum seekers arrive on US soil traumatized by persecution in their home country as well as by the act of exile, while many other intending immigrants have languished in detention for years vainly waiting for the day that they will finally be deported or released.⁹

- 1 Executive Order, March 7, 2011 available at <http://www.whitehouse.gov/briefing-room/presidential-actions/executive-orders> (“March 7, 2011 Executive Order”). See also FINAL REPORT GUANTÁNAMO REVIEW TASK FORCE, January 22, 2010 at 3, (“GUANTÁNAMO TASK FORCE”) [describing recommendations for continued detention of certain detainees], available at www.justice.gov/ag/guantanamo-review-final-report.pdf.
- 2 Approximately 170 individuals remain in US custody in Guantánamo, 89 of whom have already been approved for release and approximately 50 of whom the United States intends to continue to detain indefinitely. Human Rights First, *Guantánamo by the Numbers*, Updated February 28, 2011. The number of individuals detained at other sites, such as Bagram Airfield in Afghanistan, is unknown.
- 3 The Guantánamo Docket: High Value, NYTIMES available at <http://projects.nytimes.com/guantanamo/detainees/high-value>.
- 4 The first detainees were transferred to Guantánamo on January 11, 2002. The Guantánamo Docket: A History of the Detainee Population, NYTIMES, available at <http://projects.nytimes.com/guantanamo>.
- 5 G. Brenner, *The Expected Psychiatric Impact of Detention in Guantánamo Bay, Cuba, and Related Considerations*, 11 JOURNAL OF TRAUMA & DISSOCIATION 469, 471 (2010) (noting that Guantánamo detainees are held for “22 hr per day, in small rooms with minimal exercise or stimulation. Nearly 80% are isolated, often for years. In maximum security areas, there is minimal activity, companionship, or physical exercise”).
- 6 PHR, AIDING TORTURE: HEALTH PROFESSIONALS’ ETHICS AND HUMAN RIGHTS VIOLATIONS REVEALED IN THE MAY 2004 CIA INSPECTOR GENERAL’S REPORT, August 2009, available at <http://physiciansforhumanrights.org/library/reports/aiding-torture-2009.html>; V. Iacopino, S. Allen and A. Keller, *Bad Science Used to Support Torture and Human Experimentation*, 331 SCIENCE 34, January 7, 2011.
- 7 PHR, BROKEN LAWS, BROKEN LIVES: MEDICAL EVIDENCE OF TORTURE BY US PERSONNEL AND ITS IMPACT 2008, available at <http://physiciansforhumanrights.org/library/reports/broken-laws-torture-report-2008.html>; PHR, BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY US FORCES, 2005, available at: <http://physiciansforhumanrights.org/library/reports/us-torture-break-them-down-2005.html>; PHR/HRF, LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY, 2007, available at <http://physiciansforhumanrights.org/library/reports/leave-no-marks-report-2007.html>.
- 8 Immigration and Customs Enforcement (ICE), the agency within the Department of Homeland Security, responsible for administering US immigration policy, detains more than 400,000 individuals every year. Heartland Alliance National Immigrant Justice Center *et al.*, YEAR ONE REPORT CARD: HUMAN RIGHTS AND THE OBAMA ADMINISTRATION’S IMMIGRATION DETENTION REFORMS, October 16, 2010, available at <http://immigrantjustice.org/icereportcard>. See also N. Bernstein, *Immigration Detention System Lapses Detailed*, NYTIMES, December 3, 2009. From 2001 to 2010, the average daily detention population rose from approximately 20,000 non-citizens to over 30,000. C. Haddad and A. Siskin, *Immigration-Related Detention: Current Legislative Issues*, CONGRESSIONAL RESEARCH SERVICE, January 27, 2010 at 12. In 2003, at least 5,000 of those held in immigration detention were asylum seekers. A. Keller *et al.*, *Mental health of detained asylum seekers*, 362 LANCET 1721, 1721 (2003).
- 9 PHR, Bellevue/NYU Program for Survivors of Torture, FROM PERSECUTION TO PRISON: THE HEALTH CONSEQUENCES OF DETENTION FOR ASYLUM SEEKERS, 2003, at 38; M. Dow, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS, U. of California Press: 2004 at 223 (“AMERICAN GULAG”).

Physicians for Human Rights and other non-governmental organizations (NGOs) have devoted considerable resources to documenting the human rights abuses suffered by both national security detainees and asylum-seeking detainees. Independent evaluations of current detainees' medical records and forensic medical and psychological evaluations of former detainees, confirmed by first-hand accounts of military personnel and lawyers, have demonstrated that national security detainees were tortured by the US government;¹⁰ similar evaluations of asylum seekers have established that many were tortured at the hands of state and non-state actors within their home countries.¹¹

In addition, these NGOs have collectively and powerfully made the case that mandatory, indefinite detention schemes such as those at issue here violate domestic and international laws concerning the civil and political right to be free from arbitrary arrest and detention.¹² This combined effort of medical and legal advocacy has yielded concrete results. Upon taking office, the Obama Administration:

- standardized interrogation practices, making them consistent with those described in the Army Field Manual in a first step toward ending the use of EITs;¹³
- called for the closing of all CIA Black Sites in which detainees were secreted;¹⁴
- began the process of reviewing the evidence the government had developed against each of the Guantánamo detainees;¹⁵ and
- in both the national security and immigration contexts, embarked on the lengthy process of analyzing existing detention policies and crafting new ones that would, the Administration promised, satisfy domestic concerns about immigration and national security while comporting with the US Constitution and our obligations under international law.¹⁶

The Administration's analysis of current procedures has resulted in it promulgating rules that contemplate more frequent reviews (before military tribunals) of the government's justification for detaining those held on national security grounds, as well as statements of intent to reform the civil detention scheme applicable to immigrants and asylum seekers.¹⁷ As a matter of process, however, a system that permits the government to hold people year after year, review after review, on the grounds that the individual poses a threat to the nation without the govern-

10 See, e.g., PHR, *AIDING TORTURE*, *supra* n. 6; PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n. 7; PHR, *BREAK THEM DOWN*, *supra* n. 7; PHR/HRF, *LEAVE NO MARKS*, *supra* n. 7. See also Iacopino, *supra* n.6.

11 See, e.g., PHR, *FROM PERSECUTION TO PRISON*, *supra* n. 9.

12 See, e.g., Human Rights Watch, "US: Prolonged Indefinite Detention Violates International Law Current Detention Practices at Guantánamo Unjustified and Arbitrary," January 24, 2011, available at <http://www.hrw.org/en/news/2011/01/24/us-prolonged-indefinite-detention-violates-international-law>.

13 Executive Order, January 22, 2009, available at <http://www.whitehouse.gov/the-press-office/ensuring-lawful-interrogations>.

14 *Id.*

15 Executive Order, January 22, 2009, available at <http://www.whitehouse.gov/the-press-office/closure-guantanamo-detention-facilities>.

16 Executive Order, January 22, 2009, available at <http://www.whitehouse.gov/the-press-office/review-detention-policy-options> (national security detainees); U.S. Immigration and Customs Enforcement, "Fact Sheet: 2009 Immigration Detention Reform," available at <http://www.ice.gov/news/library/factsheets/reform-2009reform.htm> (immigration detainees).

17 March 7, 2011 Executive Order, *supra* n. 1; A/HRC/WT.6/9/USA/1 at ¶ 93 (National report submitted by the United States to the Human Rights Council Working Group on the Universal Periodic Review, 1-12 November 2010) ("DHS issued revised parole guidelines, effective January 2010, for arriving aliens in expedited removal found to have a credible fear of persecution or torture. The new guidelines firmly establish that it is not in the public interest to detain those arriving aliens found to have a credible fear who establish their identities, and that they pose neither a flight risk nor a danger to the community"). The phrasing used by the government in this reports suggests that the asylum seeker bears the burden of "prov[ing] the negative," i.e., that he is not dangerous." *Artway v. New Jersey*, 81 F.3d 1235, 1251 (3rd Cir. 1996). Such a scheme raises serious due process concerns. *Cf. id.*

ment ever being required to prosecute or release the detainee, does not make the detention any less arbitrary or indefinite.

More importantly, these policies beg two critical questions: First, can an explicitly contemplated or *de facto* detention of an indeterminate duration cause severe physical and psychological harms even in the absence of torture? Second, as applied to individuals who *were* tortured, can such detentions exacerbate the severe physical and psychological harms these individuals suffered as a consequence of having been tortured?

In an effort to address these largely unanswered questions and thereby to fill a gap in the literature, PHR determined to review the available clinical data concerning the physical and psychological consequences of the indeterminacy of indefinite detention. This review revealed evidence strongly suggesting that indefinite detention comes at an unacceptably high cost because:

- i) it causes psychological and physical traumas that appear to be *independent* of the conditions of detention or the abuse to which those in indefinite detention have been subjected, and
- ii) it not only delays – indefinitely – the opportunity for torture victims to begin to heal from the suffering they have already endured, but likely exacerbates the effects of that ill-treatment thus constituting unlawful cruel, inhuman, or degrading treatment.

The government's reliance on continued detention schemes as a panacea for resolving the difficult balance between national security or immigration policies and the rule of law is not only misguided, but it will yield new due process violations and violations of domestic and international rules prohibiting cruel, inhuman, and degrading treatment. In addition, the US government's continued disregard for the rule of law places the safety of US citizens in jeopardy by fostering a similar disregard for the rule of law in the treatment of US citizens by foreign governments and by potentially provoking retaliatory violence.

Methodology and Purpose of Report

As used in this report, "indefinite detention" refers to the government's restriction of an individual's liberty for reasons other than public health or the commission of any chargeable crime by the individual. The term encompasses custody arrangements that explicitly contemplate a detention of an indefinite term, as well as those that may result in detention of an indefinite term, including "preventive detention,"¹⁸ "executive custody,"¹⁹ "security detention,"²⁰ "military detention,"²¹ "prolonged detention,"²² "administrative detention,"²³ "conditional detention,"²⁴ or, under the March 7 Executive Order, "continued law of war detention."²⁵

18 See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 691 [2001]; *al-Kidd v. Ashcroft*, 580 F.3d 949, 965 [9th Cir. 2009] cert. granted, *Ashcroft v. al-Kidd*, No. 10-98 [refusing to dismiss complaint against former US Attorney alleging that he "developed, implemented, and set into motion a policy and/or practice under which the FBI and DOJ would use the material witness statute to arrest and detain terrorism suspects about whom they did not have sufficient evidence to arrest on criminal charges but wished to hold preventively or to investigate further"] (emphasis in original).

19 *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218 [1953] (Jackson, J., dissenting) ["Mezei"].

20 ICRC, *Contemporary challenges to IHL – security detention: overview* (Oct. 29, 2010), available at <http://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/security-detention/overview-security-detention.htm>

21 B. Wittes and J. Goldsmith, *Ghailani verdict makes stronger case for military detentions*, WASHINGTON POST (editorial), November 20, 2010.

22 P. Finn and A. Kornblut, *Obama Administration readies indefinite detention order for Guantánamo detainees*, WASHINGTON POST, Dec. 21, 2010.

23 AMERICAN GULAG, *supra* n. 9 at 223.

24 GUANTÁNAMO TASK FORCE, *supra* n. 1 at 12.

25 March 7, 2011 Executive Order, *supra* n. 1. See also A. Caldwell, *Executive Order for Detainee Review Being Drafted*, WASHINGTON POST, Dec. 22, 2010.

For both practical and ethical reasons, relatively little clinical research has focused specifically on the health effects of the indefinite duration of detention as opposed to the conditions of detention or the abuses to which detainees may be subjected.²⁶ This report therefore draws on research concerning:

- i) the experiences of analogous populations such as political prisoners and prisoners of war,²⁷ the wrongfully convicted,²⁸ and inmates held in administrative segregation for non-disciplinary reasons;²⁹
- ii) the physical and psychological effects of uncertainty, uncontrollability, and unpredictability as evidenced by those subjected to conditions of sensory deprivation³⁰ and confronted with medical uncertainty;³¹ and
- iii) the physical and psychological effects of being isolated from one's social, linguistic, cultural and familial networks.³²

In the first instance, this report trains a narrow lens on the harms associated with the indeterminacy of detention, independent of other conditions or mistreatment, in order to highlight the common denominators likely to affect all individuals held indefinitely. The literature review raises serious doubts about the possibility of crafting an indefinite detention policy that is humane and harm-neutral.³³ This finding is significant for individuals languishing in a state of indefinite detention on account of alleged immigration violations, for national security detainees who may be taken into custody in the future (and who may therefore be spared the devastating consequences of the kinds of harsh interrogation tactics employed in the early years following September 11 if loopholes in Appendix M of the Army Field Manual are closed, as described later in this report), and for policy makers who believe that it is the harsh conditions of detention rather than the nature of indefinite detention itself that is problematic.

It is only when these harms are understood in the context in which they are experienced, however, that they become truly meaningful. Abusive conditions and treatments rarely exist in isolation. Furthermore, researchers suspect that the combined effects of abusive conditions and treatments on the human psyche and body are multiplicative, and not simply additive.³⁴ For

26 G. Coffey *et al.*, *The meaning and mental health consequences of long-term immigration detention for people seeking asylum*, 70 *SOCIAL SCIENCE & MEDICINE* 2070, 2071 (2010) ("Very little is known about how detainees attempt to adapt to the institutional environment of detention centres and deal with the indeterminate nature of their confinement, or how the measures they take affect their well-being and integration into society on release").

27 See, e.g., B. Griffeth and R. Bally, *Language and Cultural Barriers in the Assessment of Enemy Prisoners of War and Other Foreign Nationals*, 57 *PSYCHIATRIC SERVICES* 258, 258 (2006); B. Saab *et al.*, *Predictors of psychological distress in Lebanese hostages of war*, 57 *SOC SCI & MED* 1249-57 (2003).

28 See, A. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 *CRIME AND JUSTICE* 1 (2005).

29 See, e.g., Bruce Arrigo, *THE ETHICS OF TOTAL CONFINEMENT* (Oxford U. Press: pending) at 94 ("Perhaps one of the greatest concerns regarding administrative segregation is that an inmate may be placed there indefinitely ... placement in this type of solitary confinement relies solely on the discretion of correctional administrators and staff ... [because this isn't considered "disciplinary segregation," there is no process associated with it]).

30 See, e.g., C. Haney, *Issues in Solitary, Supermax Confinement*, 49 *CRIME & DELINQUENCY* 124 (2003); PHR/HRF, *LEAVE NO MARKS*, *supra* n. 7.

31 L. Johnson *et al.*, *The Illness Uncertainty Concept: A Review*, 13 *CURRENT PAIN AND HEADACHE REPORTS* 133 (2009); J. Reich *et al.*, *Uncertainty of Illness Relationships with Mental Health and Coping Processes in Fibromyalgia Patients*, 29 *JOURNAL OF BEHAVIORAL MEDICINE* 307 (2006).

32 Griffeth *supra* n. 27 at 258.

33 See, e.g., PHR, *FROM PERSECUTION TO PRISON*, *supra* n. 9 at 82-83 (describing interviews with formerly detained asylum seekers who, after being granted asylum and despite describing the conditions of their detention as reasonably good with responsive staff, nevertheless reported continued intrusive nightmares, ongoing depression, and pervading despondency).

34 See, e.g., M. Basoglu, *A Multivariate Contextual Analysis of Torture and Cruel, Inhuman, and Degrading Treatments: Implications for an Evidence-Based Definition of Torture*, 79 *AM. J. OF ORTHOPSYCHIATRY* 135, 135 (2009); S. Miles, *Profane Research Versus Researching the Profane: Commentary on Basoglu* (2009), 79 *AMERICAN JOURNAL OF ORTHOPSYCHIATRY* 146, 147 (2009) ("Torture is always administered as a set of abuses. The idea that research might distill some set of

these reasons, this report ultimately focuses on the consequences of indefinite detention for the populations that, poignantly, are those most likely to be subjected to these policies as well as those most vulnerable to their damaging effects: national security detainees who have already endured years of isolation, torture, and possible experimentation at the hands of US personnel, and asylum seekers who arrive in the hands of US immigration authorities already traumatized by the act of exile as well as by torture and other persecution in their home countries.

Indefinite Detention Places Individuals at an Unreasonable Risk of Serious Psychological and Physical Harm

To understand the serious physical and psychological effects that indefinite detention causes the most vulnerable populations, we begin by attempting to identify, in broader terms, the specific characteristics of indefinite detention that give it the power to harm healthy individuals and the kinds of harms that appear to be associated with those characteristics.

The Nature of Indefinite Detention

By definition, indefinite detention refers to a situation in which the government places individuals in custody without informing the detainee – and perhaps without the governmental custodian having decided – when or whether the detainee will be released. Indefinite detention therefore creates a situation of profound uncertainty that sets it apart from other types of governmental custody.³⁵ Whereas a criminal trial imposes on the government a rigorous burden of proving that a defendant engaged in conduct that meets carefully and constitutionally defined standards and which results in either a conviction and sentence or an acquittal and freedom, indefinite detention schemes permit the government to keep a detainee in a dead zone of prolonged custody on the basis of facts or suspicions about the detainee’s associations, affiliations, inclinations, religious or political beliefs, national or ethnic identity, that the detaining authority asserts makes the detainee dangerous.³⁶ Many of these factors are ones that are neither susceptible to evidentiary standards of proof nor over which the detainee has substantial control.

Accordingly, in addition to indefinite detention being, by its nature, a condition marked by profound uncertainty about its duration, it is also characterized by a profound lack of control over the duration of that detention, and concomitantly renders the detainee incapable of predicting

torturous abuse (e.g., waterboarding) from nontorturous abuse (e.g., beating a person with a phonebook) neglects this reality. Torture is inflicted in a complete environment, a total institution, in which many forms of abuse are threatened and used”).

- 35 Pretrial detention, for example, is typically limited by statute or case law to a period of 60 or 90 days, while individuals convicted of crimes are sentenced to fixed terms, whether measured in months, years or lifespans.
- 36 See Matsu Taylor Saito, *Internments, Then and Now: Constitutional Accountability in Post-9/11 America*, 72 DUKE FORUM FOR LAW AND SOCIAL CHANGE 71, 76-77 (2010) [arguing that like the internment of Japanese-Americans during World War II, the United States has “indefinitely detained a large number of persons in the name of ‘national security,’ while investigating the equivalent of their ‘loyalty.’” The criteria for arrest were never specified, but it appears that immigration status, country of origin, and religious or political association, played a primary role in the selection of detainees”]; C. Cotter, *Emergency Detention in Wartime: The British Experience*, 6 STANFORD L. REV. 238, 259 (1954) [noting similarities between Emergency Detention Act of 1950 and legislation in Britain during World War II, which targeted individuals suspected of Nazi or Fascist affiliations, suspicions that were later determined to have turned largely on the individuals’ “enemy” nationality]; D. Silove *et al.*, *No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia*, 44 TRANSCULTURAL PSYCHIATRY 359, 360 (2007) [noting that the detention of asylum seekers often reflects a policy adopted by Western countries to deter non-Westerners from seeking refuge]. *Cf. In re Lawrence*, 190 P.3d 535, 564 (Cal. 2008) [governor violated statutory and constitutional due process principles that promise inmates genuine opportunity for parole by practice of reversing parole board decisions on the basis of a “current dangerousness” assessment that relied entirely on “the immutable and unchangeable circumstances of [inmate’s] commitment offense,” without presenting any evidence that inmate “remains a current threat to public safety”].

what factors might affect its duration.³⁷ These additional characteristics contribute to the detainee experiencing his captivity as capricious and arbitrary.

The lack of control over the duration of detention and a detainee's inability to predict what might shorten the duration of his detention echoes the lack of control over and the inability most detainees have to anticipate the risk of being taken into custody in the first place, factors that the literature suggests have meaningful and deleterious consequences. It has long been recognized that asylum seekers arrive at the border seeking and expecting solace and refuge, and are shocked to be arrested instead. More recently, it has become widely accepted that the majority of national security detainees held at Guantánamo since January 2002 were never suspected of being actively engaged in terrorist or other hostile activities against the United States, but instead came into US custody after having been picked up by bounty hunters operating in Pakistan and Afghanistan who were motivated by greed – i.e., by promises of cash – or by self-interest – i.e., in order to create false trails that would lead US investigators away from the bounty hunters themselves.³⁸

The lack of information and uncertainty inherent in indefinite detention is similar to the lack of information and uncertainty inherent in situations of sensory deprivation. In the case of sensory deprivation, the subject is deprived of information about his or her environment; in the case of indefinite detention, the subject is deprived of information about his or her fate: Will he remain locked up in a detention facility for the rest of his life or will the doors be thrown open tomorrow? Should he try to hold onto his spouse and children's affections in the hope that they will be reunited soon, or should he tell them to move on with their lives without him? Does anyone know about her whereabouts or has she become, for all intents and purposes, invisible to all but her captors? If her captors can keep her locked up for life, what prevents them from abusing, torturing, raping, or killing her?³⁹ As one researcher put it, indefinite detention places people

*in a situation which is uncontrollable in any meaningful way; unpredictable in any consistent way; and in which he/she is deprived of establishing an effective mode of confronting these conditions because of the apparent unaccountability of others with whom he/she is in contact.*⁴⁰

This constellation of properties, inherent in the nature of a detention of an indeterminate duration, is of concern because together they have been shown to cause severe and chronic states of stress, helplessness, hopelessness, depression, anxiety and dread – states that may have persistent adverse consequences for detainee psychological and physical health.⁴¹

37 See, e.g., *Basardh v. Obama*, 612 F.Supp.2d 30, 32 (D.D.C. 2009) (granting habeas corpus petition of a Yemeni who, it was undisputed, had been a government informant – albeit an unreliable one – for the entire seven years of his detention). Basardh, along with twelve others whose habeas petitions have been granted, may still be detained at Guantánamo. Center for Constitutional Rights, *Guantánamo Habeas ScoreCard*, updated February 9, 2011. See also GUANTÁNAMO TASK FORCE, *supra* n. 1 at 10-11.

38 See, e.g., M. Denbeaux and J. Denbeaux, *Report on Guantánamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data*, (2006), available at http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf; D. Cole and J. Lobel, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR (New York: The New Press (2007)): 105-06 (noting that “[a]ll but 5 percent of the [Guantánamo] detainees were captured by non-US forces, often in exchange for generous bounties” using flyers such as one that read, “Get wealth and power beyond your dreams ... You can receive millions of dollars helping the anti-Taliban forces catch al-Qaeda and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people”). See also J. Mayer, *The Hard Cases*, THE NEW YORKER, February 23, 2009; Alex Gibney, director, TAXI TO THE DARK SIDE, 2007 (documentary film) (describing death of an Afghani in US custody who had been falsely identified to US authorities as perpetrator of bombing attack, by the Afghan patrol that had perpetrated attack).

39 These are precisely the concerns that animated the court's decision in *Rosales-Garcia v. Holland*, 322 F.3d 386, 410 (6th Cir. 2003), as well as Justice Jackson's dissent in *Mezei*.

40 J. Levin, *Intervention in detention: Psychological, ethical and professional aspects*, 74 SOUTH AFR. MED. JOURNAL 460, 460 (1988).

41 L.J. West, *Effects of Isolation on the Evidence of Detainees*, DETENTION AND SECURITY LEGISLATION IN SOUTH AFRICA.

Without any information about or ability to control the fact or terms of their confinement, detainees develop feelings of helplessness and hopelessness that lead to debilitating depressive symptoms, chronic anxiety, despair, dread of what may or may not happen in the future, as well as to PTSD and suicidal ideation.⁴² Many detainees act on that suicidal ideation by attempting – and sometimes succeeding in their attempts – to commit suicide.⁴³ In addition, the uncertainty and uncontrollability of the detention renders detainees peculiarly vulnerable to the kinds of pathological levels of stress that have been shown to result in people who are socially isolated.

Chronic Uncertainty Causes Severe Psychological Trauma

Individuals deprived of information about when or whether they will be released from detention and who are deprived, as well, of any information that might justify so isolating and indefinite a detention, suffer from high rates of severe anxiety, despair, depression, PTSD, and dread.⁴⁴

It should come as no surprise that where indefinite detention and sensory deprivation share a basic attribute – i.e., where they both induce states of profound uncertainty – that they would have the power to cause similar psychological harms. Sensory deprivation, a recognized form of psychological torture that has been proven to cause “high levels of negative arousal, discomfort, and distress,” is an extreme form of imposed uncertainty.⁴⁵ Whereas sensory deprivation provokes an acute state of fear, the uncertainty that indefinite detainees are subjected to is chronic and insidious – more akin to a malignant tumor than a blunt trauma wound. Uncertainty creates a state of constant and heightened anxiety about unknown and unknowable dangers and outcomes, creating a state of deep stress that has no fixed source or object. Uncertainty primes people for pain, which means that detaining authorities can elicit many of the physiological and psychological responses to pain without ever touching the detainee.⁴⁶

This theoretical construct has been demonstrated in the actual experience of certain detained populations who endure indefinite detentions with eyes wide open. Research has shown, for example, that individuals who are detained by repressive regimes on account of their political activities tend to survive the experience with fewer short and long term health consequences than individuals who are shocked to find themselves in custody.⁴⁷ This suggests that those who actively assume the risk of detention when they engage in certain activities enter detention somewhat shielded from the damaging effects of uncertainty and unpredictability.⁴⁸

This hypothesis is further bolstered by evidence suggesting that research subjects who are told

PROCEEDINGS OF A CONFERENCE HELD AT THE UNIVERSITY OF NATAL, September 1982 (A. Bell and R. Mackie, eds.) (1985): 69-80, at 71.

42 I. Robbins, *et al.*, *The Psychiatric Problems of Detainees under the 2001 Anti-Terrorism Crime and Security Act*, 29 PSYCHIATRIC BULLETIN 407, 408 (2005) [helplessness and hopelessness are “integral aspect[s] of indefinite detention”]. See also K. Robjant, *et al.*, *Mental health implications of detaining asylum seekers: systematic review*, 194 BR JOURNAL PSYCH 306, 309 (2009); Z. Steel and D. Silove, *The mental health implications of detaining asylum seekers*, 175 MEDICAL J OF AUSTRALIA 596 (2001). See also C. Pourgourides, *A second exile: the mental health implications of detention of asylum seekers in the UK*, 21 PSYCHIATRIC BULL. 673, 674 (1997).

43 PHR, FROM PERSECUTION TO PRISON, *supra* n. 9 at 57; Steel and Silove, *supra* n. 42. See also Pourgourides, *supra*, n. 42.

44 Levin, *supra* n. 40 at 481; Silove, *supra* n. 36 at 366.

45 J. Reich *supra* n. 31 at 307. See also PHR/HRF, LEAVE NO MARKS, *supra* n. 7 at 30-33; Haney, *supra* n. 30 at 130; Brenner, *supra* n. 5.

46 J. Wright *et al.*, *The Illness Uncertainty Concept: A Review*, 13 CURRENT PAIN AND HEADACHE REPORTS 133, 134 (2009).

47 Saab, *supra* n. 27 at 1250 (“[I]deological and political commitment alleviates the development of psychological distress [and] a strong belief in a cause may protect the core of the personality of POWs”) (internal citations omitted); Basoglu, *supra* n. 34 at 137. See also Leslie Koopowitz and Sotoodeh Abhary, *Psychiatric aspects of detention illustrative case studies*, 38 AUSTRALIAN AND NEW ZEALAND J OF PSYCH 495, 499 (2004).

48 *Id.*

that they will be subjected to non-painful stimulation report, not surprisingly, that they felt no pain.⁴⁹ Meanwhile, individuals who are warned that they will receive a painful stimulus and who are also provided with information about the degree of pain they can expect to feel, report experiencing pain in expected degrees. By contrast, subjects who are kept in the dark about

- i) whether a stimulus will be painful and
- ii) if painful, how painful it will be, react to non-painful stimuli as if it were painful and typically report pain ratings that exceed those of their informed peers.⁵⁰

These findings led researchers to theorize that uncertainty leaves people “prime[d] ... to pay greater attention to pain and experience more pain than patients who are less certain.”⁵¹ Hence, a detainee who is unprepared for the possibility of being taken into custody or being indefinitely detained – which is the case for many of those in both immigration and national security detention – is particularly susceptible to suffering from PTSD and other psychiatric disorders on account of the uncertainty associated with his detention.⁵²

Anxiety and uncertainty go hand in hand. Whereas a concrete, recognizable threat provokes an active fight or flight response, an unknown, uncertain, unrealized threat appears to produce free-floating, chronic anxiety. Moreover, “uncertainty itself can be considered threatening, therein promoting or maintaining anxiety and exacerbating the perception of threat.”⁵³ In its strongest form, however, anxiety – a state of excessive uneasiness and apprehension about the unknown – becomes a state of dread: a great and oppressive “fear of the unknown, the apprehension of a future heavy with the possibility of danger.”⁵⁴

Dread is among the more disabling states a detainee endures.

Dread is among the more disabling states a detainee endures, as it represents the accumulation of fears that arise as a result of the detainee being unable to

control or predict events The smallest abuse can evoke dread as it all too clearly demonstrates the impotence and vulnerability of the captive

Dread is a type of continuing and pervasive fear that is made up of all the small fears a captive is entitled to have; a fear that the captivity will continue indefinitely, fear of what the captors might do, fear of the safety of one’s loved ones. There is nothing quite as frightening as the unknown, especially where your freedom is concerned. Indefinite confinement is a terrible, terrible thing; prisoners will tell you that as soon as one can set a limit on captivity, even if it is five or ten years, it becomes easier. Indefinite confinement, even if it is for a matter of days or weeks, can be fearsome indeed. With regard to what the captors may do, a little bit of abuse can be terribly frightening because it demonstrates to you that you have no recourse. If the captor rolls up a newspaper and tells you to keep your arms up and then when you are beginning

49 Wright, *supra* n. 46 at 134.

50 *Id.*

51 *Id.*

52 Indefinite detention may also be a condition capable of causing Cotard’s syndrome. In this “rare psychotic disorder with multiple etiologies (severe depression, schizophrenia ... and trauma, for example), a constellation of symptoms are spun into a core delusion of nihilism, in which the person denies his own existence or holds to the belief that he or she is dead.” R. Christensen, *Dead men walking: Reflections on Cotard’s syndrome and homelessness*, 68 PHAROS ALPHA OMEGA ALPHA HONOR MED. SOC. 33 (2005). Although the literature on Cotard’s syndrome is built primarily of case studies or reviews that analyze the presenting symptoms of those diagnosed with the disorder rather than its underlying causes, see, e.g., G. Berríos, R. Luque, *Cotard’s syndrome: analysis of 100 cases*, 91 ACTA PSYCHIATRICA SCANDINAVICA 185, 186 (1995), there is anecdotal evidence that it can be triggered by severely dislocating and threatening experiences, such as those created by homelessness, by torture – and, perhaps, by indefinite detention. See, e.g., Christensen, *supra*; PHR, *BREAK THEM DOWN*, *supra* n. 7 at 55 (noting former detainee’s report of “feeling that one is already dead”); F. Davidoff, 145 *Homeless*, ANNALS OF INTERNAL MEDICINE 75, 76 (2006).

53 R. Carleton et al., *Anxiety sensitivity and intolerance of uncertainty: Requisites of the fundamental fears?* 45 BEHAVIOUR RESEARCH AND THERAPY 2307, 2307 (2007).

54 G. Craft, *The Persistence of Dread in Law and Literature*, 102 YALE LAW JOURNAL 521, 521 (1992).

to ache and you start to droop then he whacks you across the head with the newspaper, it is frightening because although it will not leave a scar, it makes clear that he could do the same thing with a club if he chose.⁵⁵

People become vulnerable to developing PTSD when they experience a traumatic event that poses an actual or potential threat of injury or death, and then subsequently have an experience of fear (or its stronger form, dread) and helplessness.⁵⁶ In light of research suggesting that many more individuals in the general population have suffered traumatic events sufficient to satisfy the diagnostic criteria for PTSD than researchers and clinicians once believed, the likelihood of a detainee developing PTSD is very high.⁵⁷

The length of detention as well as the cultural and religious background of a detainee can affect the severity of a detainee's symptoms and suffering. Detainees held for longer than six months – a milestone that most current indefinite detainees long ago passed – show higher proportions of meeting “diagnostic cut-offs for PTSD, depression, and moderate to severe mental health-related disability than those who ha[ve] been detained for” less time or not at all.⁵⁸ The risk of temporally-induced mental disturbances is unacceptably high for those whose detention truly is indefinite. Meanwhile, for detainees from Islamic countries or other cultures for whom exhibiting or acknowledging mental health problems is stigmatizing and suicide is prohibited, the anxiety, despair, helplessness, and dread triggered by the uncertainty of indefinite detention may be experienced as even more isolating and paralyzing,⁵⁹ particularly for deeply religious Muslims who may interpret feelings of hopelessness and despair as a lack of faith.⁶⁰

Social Isolation Contributes to Pathological Levels of Distress

Research over the last 30 years has demonstrated that being isolated from one's community of friends and family causes debilitating stress and can seriously impair one's ability to cope with stressful situations.⁶¹ One explanation is that stressful events activate a basic psychological need for warmth, support and protection. Simply put, “when people are uncertain and afraid they seek the company of others.”⁶² Without a date certain on which they know they will be set free, detainees wake up each day facing what may be a lifetime of detention with no hope of release, hence this basic need for comfort in the face of extreme stress feeds on itself, creating a greater and a necessarily insatiable need for community and family. This theory of the relationship between stress and social isolation is painfully intuitive.

55 Levin, *supra* n. 40 at 461 (quoting West, *supra* n. 41 at 72-73).

56 M. Friedman *et al.*, *Considering PTSD for DSM-5*, 0 DEPRESSION AND ANXIETY 1 [2010] (describing symptoms of and diagnostic criteria for PTSD). See also PHR/HRF, *LEAVE NO MARKS*, *supra* n. 7 at 44-45 (describing prevalence of PTSD among torture victims and long-term prognosis for sufferers of PTSD). For some detainees, the traumatic event may be the shock of arrest or capture; for others it may have been persecution or torture.

57 T. Keane, A. Marshall and C. Taft, *Posttraumatic Stress Disorder: Etiology, Epidemiology, and Treatment Outcome*, 2 Annu. Rev. Clin. Psychology 161, 164 [2006] (noting that “the prevalence of exposure to traumatic events in the United States is far more common than anticipated in 1980 when the diagnosis of PTSD was incorporated in the diagnostic nomenclature”).

58 Robjant, *supra* n. 42 at 308.

59 *Id.*

60 V. Cornell, *A Muslim to Muslims: Reflections after September 11*, 101 SOUTH ATLANTIC QUARTERLY 325, 333 [2002] (“Hopelessness and despair have long been regarded as major sins in Islam, because they imply a lack of faith. The desire to take one's life out of despair is a sign of disbelief”).

61 G. Tyson, *The Psychological Effects of Detention*, DETENTION AND SECURITY LEGISLATION IN SOUTH AFRICA. PROCEEDINGS OF A CONFERENCE HELD AT THE UNIVERSITY OF NATAL, September 1982 [A. Bell and R. Mackie, eds.] [1985]: 81-84, at 82 (noting that Vietnam Veterans reported isolation “as being amongst the most serious problems they experienced in captivity”); Coffey, *supra* n. 26 at 2071.

62 Tyson, *supra* n. 61 at 82.

Other research suggests, however, that there is more to the association between social isolation and stress than the primal urge to seek comfort. Coping and adapting to new, frightening and stressful situations – the two skills necessary to survive such experiences psychologically intact – are not skills that detainees have at their disposal. Coping with a stressful situation implies that a person is able to “manipulat[e] the environment in the service of self.”⁶³ The detainee, however, has no control over his environment, while the detaining authority exercises absolute control over every detail of his environment: from the clothes he wears; to the number of hours he sleeps; to the degree of light or darkness in his cell; to the food he eats; to the sounds he hears; to the amount and quality of the fresh air he breathes; to the degree of physical activity or inactivity in which he engages; and the people with whom he communicates. Meanwhile, the ability to adapt to one’s environment requires an inner resiliency that, research suggests, depends on the existence of social support.⁶⁴ Detainees have few of these tools at their disposal and without them, their ability to cope or adapt to the very stressful experience of being indefinitely detained may be severely compromised.

Not only are detainees abruptly and completely cut off from friends and families, they are often similarly cut off from their cultural, religious, and language communities. The inability to communicate with others in his own language or to understand what little information is available to him about his circumstances exacerbates the stress a detainee experiences by adding to his sense of isolation.⁶⁵ In addition, even when detaining authorities provide detainees with access to medical or mental health care workers, they often overlook the fact that linguistic barriers may make it impossible for the professional to ameliorate a detainee’s stress or suffering.⁶⁶

Indefinite Detention Causes Physical Harm in Healthy Individuals

In addition to causing psychological harm, indefinite detention causes physical harms that are independent of the harms that detainees suffer as a consequence of the conditions in which they are detained or any abuse to which they may be subjected while in custody. Some of the physical harms to which indefinite detainees are vulnerable reflect the body’s manifestation of the psychological harms and social isolation that detainees endure; others represent purely physical risks to which detainees are vulnerable simply on account of being detained for an indefinite term.

Chronic Stress and Anxiety Have Deleterious Effects on Every System in the Body

Stress has measurable and deleterious effects on several core physiologic systems, leading to a domino effect of illness and disease. Stress adversely affects

*the immune system, the cardiovascular system, and the adipose tissue and muscle. Compromise of the immune system can exacerbate the metastatic spread of cancer and of viral infections; whereas, in the cardiovascular system, plaque formation leads to atherosclerosis and plaque rupture and platelet aggregation result in myocardial infarction and often in sudden death.*⁶⁷

Chronic stress has also been found to be a significant contributing factor in the development

63 S. Cobb, *Social Support as a Moderator of Life Stress*, 38 *PSYCHOSOMATIC MEDICINE* 300, 311 (1976).

64 *Id.*

65 Robjant, *supra* n. 42 at 308; Human Rights First, *U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON*, 2009 at 54-54.

66 See, e.g., Pourgourides, *supra* n. 42 at 674 (noting that for asylum seekers detained by British authorities, “an adequate level of care is almost impossible to implement given the language difficulties and lack of adequate interpretation facilities”); Griffeth, *supra* n. 27 at 258 (describing attempts to care for Iraqi casualties during early months of war using interpreters who spoke Arabic but who were unable to translate words for “depressed” or “flashback,” difficulties exacerbated by the fact that these terms were unfamiliar to the traumatized casualties, as well).

67 B. McEwen and E. Stellar, *Stress and the Individual*, 153 *ARCH INTERN MED* 2093, 2096 (1993).

of “asthma, diabetes, gastrointestinal disorders, viral infections and autoimmune disorders.”⁶⁸ Moreover, physical and psychological reactions to stress, such as anxiety, helplessness, aggression, risk-taking, and self-damaging behavior, as well as the body’s attempts to adapt to stress, cause the body to secrete adrenal steroids that, while protective in the short run, subjects the nervous system to damaging “wear and tear” over the long run.⁶⁹ Evidence has also shown that endured over long periods, chronic stress can cause neurological damage that mirrors that suffered by victims of stroke,⁷⁰ and that “neuronal atrophy and cell death” associated with “prolonged stress [manifests its] most pronounced effects ... in brain regions that are responsible for higher order executive functions.”⁷¹ It is highly doubtful that these physiological and neurological changes, occurring at the cellular level, are entirely reversible once the stressor has been eliminated.⁷²

Indefinite Detention Deprives Individuals of Protective Effects of Social Networks

Although research to date has demonstrated only a weak association between social networks and the incidence or onset of disease, social relationships have been found to be strongly protective of mortality from established disease, particularly hypertensive disorders and cardiovascular disease.⁷³ Accordingly, detainees with pre-existing heart conditions may be more likely to suffer a cardiovascular event as a result of the stress they endure on account of the uncertainty, lack of control and unpredictability associated with indefinite detention, while the lack of social relationships may make it less likely that the detainee will survive the event. Evidence that many detainees have succumbed to cardiac-related deaths throws this risk into stark relief.⁷⁴

In addition, there is evidence that it is the quality of the connections or relationships that is relevant, not their quantity. One study, for example, tested the hypothesis “that what mattered was not the number of social interactions, nor the degree to which other people provided practical benefit, but the degree to which social interactions satisfied an individual’s specific, subjective need for connection.”⁷⁵ Researchers found that loneliness – that is, the absence of qualitatively

68 *Id.* at 2098-99.

69 B. McEwen, *Allostasis and Allostatic Load: Implications for Neuropsychopharmacology*, 22 NEUROPSYCHOPHARMACOLOGY 108, 109 (1999) (noting “inherent paradox” in the fact “that the systems that react to stress – the autonomic nervous system and the adrenocortical system – are important protectors of the body in the short run but cause damage and accelerate disease when they are active over long periods of time”).

70 McEwen, *supra* n. 67 at 2096 (stress identified as causing “[d]amage or destruction of neurons [that] can impair brain function and compromise physiologic control mechanisms”).

71 B. Compas, *Psychobiological Processes of Stress and Coping*, 1094 ANN. N.Y. ACAD. SCI. 226, 229 (2006).

72 Cf. P. Tough, *The Poverty Clinic: Can a stressful childhood make you a sick adult?* THE NEW YORKER, March 21, 2011 at 25-32 (describing a clinic in San Francisco whose director is evolving her practice to take account of the extent to which her urban poor children patients’ neurological, physical, and psychological problems may be caused by anxiety, and noting the limits of interventions as those stressors become more rooted in a remote past).

73 I. Kawachi *et al.*, A prospective study of social networks in relation to total mortality and cardiovascular disease in men in the USA, 50 J EPIDEMIOLOGY COMMUNITY HEALTH 245, 250 (1996). See also J. House *et al.*, *Social Relationships and Health*, 241 SCIENCE 540, 542 (1988). Social relationships are believed to have this protective effect by “activate[ing] the anterior hypothalamic zone [stimulating release of human growth hormone] and inhibit[ing] the posterior hypothalamic zone [and hence secretion of adenocorticotrophic hormone, cortisol, catecholamines, and associated sympathetic autonomic activity].” *Id.* Although cause and effect has not been proven to a scientific certainty, the degree of scientific certainty exceeds that which prompted the Surgeon General to declare, in 1964, that cigarette smoking caused mortality and morbidity, as well as the “certification ... [that] the Type A behavior pattern [was] a risk factor for coronary heart disease.” *Id.* at 543. See also L. Berkman, Assessing social networks and social support in epidemiological studies, 35 REV. EPIDEM. 46, 48-49 (1987) (The association between social disconnection and increased mortality risk persists while controlling for baseline physical health status, social class, health practices, such as cigarette smoking, alcohol consumption, physical activity, obesity, and certain eating and sleep patterns [as well as] independent of a wide range of psychological factors”).

74 See, e.g., J. Rizzo, *Documents raise questions on treatment of detainees*, CNN.com, January 22, 2011. See also *Afghan detainee dies after exercise at Guantánamo*, Associated Press, February 3, 2011 (reporting cardiac-related death of 48-year old Awal Gul, an Afghan detainee who “had been held for eight years without charge”).

75 J. Cacioppo and W. Patrick, *LONELINESS: HUMAN NATURE AND THE NEED FOR SOCIAL CONNECTION* (New York: WW. Norton & Company; 2008) at 94, 105-106.

and subjectively satisfying connections – was associated

- i) with increases in the stress hormone epinephrine;
- ii) with rises in levels of salivary cortisol, a stress-induced steroid that affects metabolism and immune function, and
- iii) with “changes in DNA transcription that in turn made changes in the cell’s sensitivity to circulating cortisol, dampening the ability to shut off the [body’s] inflammatory response.”⁷⁶

In other words, the fact of being cut off from meaningful contact with people with whom the detainee has close relationships, and the possibility that the situation may endure indefinitely, may result in physical changes that hold the potential to exacerbate pre-existing conditions and to compromise the detainee’s ability to heal from or survive acute traumas.

Psychological Distress May Manifest as Physical Disease

Somatization, the manifestation of physical symptoms in the absence of an organic cause, has long been observed in traumatized populations.⁷⁷ For example, while some people evidence psychological trauma in the form of depression, anxiety, or PTSD, others evidence the same trauma by way of physical symptoms and illnesses, such as breathing difficulties, nausea, back pain and skin disorders.⁷⁸ Originally dismissed by psychiatrists as a form of hysteria, clinicians

now recognize that somatization does not indicate that a patient’s symptoms are any less real or his suffering less debilitating, but rather that an appropriate treatment must address both the patient’s physical symptoms and their psychological roots.

Although there is no perfect predictor for whether a person will manifest psychological trauma as physical illness, there are certain clusters of cultural and psychological factors that have been observed in individuals who manifest psychological trauma as physical distress. For example, there is

Being cut off from meaningful contact with people with whom the detainee has close relationships, and the possibility that the situation may endure indefinitely, may result in physical changes.

evidence that men whose cultures “emphasize social integration more than autonomy,” and in which “the man is required to play the superior, confident, dignified role,” may find the shame of admitting to feelings of helplessness, anxiety, and depression so great that they “report fewer symptoms, aside from pain, or ... deny symptoms altogether.”⁷⁹ This conclusion draws in part on observations that Egyptian psychiatric patients had “higher rates of conversion disorder (that is, physical manifestations of psychiatric symptoms) ... than among patients in the West,” as well as the observation that Iraqi casualties of war depended much more heavily on narcotics and sedatives than “[a]llies with similar injuries.”⁸⁰

There is a strong possibility, therefore, that at least a sizeable subset of detainees of non-West-

⁷⁶ *Id.*

⁷⁷ PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n. 7 at 27, 31, 61, 68.

⁷⁸ See, e.g., Andrew Ryder *et al.*, *The Cultural Shaping of Depression: Somatic Symptoms in China, Psychological Symptoms in North America?* 117 *J. OF ABNORMAL PSYCHOLOGY* 200 (2008); A. Kagee and A. Naidoo, *Reconceptualizing the Sequelae of Political Torture: Limitations of a Psychiatric Paradigm*, 41 *TRANSCULTURAL PSYCHIATRY* 46, 49 (2004) (noting that “many traumatized African people present with somatic symptoms such as back and chest pains or feelings of faintness or dizziness given the integrative worldview of African culture in which psyche-soma or body-mind splits are absent”). See also D. Bichescu *et al.*, *Long-term consequences of traumatic experiences: an assessment of former political detainees in Romania*, 1 *CLINICAL PRACTICE AND EPIDEMIOLOGY IN MENTAL HEALTH* 17, 25 (2005) (study of long-term somatic symptoms of Romanian political prisoners who were subjected to abuse and torture similar to what the Guantánamo detainees have endured).

⁷⁹ Griffeth, *supra* n. 27 at 259.

⁸⁰ *Id.* (this observation led the medical team to “question whether the somatic treatment was in part addressing the unconscious dependency needs of patients with conversion disorder”).

ern backgrounds with physical complaints of pain and distress have somaticized the anxiety and stress caused by the uncertainty and unpredictability of their indefinite detention.

Indefinite Detention Places Detainees at Special Risk of Abuse

All detainees are at risk of abuse from other detainees or, to the extent housed within a general prison population, from inmates. However, there are a few types of abuses to which individuals in indefinite detention are particularly vulnerable. For example, the fact that detainees are likely to languish in detention for months or years may foster an atmosphere of lawlessness and vigilantism on the part of detention facility personnel, making detainees more vulnerable to physical abuse and violence at the hands of the detaining authority.⁸¹ There is also mounting evidence that women detainees are regular targets of sexual threats, coercion, and abuse precisely because their circumstances are so rife with uncertainty.⁸²

Harmful Effects of Indefinite Detention are not Resolved Upon Release

A small but developing body of evidence involving several populations – such as formerly detained asylum seekers, individuals freed from prison after a wrongful conviction, and Vietnam veterans – as well as forensic evaluations of and interviews with former Guantánamo detainees, suggests that physical, social and emotional problems continue to plague individuals long after their release from some form indefinite detention.⁸³ Taken as a whole, the literature supports the conclusion that the harms that develop during detention do not resolve once the detainee is freed, and that indefinite detention makes detainees vulnerable to new physical, social, and emotional harms after they are released.

Indefinite Detention Causes Enduring Personality Change

Indefinite detention appears to cause fundamental and radical changes in self-perception and drive. One study found that immigration detainees “had changed irrevocably as [people] ... [and

81 Levin, *supra* n. 40 at 460. See also D. Cole and J. Dempsey, TERRORISM AND THE CONSTITUTION: FIRST AMENDMENT FOUNDATION 2006, at 177 (arguing that “policy of preventive detention led to the practice of coercive interrogation”); B. Morentin, L. Callado and M. Itxaso Idoyaga, *A follow-up study of allegations of ill-treatment/torture in incommunicado detainees in Spain*, 18 TORTURE VOLUME 87, 91 (2008) (noting that “incommunicado detention creates conditions that facilitate the perpetration of torture and can in itself constitute a form of cruel, inhuman, or degrading treatment or even torture”).

82 See, e.g., AMERICAN GULAG, *supra* n. 9 at 52 (“Sexual abuse of prisoners is a common practice and INS detainees are especially vulnerable for the simple reason that they can be deported. As a 1993 Justice Department investigation ‘concluded’ [in one specific case, “Detainee’s], version of rape and forced oral sex is corroborated only by her ... statements to public health service personnel ... Moreover, [she] has been deported to Haiti. Under these circumstances, this matter lacks prosecutorial merit”). See also B. Arrigo and J. Bullock, *The Psychological Effect of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INT’L J OF OFFENDER THERAPY AND COMPARATIVE CRIMINOLOGY 622, 634 (2008); M. Ichikawa, S. Nakahara, S. Wakai, *Effect of post-migration detention on mental health among Afghan asylum seekers in Japan*, 40 AUSTRALIAN AND NEW ZEALAND JOURNAL OF PSYCHIATRY 341, 342 (2006); HRW, DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN UNITED STATES IMMIGRATION DETENTION, August 2010 (detailing examples of sexual abuse of detainees by private detention facility personnel).

83 See PHR, BROKEN LAWS, BROKEN LIVES, *supra* n. 7; Human Rights Center/International Human Rights Law Clinic, University of California, Berkeley, RETURNING HOME: RESETTLEMENT AND REINTEGRATION OF DETAINEES RELEASED FROM THE U.S. NAVAL BASE IN GUANTÁNAMO BAY, CUBA, 3-7 (March 2009). See also “Guantánamo: Beyond the Law” (database containing government allegations, personal information and interviews with 66 detainees who have been released from Guantánamo) available at <http://detainees.mcclatchydc.com/>. Because of pressing concerns about the torture and cruel, inhuman, and degrading treatment to which Guantánamo detainees were subjected, these reports rarely attempt to distinguish between harms resulting from overt abuse and harms resulting from the indeterminate nature of the detention.

demonstrated a] general loss of agency.”⁸⁴ These enduring, permanent effects of detention mirror changes that have been observed among individuals deemed to have been wrongfully convicted of crimes – a population whose circumstances parallel those of indefinite detainees insofar as they wake up each day with the same kind of uncertainty and lack of control about when or whether they will finally be exonerated and released.

Ten years after being released from their wrongful imprisonment, the men in one such study were found to suffer “continuing distress, disability and social dysfunction,” irreversible personality changes that at best, were persistent, and at worst, had been exacerbated by the passage of time.⁸⁵

*[T]he men had marked features of estrangement, loss of capacity for intimacy, moodiness, inability to settle, loss of a sense of purpose and direction, and a pervasive attitude of mistrust toward the world. They were withdrawn, unable to relate closely[and exhibited] characteristics that were not previously seen, such as a hostile ... attitude toward the world ... feelings of emptiness or hopelessness [and] a chronic feeling of threat.*⁸⁶

A British resident and former Guantánamo detainee described himself in similar terms:

*You have to speak with people again and you have to become normal, because I was locked up more than five years, and most of those years I was in isolation cells. So it was very difficult to learn how to communicate again with people, to talk in a normal way and socialize in a normal way. It was difficult to go back to work, to wake up in a normal way, to sleep in a normal way. We had and we still do experience lots of psychological hardships, dreams, bad dreams. Sometimes some incidents trigger memories, back inside the cells. Our emotions is different, psychologically our feelings, we're more cold than when we used to be. We can't express our feelings easily to our families and friends. Suspicion, and we suspect everyone and everything ... [T]he physical damage that was caused to us probably is more apparent and is hard, but the psychological wounds and injuries inside each one of us is more deeper and probably longer than the physical abuse.*⁸⁷

Likewise, families of individuals released from prison many years after having been wrongfully convicted said that the men “were not the people they used to be; they were withdrawn, unable to relate.” One mother observed, “He’s like a complete stranger. I don’t understand him at all;” siblings described a new “emotional coldness;” wives reported that their husbands, who were “warm, family men” before prison, returned home different men: “We were really shocked ... It’s very distressing ... he is not the same person ... he just [is] not able to fit into family life.”⁸⁸

Indefinite Detention Shatters Familial Bonds

Being indefinitely detained has devastating emotional, social and economic consequences for detainees, their children, their spouses and extended family, which makes it very difficult for families to navigate their way back toward wellness and stability even when they are fortunate enough to be reunited.

⁸⁴ Coffey, *supra* n. 26 at 2076.

⁸⁵ Grounds, *supra* n. 28 at 41-42 (hypothesizing that the “diagnostic category of PTSD most accurately describes responses to single catastrophic events rather than responses to very prolonged trauma. In cases where either the trauma itself is chronic or the long-term psychological effects persist over many years, the condition becomes more accurately regarded as an enduring personality change”).

⁸⁶ *Id.* at 22.

⁸⁷ O. Deghayes, *Omar Deghayes and Terry Holdbrooks Discuss Guantánamo (Part Three): Deaths at the Prison*, available at <http://www.andyworthington.co.uk/2010/06/03/omar-deghayes-and-terry-holdbrooks-discuss-guantanamo-part-three-deaths-at-the-prison/>.

⁸⁸ Grounds, *supra* n. 28 at 23.

For many detainees and their families, indefinite detention means a complete and utter lack of contact, which can be the result of onerous rules governing a particular type of detention or on account of the geographic challenges that result when detention centers are built in remote locations.⁸⁹ Detainees who are privileged to have even limited contact with spouses and children are not in a markedly better position, however. Detainees report feeling uncertain about what role they can or should play in the lives of their children, including worrying about whether it is in the best interests of their children to suffer from feelings of abandonment (if detainees keep their distance) or from feelings of shame or fear at seeing their parent locked up like a criminal (if detainees try to maintain some semblance of normal contact).⁹⁰ Questions about what one can expect from one's spouse or partner also abound: with a future plagued by uncertainty, the long odds of a speedy reunification may shatter expectations of faithfulness, thus splintering otherwise stable bonds. Guilt and worry about a spouse's mental health have also been shown to exacerbate the mental health problems of detainees, a factor that adds yet another weight to the already heavy toll that indefinite detention places on a marriage.⁹¹

This worry operates in both directions. Clinical evaluations of a small group of women whose husbands were indefinitely detained in the United Kingdom on national security grounds indicated that all of the women suffered from clinical depression, while one woman manifested symptoms of PTSD, triggered by her husband's arrest, "and another ha[d] a phobic anxiety state," all of which the clinicians attributed "directly to the incarceration of their husbands and its indefinite nature."⁹² Children also suffer when they witness, or believe, that a loved one has been persecuted, and "may develop dysfunctional beliefs, such as that he/she is responsible for the bad events or that he/she has to bear the parent's burdens. These types of beliefs can lead to long-term problems with loyalty conflicts, guilt, personal development, and maturing into an independent adult."⁹³

Indefinite detainees often emerge from detention having "lost a generation of family life."

Complicating the situation even more, indefinite detainees, like those who are wrongfully imprisoned, often emerge from detention having "lost a generation of family life."⁹⁴ Many return home to find that their parents died while they were in custody; others must reconcile themselves to the fact that although they were young men with young children when first taken into custody, they have emerged "middle-aged men with grandchildren."⁹⁵ In short, during detention, detainees struggle with the fear that their life may be "wast[ing] away;" while release forces them to confront the fact that both the life they knew and all hope of the life they might have lived are now gone.⁹⁶

89 Department of Homeland Security Office of the Inspector General, *Management of Mental Health Cases in Immigration Detention*, OIG-11-62 ("OIG Report"), March 2011 at 10; HRF, *SEEKING PROTECTION, FINDING PRISON*, *supra* n. 65 at 55.

90 Human Rights Watch, *Findings: Arbitrary and Indefinite Detention of Unadjusted Refugees*, in *JAILING REFUGEES*, December 29, 2009, available at <http://www.hrw.org/en/node/87369/section/7> [describing the situation of a refugee indefinitely detained in Arizona, "hundreds of miles away [from his wife and two young children who] he says he calls ... often, but, "It is kind of stressful. They ask me the same questions: 'When are you coming home?'" None of his family has visited [the detainee] since his detention. "I don't want them to waste the time to drive 12-15 hours for a 25 minute visit"; and quoting another refugee indefinitely detained in Arizona whose his nine-year-old (based in California) "does not know that [his father] is in detention. 'He knows I'm away. He's a smart kid. But I didn't want to tell him"; another, speaking of his three young children, "I don't want them to visit. For them, dad is somewhere on vacation. I told [my fiancée], 'Tell them what you gotta tell them but don't tell them I'm in here'"].

91 Robbins, *supra* n. 42 at 408.

92 *Id.*

93 PHR, *EXAMINING ASYLUM SEEKERS* [2001] at 93.

94 *Grounds*, *supra* n. 28 at 22.

95 *Id.*

96 *AMERICAN GULAG*, *supra* n. 9 at 294-95 ["If they don't want me in this country, send me back. If Cuba don't want me back, send me to the jungle I would like INS to get me in a plane, give me a parachute, and drop me in the jungle. Somewhere. I'll survive. I'd rather be in the jungle, in the desert, in the middle of the ocean, than be locked

*I worry about my future. I am now 39 years old. The train I might have caught has left without me on board, and now it is too late to catch it It is the train that leads to the destination of marriage and a family. I will be too old to be a father in the future.*⁹⁷

For families, the consequences are equally grave. The loss of productivity among “heads of families inevitably work[s] privation and hardship upon their dependents,” hence the chance that a family has succeeded in remaining intact while it awaits the return of a formerly bread-earning detainee is remote.⁹⁸ One recent study, although specifically focused on difficulties former Guantánamo detainees face as they try to reintegrate themselves back into their communities, describes the economic and educational hardships experienced by families on account of their loved ones’ indefinite detentions, hardships that seem entirely generalizable: children abandon their educations in order to work so that family members can eat; assets – homes, shops, etc., – are sold to make ends meet; families go into deep debt in order to track down the detained family member and “to finance efforts to secure their release.”⁹⁹ In short, the “[c]onsequences for family relationships are devastating.”¹⁰⁰

Individuals Released from Indefinite Detention Carry the “Stain” of Detention

Release from indefinite detention is almost never accompanied by a full airing of the evidence that supposedly justified a detainee’s prolonged detention nor any kind of public exoneration concerning his alleged wrongdoing or dangerousness. Hence, being released rarely clears the stain of detention from the detainee’s reputation.¹⁰¹ Indeed, as Justice Jackson recognized more than 50 years ago, an immigrant indefinitely detained by the US government on account of secret evidence may find himself in a Catch-22: Having marked the immigrant as “an unwanted man,” the government’s efforts to find another country willing to accept him are remote, which prolongs the detainee’s detention, making the stain on the detainee’s reputation even more indelible, making repatriation less and less likely.¹⁰²

PHR and other NGOs have documented these very effects on the lives of detainees released from Guantánamo. Communities, potential and former employers and home-governments often view these individuals as dangerous. These views persist despite the fact that the US government released the detainee without having charged him of any crime and long before the hostilities between the United States and al Qaeda have ended – a release that powerfully suggests that the United States found neither any basis for the detainee’s original detentions nor any evidence of wrong-doing or dangerousness sufficient to hold him until the end of hostilities.¹⁰³

up. You know how much suffering you see here? You know what it is like to sit in here and you see your life waste away?” (Mariel Cuban detainee after 20 years in detention). It is a sad testament to the detention system that some detainees who served prison sentences prior to being placed in immigration detention have sought leave to be transferred back to prison where they at least had access to educational and reading materials as well as opportunities for exercise and for low-pay work. *Id.* at 275.

97 Coffey, *supra* n. 26 at 2075.

98 Cotter, *supra* n. 36 at 249.

99 UC Berkley, RETURNING HOME, *supra* n. 83 at 5.

100 HRW, LOCKED UP ALONE: DETENTION CONDITIONS AND MENTAL HEALTH AT GUANTÁNAMO (2008) at 14-15.

101 Cotter, *supra* n. 36 at 264 (“[O]n release, [the detainee] is a marked man. Suspicion clings to him which he will never be able to clear”).

102 *Mezei*, 345 U.S. at 219-220 (Jackson, J., *dissenting*).

103 See, e.g., PHR, BROKEN LAWS, BROKEN LIVES, *supra* n. 7 at 92-93; UC Berkeley, RETURNING HOME, *supra* n. 83 at 3-5.

Indefinite Detention has Grave Consequences for Individuals Traumatized by Torture and Ill-Treatment

Taken as a whole, the literature strongly suggests that the uncertainty of an indefinite detention has the potential to cause physical disease and psychological disorders in healthy individuals. As noted above, however, context matters. It is therefore necessary to evaluate the harm that such a detention imposes on those most vulnerable to its harmful effects, namely, those who are suffering the ill effects of torture and other cruel, inhuman, or degrading treatment. National security detainees held at Guantánamo who, in addition to having been subjected to ill-treatment, are held in conditions of extreme isolation, and asylum seekers fleeing persecution, are two such vulnerable populations who are also specific targets of US policies that contemplate or permit indefinite detention.

National Security Detainees are Indefinitely Detained and Vulnerable to Harm

Approximately 175 individuals – only 15 of whom are considered “high value detainees” – are being held at Guantánamo in what is likely to remain a state of indefinite detention.¹⁰⁴ Sixty-five of these individuals having already been approved for transfer but that does not render their continued detention any less “indefinite”: political resistance to transferring any detainee into the United States means that these detainees will not be released unless government officials successfully establish or exploit diplomatic ties with the detainees’ countries of origin or, alternatively, find other foreign governments willing to take them.¹⁰⁵ At a time when thousands of immigrants, including many detained on account of immigration, not criminal, violations, languish in detention facilities pending the state department’s ability to negotiate their transfer, the prior administration’s effective – if false – branding of every detainee as the “worst of the worst” presages that diplomatic efforts on their behalf will fail more often than they succeed.¹⁰⁶

For the rest of the detainees who have neither been approved for transfer nor deemed suitable for prosecution, the creation of Periodic Review Boards pursuant to the March 7 Executive Order does little more than provide a veneer of process to what is likely to remain for many or most detainees a revolving door of indefinite detention – a state reminiscent of the outcomes available to K., the protagonist in the *The Trial*.¹⁰⁷ The experience of a recently released detainee from Bagram drives this point home:

104 GUANTÁNAMO TASK FORCE, *supra* n. 1 at 3. The report notes that of the 240 detainees whose situations the Task Force reviewed, 44 had already been transferred to foreign countries and the Attorney General had announced that the government would be prosecuting 12 others, while more recent reports from independent sources that concerning Guantánamo detainees indicate that as of November 2010, 174 detainees remained. A. Worthington, “Who Are the Remaining Prisoners in Guantánamo? Part Eight: Captured in Afghanistan (2002-07),” available at <http://www.andyworthington.co.uk/category/a-list-of-the-remaining-guantanamo-prisoners-new/>. See also “The Guantánamo Docket: High Value Detainees,” *supra* n.

105 GUANTÁNAMO TASK FORCE, *supra* n. 1 at 26-28 (describing presidential mandate issued to Secretaries of State and Defense to engage in diplomatic efforts with foreign nations to resettle detainees designated for release). *But see* 112th Congress, 1st Sess., H.R. 1473, § 1112(2)(c)(1), April 14, 2011 (complicating those efforts by making any resettlement plan contingent on there being no instance of a former Guantánamo detainee being released to a particular country and who then engaged in terrorist activities).

106 See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 684, 696 [2001] (noting the seven years of “sensitive repatriation negotiations” in which government had already engaged in its effort to transfer immigrant awaiting release from detention).

107 F. Kafka, *THE TRIAL* (Project Gutenberg: 2003) at 157-160. Here, K. is advised that “deferment” may be a better outcome than an “apparent acquittal” because “deferment ... consists of keeping proceedings permanently in their earliest stages Compared with an apparent acquittal, deferment has the advantage that the defendant’s future is less uncertain, he’s safe from the shock of being suddenly re-arrested and doesn’t need to fear the exertions and stress involved in getting an apparent acquittal just when everything else in his life is the most difficult ... [and] both have in common that they prevent the defendant being convicted ... [even if] they also prevent his being properly acquitted.”

I was released a few weeks ago. At my release an American colonel apologized to me. He said that they had concluded that I was innocent and that I had worked for the good of Afghanistan. He said that after 2.5 years! ... According to Afghan and international law you can detain a person for three months, but they hold people for years and years without any decision. Since the demonstrations, there are now reviews every six months, but there are so many people who have already been kept for years and who are still in the prison. Their detention just gets extended every time... In the end I was sent to two Afghan courts. They decided to release me. Two months after that the Americans released me. They don't care about the Afghan courts.... I wasted 2.5 years of my life.¹⁰⁸

- Medical storeowner, recently released from Bagram.

National Security Detainees Suffer from Psychiatric Disorders Due to Torture and Other Cruel, Inhuman, or Degrading Treatment

Since 2005, PHR has documented evidence of severe and prolonged physical and mental trauma among nearly all former national security detainees it has had the opportunity to evaluate. These traumas are consistent with torture even when tested against the more restrictive definition advanced by the Office of Legal Counsel in 2002.¹⁰⁹ The practices that caused these injuries include enhanced interrogation techniques authorized by the Bush Administration as well as unauthorized forms of cruelty made possible by a permissive command environment in which US personnel were encouraged to “take the gloves off.”¹¹⁰ These practices included:

- sensory deprivation;
- isolation;
- sleep deprivation;
- forced nudity;
- the use of military working dogs to instill fear;
- sexual humiliation, molestation and assault;
- religious exploitation;
- mock executions and threats of harm with handguns and power drills;
- the threat of violence or death toward detainees or their loved ones, including sexual assault of female family members, and murder of detainee’s children;
- waterboarding;
- exposure to extreme cold (including induced hypothermia);
- stress positions;
- extreme sensory deprivation and overload; and
- shaking, striking, and other physical abuse including the application of pressure to the arteries on the sides of a detainee’s neck resulting in near loss of consciousness.¹¹¹

Given PHR’s consistent findings of trauma among former detainees and the government’s continued prohibition against independent medical and psychiatric evaluation of currently held detainees,¹¹² there is reason to be concerned that the practices that caused the documented

¹⁰⁸ Martine van Bijlert, *Stories people tell (2): Bagram prison; not a single good day*, Afghanistan Analysts Network, available at <http://aan-afghanistan.com/index.asp?id=1543>.

¹⁰⁹ See Iacopino, *supra* n. 6 at 34; PHR, *AIDING TORTURE*, *supra* n. 6; PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n. 7; PHR, *BREAK THEM DOWN*, *supra* n. 7; PHR/HRF, *LEAVE NO MARKS*, *supra* n. 7.

¹¹⁰ PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n. 2 at 7.

¹¹¹ See Iacopino, *supra* n. 6 at 34; PHR, *AIDING TORTURE*, *supra* n. 6; PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n. 7; PHR, *BREAK THEM DOWN*, *supra* n. 7; PHR/HRF, *LEAVE NO MARKS*, *supra* n. 7.

¹¹² Brenner, *supra* n. 5 at 470.

injuries have been the rule rather than the exception for the seven to nine years that most of these detainees have been in US custody.

Ill-treatment of the kinds to which these detainees have been subjected has been shown to be associated with severe depression, anxiety, and PTSD.¹¹³ Independent evaluations of detainee medical records, corroborated by reports from lawyers and reporters indeed reveal a high prevalence of “depression, anxiety, psychosis, and personality disorders.”¹¹⁴ These symptoms are highly consistent with torture, particularly where they develop in detainees who had no history of psychological problems prior to being detained.¹¹⁵ Moreover, reports of increased dissociation, schizophrenia and psychosis among Guantánamo detainees suggest that their mental status has been additionally and severely compromised by conditions of detention more restrictive and isolating than conditions at Supermax facilities here in the United States as well as – surprisingly – at Bagram Air Base in Afghanistan.¹¹⁶ This highly traumatized population is most vulnerable to the harms caused by the ongoing uncertainty, uncontrollability, and unpredictability of indefinite detention.

Indefinite Detention Exacerbates Torture-Induced Mental Pain and Psychological Disabilities

*Now I am in a bad situation. I feel like half my life is gone. My economic situation is bad, my savings are gone. My health is not well. My legs hurt, I don't know why, maybe because of the lack of exercise ... I don't feel well at all. I am afraid that, because this happened once for no reason, it may happen again. Who can guarantee me that I will not be unlucky again? When I was arrested I was engaged. I still am, but I have no money or income. So much happened in those years, I cannot remember it all There was not one good day in all those years. We were not treated like humans. Even though we had done nothing wrong and they had no information against us.*¹¹⁷

- Medical storeowner, recently released from Bagram

As the debate over indefinite detention intensifies, the example of Ali Saleh Kahlah al-Marri, detained for 6 years without charge, may prove cautionary to those who think that detention can be designed in a humane way. A Charleston lawyer who now speaks to Marri by phone every few days and visits him in person every other week believes that nothing has been tougher on his client than the uncertainty of not knowing if he would ever be released. The lawyer said, “He would have preferred beatings. He'd say, ‘Andy, it's worse than beating.’ He wanted to be sent to Egypt to be renditioned. He'd say, ‘Torture me - but end it.’”¹¹⁸

113 See, e.g., Basoglu, *supra* n. 34.

114 Brenner, *supra* n. 5 at 470.

115 PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n. 1 at 68 [describing PHR's physical and psychological evaluation of Rasheed, whose medical file lacks any indication of psychiatric disorder upon his arrival at Guantánamo [after being transferred there from Bagram and Kandahar prisons in Afghanistan] but that, over the course of his four years of detention at Guantánamo, evidence medical observation of increasingly severe psychopathology]. See also V. Iacopino and S. Xenakis, *Neglect of Medical Evidence of Torture in Guantánamo Bay: A Case Series*, 8, 3 PLoS Med. 1, 3 [April 2011] [“medical records indicate that, prior to detention in GTMO, none of the detainees had any past psychological history or family history of psychological problems”].

116 “Scientific studies name hallucinations, psychotic states and regressive behavior as frequent and typical effects of isolation.” *BROKEN LAWS, BROKEN LIVES*, *supra* n. 1 at 68. That these effects would be observed in Guantánamo detainees should come as no surprise where, for example, “none of the men currently held at Guantánamo have been allowed to receive a visit from a family member or friend, and few have even been allowed to make a phone call home.” HWR, *LOCKED UP ALONE*, *supra* n. 100 at 15, 22-23. By contrast, inmates at the federal Supermax prison, including convicted criminals like Zacarias Moussaoui, the September 11 conspirator, are permitted several visits per month from family and friends, regular phone calls and recreation opportunities, while detainees at Bagram Air Base are permitted video conference calls with family members. *Id.*

117 van Bijlert, *supra* n. 108.

118 Mayer, *supra* n. 38 [describing case of al-Marri who was indefinitely detained in isolation in South Carolina for six years before finally being charged and prosecuted in federal court in 2009]. al-Marri is currently serving an 8-year

It is well known that healthy individuals can develop psychopathology when subjected to the isolating and restrictive conditions of Supermax facilities.¹¹⁹ It has also been widely acknowledged that those same conditions of confinement exacerbate the symptoms of inmates with pre-existing mental illnesses, causing them “severe psychiatric morbidity, disability, suffering, and mortality.”¹²⁰

Likewise, indefinite detention, which can create severe psychological distress and physical disease in healthy individuals, must be understood to exacerbate and perpetuate the suffering of detainees with psychiatric disorders like PTSD, depression and other psychopathology. Unlike mentally ill inmates, however, whose psychiatric disorders predate their Supermax confinement (and may have contributed to them having committed the underlying offense and serving time in a Supermax facility), national security detainees at Guantánamo appear, on the whole, to have had no prior history of psychiatric disorders, hence the mental suffering exacerbated and perpetuated by indefinite detention is mental suffering caused by the treatment and conditions they have endured in US custody.¹²¹

Helplessness and fear are two of the principal triggers of PTSD,¹²² and inducing feelings of dread, dependency, helplessness, and futility was the purpose and effect of the interrogation tactics used on national security detainees.¹²³ The uncertainty, uncontrollability, and unpredictability created by indefinite detention likewise provoke feelings of dread and helplessness.¹²⁴ Clinicians and researchers have noted that the cumulative effect of multiple forms of maltreatment must be understood in exponential terms, rather than linear, with each form of abuse amplifying the effect of other forms of abuse. As one report noted:

*In interviews, former detainees used words like “futile,” “desperate,” “helpless,” and “hopeless” to describe their feelings as they reflected on their incarceration at Guantánamo. As months turned into years, the cumulative effect of indefinite detention, environmental stressors, and other forms of abuse began to exact an increasing psychological toll on many detainees.*¹²⁵

For national security detainees who continue to suffer the mental and physical effects of torture, and who are also subjected to extreme conditions of detention known to cause extreme

prison sentence in the US Penitentiary, Florence in Colorado (a Supermax facility), having been convicted of one count of conspiracy to provide material support or resources to a foreign terrorist organization.

119 See, e.g., Haney, *supra* n. 30.

120 Arrigo, *supra* n. 82 at 633 (quoting *Jones v. Berge*, 164 F.Supp. 2d 1096, 1101 (W.D. Wis. 2001)); HWR, LOCKED UP ALONE, *supra* n. 100 at 20-21.

121 Iacopino and Xenakis, *supra* n. 115 at 3.

122 Friedman, *supra* n. 56 at 0.

123 PHR/HRF, LEAVE NO MARKS, *supra* n. 7 at 6, 16, 28; Army Regulation 15-6: *Final Report, Investigation into FBI Allegations of Detainee Abuse at Guantánamo Bay, Cuba Detention Facility* (the Schmidt Report) 1 Apr 05 (Amended 9 Jun 05), at 7-8, 15-16 (describing sexual humiliation of detainees as accepted “futility” techniques); J. Mayer, *The Black Sites: A rare look inside the CIA’s secret interrogation program*, THE NEW YORKER, August 13, 2007 (describing CIA paradigm as starting with isolation and then moving to “eliminate the prisoners’ ability to forecast the future – when their next meal is, when they can go to the bathroom – [causing the detainee to experience] dread and dependency”).

124 *Id.* See also Tyson, *supra* n. 61 at 81; Levin, *supra* n. 40 at 460. See also Pourgourides, *supra* n. 42 at 673. Pourgourides’ clinical study of asylum detainees in the UK “found that detainees are rendered hopeless and powerless in detention. They have to reconcile the contradiction of seeking sanctuary in a climate of ongoing threat and hostility. The unknown duration and reasons for detention mean they are unable to make sense of their predicament and deal with it in a meaningful way. The unpredictable outcome of detention, in particular the fear of deportation is a constant cause of stress. Detention denies asylum seekers the resources to cope with adversity, blocks adaptation to the host society and impairs psychological healing. The responses to detention, including despondency, demotivation, anxiety and depression are understandable responses to an abnormal situation. They can manifest in constellations of symptoms consistent with diagnoses of [PTSD], depression, anxiety, and psychosis. However, they can also be understood as universal manifestations of misery and suffering. This misery and suffering are generated by the practice of detention.”

125 Human Rights Center *et al.*, GUANTÁNAMO AND ITS AFTERMATH: U.S. DETENTION AND INTERROGATION PRACTICES AND THEIR IMPACT ON FORMER DETAINEES, August 2008 at 3-4 (emphasis in original).

psychopathology, the anxiety, helplessness, dread, and hopelessness caused by the uncertainty of their detention rises to the level of cruel, inhuman, or degrading treatment.¹²⁶

Forensic evaluations indicate that even after being released and reunited with their families and re-integrated into their communities, detainees continue to suffer from the psychological, social, and physical wounds caused by their ill-treatment. These findings comport with clinical observations of prisoners of war and Holocaust survivors.¹²⁷ Furthermore, prisoners released from captivity have been found to be at risk of long-term PTSD, with possible contributors being “persistent persecution after release, and lack of rehabilitation and of social support.”¹²⁸ Although treatment for PTSD may not guarantee full recovery, and some symptoms of PTSD such as “level of intrusion, somatization, and major depression” appear to be particularly resistant to treatment, significant improvements have been noted in terms of “posttraumatic hyperarousal and avoidance, substance abuse, and dissociation” in former detainees who had regular access to competent psychological support.¹²⁹ Without access to care and so long as the psychological wounds continue to be re-opened by fresh harms, indefinite detention forecloses any opportunity for detainees to heal.

National Security Detainees Are At Special Risk of Continued Psychological and Physical Abuse

In addition to perpetuating the trauma caused by past ill-treatment, indefinite detention leaves national security detainees vulnerable to several specific types of physical and psychological abuse. For example, because Guantánamo detainees lack the kinds of procedural avenues for raising legitimate complaints, they are more likely than inmates in US jails and prisons to resort to hunger strikes as a form of protest.¹³⁰ And notwithstanding government officials’ tendency to dismiss hunger strikes as mere acting out, the link between hunger strikes and the indefinite nature of these detainees’ detention is, as military personnel have conceded, explicit: in 2002 and again in 2005, US personnel at Guantánamo described detainee hunger strikes as “protest[s] rooted in uncertainty over their indefinite detention and their fate.”¹³¹ This form of protest places detainees at serious risk of physical and psychological harm. As a former prison doctor put the point:

[t]he lack of ... protections and alternative means of resolution of legitimate disputes in US detention facilities such as Guantánamo is the faulty foundation that actually sets the stage for
1) more hunger strikes, and
*2) hunger strikes that are clinically more difficult [to] resolve ... without the use of force.*¹³²

126 PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n.7 at 99 (“it must be recognized that multiple abusive techniques were usually used in combination presumably for the intended effect of amplifying physical and psychological pain”). See also Basoglu, *supra* n. 34 at 135. That there is as much research on the effects of torture reflects the sad truth that the field of torture studies has exploded since 2001: A search of PubMed for articles with the term “torture” in the title or abstract yielded 1258 results since September 11, 2001; when restricted to the 100 years prior to September 11, 2001, the same search produced 0 results.

127 PHR/HRF, *LEAVE NO MARKS*, *supra* n. 7 at 44-45; PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n. 7 at 118.

128 H. Johnson and A. Thompson, *The development and maintenance of post-traumatic stress disorder (PTSD) in civilian adult survivors of war trauma and torture: A review*, 28 *CLINICAL PSYCHOLOGY REVIEW* 36, 25 (2007).

129 Bichescu, *supra* n. 78 at 25.

130 A. Leighton, *What will happen to us?* Associated Press, March 3, 2002 (quoting the commander of Guantánamo naval base as identifying the “underlying complaint” motivating hunger strikers as concern about the future. “The single biggest complaint is that they want to know what will happen to them”). See also PHR, *BROKEN LAWS, BROKEN LIVES*, *supra* n. 1 at 65 (Guantánamo detainee who “was reported as participating in a hunger strike demand[ed]: “Either send me home or prosecute me”).

131 Leighton, *supra* n. 130; T. Golden, *Tough U.S. Steps in Hunger Strike at Camp in Cuba*, *NY TIMES*, Feb. 9, 2006 (“military officials and the lawyers agreed that when another wave of hunger strikes began in early August [2005] they were more generally focused on the indefinite nature of the detentions and that it was harder for the authorities there to address”).

132 S. Allen, “The challenge of hunger strikes and the risk of medical complicity in abuse and torture in U.S. detention

While a “successful” hunger strike may result in the detainee’s death, forced feeding, the typical response on the part of US officials, causes psychological scars and places the striker at risk of “major infections, pneumonia, and collapsed lungs.”¹³³

Unfortunately, despite President Obama’s intention to break sharply with Bush-era tactics, an intention expressed most forcefully in the first days of his administration, some of the policies pursuant to which those tactics were implemented – as well as key personnel responsible for their implementation – remain in place today.¹³⁴ As PHR and other NGOs have noted in correspondence with Defense Department personnel, Appendix M of Army Field Manual 2-22.3, describes interrogation techniques in language that “give[s] rise to human rights concerns or that risk[s] sowing ambiguity.”¹³⁵ Specifically, Appendix M employs permissive and vague language concerning sleep manipulation and sensory deprivation.¹³⁶ These two techniques have consistently been shown to cause “high levels of depression, anxiety, paranoia ... impaired cognition, susceptibility to suggestion [and] dissociative states” even in individuals who voluntarily engage in activities such as polar expeditions or space exploration that they understand will expose them to these conditions.¹³⁷ In light of what is now known about the use of torture and abuse to “soften” detainees as well as the efforts undertaken by the Office of Legal Counsel to manipulate language and exploit legal loopholes in an attempt to legitimate such treatment, government assurances that permissive and ambiguous language will not be misused are hollow, at best.

Likewise, the continued presence of behavioral science consultation teams (commonly known by the acronym “BSCT”) that are known to have exploited medical information about detainees’ psychological vulnerabilities for purposes of crafting targeted interrogation strategies that would “break” the detainee physically and psychologically, gives at least the appearance that despite a change of administration, nothing has actually changed at Guantánamo Bay.¹³⁸ PHR fears that policies that may be interpreted as permitting torture and the presence of personnel associated with facilitating torture create the opportunity for these acts to continue.

Asylum Seekers Are Especially Vulnerable to Harm When Indefinitely Detained

Since assuming responsibilities formerly delegated to the Immigration and Naturalization Service, Immigration and Customs Enforcement (ICE) (an arm of the Department of Homeland Security (DHS)), has detained tens of thousands of people who fled persecution in their countries of origin and sought asylum in the United States. In 2008, the last year in which DHS issued its semi-annual report to Congress, 8,480 asylum seekers were detained.¹³⁹ Although

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- facilities,” Testimony before U.S. Helsinki Commission on Medical Evidence of Torture, available at <http://physiciansforhumanrights.org/library/statements/statement-2008-7-25.html>.
- 133 ACLU Letter to Defense Secretary Gates in Response to Force-Feeding of Guantánamo Detainees, January 9, 2009, available at <http://www.aclu.org/human-rights/aclu-letter-defense-secretary-gates-response-force-feeding-guantanamo-detainees>.
- 134 See PHR, *BREAK THEM DOWN*, *supra* n. 7 at 47 (reporting on behavioral science consultation teams’ (BSCTs) roles in conveying information about detainees’ physical and psychological vulnerabilities to interrogators so that interrogators might exploit those weaknesses); Iacopino and Xenakis, *supra* n. 115 at 3. See also United States Army Medical Command, OTSG/MEDCOM Policy Memo 09-053, January 7, 2010 and US Army Behavioral Science Consultation To Detention Operations, Intelligence Interrogation, Detainee Debriefing, and Tactical Questioning, 1-29 (suggesting a current, continuing tactical role for Behavioral Science Consultation Teams in interrogations); Department of Defense Directive, Number 3115.13 at 10, December 9, 2010 (defining “mobile interrogation team” as including “behavioral science experts” that “is organized, trained, equipped, and dispatched by the [interagency body responsible for interrogating high-value detainees] to interrogate [those] detainees”).
- 135 Appendix M Letter, Nov 29 2010, Letter from PHR & affiliated orgs with recommended updates and changes to Appendix M, available at <http://physiciansforhumanrights.org/site-search/search.jsp?query=appendix%20m>
- 136 *Id.*
- 137 Brenner, *supra* n. 5 at 472.
- 138 See *supra* n. 134.
- 139 DHS/ICE Detention and Removal Operations Report Required by Section 903 of the Haitian Refugee Immigration

some asylum seekers are detained for days, others languish in detention for months or even years and, most importantly, none know when they will be released, rendering all of their confinements “indefinite.”¹⁴⁰ On the day that an asylum seeker is taken into custody by ICE, she has no way of knowing when she will be released or whether she will be released freely into the United States or sent back to the country from which she fled.

DHS has issued guidelines that state the agency’s intention to shift the presumption away from mandatory detention for at least some sets of asylum seekers.¹⁴¹ Unlike regulations, however, guidelines are not binding on the agency, which means that chances are high that two identically situated asylum seekers will be treated differently depending on how and where they enter the United States and on the disposition of the particular officers they meet.¹⁴² Furthermore, the guidelines appear to provide immigration officials with unfettered discretion to detain asylum seekers that an agent believes may be “dangerous to the community,” discretion that invites determinations based entirely on prejudice and instinct rather than evidence, thus contributing to the asylum seeker’s experience of indefinite detention being rife with uncertainty, uncontrollability, and unpredictability.¹⁴³

Asylum Seekers Are a Traumatized Population

Asylum seekers arrive on US shores having escaped persecution, illegal confinement, torture, rape, and loss, followed by the stress of fleeing their home and often being forced to abandon their family.¹⁴⁴ The numbers are stunning: in one study of detained asylum seekers, investigators found that 74% had been tortured before arriving in the US; 67% had been imprisoned in their country of origin; 59% reported the murder of a family member or friend, and 26% reported having been sexually assaulted prior to immigrating.¹⁴⁵ Although conditions of immigration detention tend not to be nearly as restrictive as the conditions in which national security detainees are held, asylum seekers are another population that is especially vulnerable to the harmful physical and psychological effects of an indefinite, indeterminate detention.

Indefinite Detention Exacerbates Asylum Seekers’ Existing Psychological and Physical Vulnerabilities

*Because of being detained, not knowing when I will be allowed to get out, or whether I will get out ... If I were not in detention, these stresses would be decreased because I would be free and I would be able to occupy myself... I never expected this was what was going to happen to me. I thought I was going to a place where things would get better, but life is even more difficult [now] because I am here. I am not free. I feel powerless and I don’t know what is going to happen to me.*¹⁴⁶

- Detained Asylum Seeker

When I am talking to you now it is as if you are shaking, (he said while waving his hand back and forth to express the motion he sees). When I’m nervous, I shiver from the inside and sweat... When I’m doing something and then it comes to my mind that I’m in prison and I don’t know what will happen to me, I feel as if my heart... it starts pumping very fast. I feel like some-

Fairness Act (PL 105-277), December 4, 2009, at 3 & 1/21.

140 See, *id.* at 17/21 (indicating that 100 asylum seekers, including many who met the “credible fear” standard, were still in custody one year after being detained).

141 A/HRC/WT.6/9/USA/1, *supra* n. 17 at ¶ 93.

142 See HRF, SEEKING PROTECTION, FINDING PRISON, *supra* n. 65 at 33.

143 A/HRC/WT.6/9/USA/1, *supra* n. 17.

144 Pourgourides, *supra* n. 42 at 673.

145 Keller, *supra* n. 8; PHR, FROM PERSECUTION TO PRISON, *supra* n. 9 at 50-51.

146 PHR, FROM PERSECUTION TO PRISON, *supra* n. 9 at 67.

one who just received a message that his relative died ... When I think of all these things I'm going through, I feel so restless I don't want anyone to come near me.¹⁴⁷

- Detained Asylum Seeker

The main problem is that we don't know what is going to happen. At least with a prison sentence you know you are lessening your time. But here, even after three years they may still send you back In my country I was in prison for five days and there were beatings, but then they release you after five days. But you get here to a democratic country, and it goes on and on with no release. It's another kind of torture – mental torture....No one knows we're here.¹⁴⁸

- Asylum detainee in US detention facility after 6 months of detention

The most threatening aspect [of detention] is loss of liberty for an indeterminate period of time – detention without trial imposed on people fleeing injustice in a context where no crime has been committed.¹⁴⁹

- Physician/researcher detained in Australian Refugee Detention Center

[D]etention without time limit, no matter how reasonable the conditions, is extremely stressful. When combined with an uncertain future, language difficulties, a perceived or real lack of information and the fact that some detainees appear to be terrified at the prospect of being deported, the stress increases.¹⁵⁰

- British Inspector of Prisoners

Detention can induce fear, isolation and hopelessness, and exacerbate the severe psychological distress frequently exhibited by asylum seekers who are already traumatized.

PHR and others have long observed that “[d]etention can induce fear, isolation and hopelessness, and exacerbate the severe psychological distress frequently exhibited by asylum seekers who are already traumatized.”¹⁵¹ For some asylum seekers, the clinical signs of depression, anxiety and PTSD with which they present at the start of detention worsen over the length of their detention, with detentions of longer durations causing long-term health effects years after release.¹⁵² For others, detention results in the development of “significant psychotic symptoms ... [that] were not present prior to detention.”¹⁵³

In one study, a (detained) Australian medical doctor documented several stages of depression among his fellow asylum detainees. He observed that detainees entered detention facilities shocked at having been locked up rather than granted the refuge they sought. Shock typically gave way to “hope that confinement [would] be short-lived,” but as detainees realized “that they face[d] a serious threat of forcible repatriation or detention for an indeterminate period, or both,” they tended to develop “major depressive disorder[s] ... dominated by hopelessness, passive acceptance and an overwhelming fear of being targeted or punished by the managing

¹⁴⁷ *Id.* at 65-66.

¹⁴⁸ *Id.* at 7.

¹⁴⁹ A. Sultan and K. O’Sullivan, *Psychological disturbances in asylum seekers held in long term detention: a participant observer account*, 175 *Med J of Australia* 593 (2001).

¹⁵⁰ Pourgourides, *supra* n. 42 at 674.

¹⁵¹ PHR, *FROM PERSECUTION TO PRISON* at 9.

¹⁵² Keller, *supra* n. 8 at 1722; Robjant, *supra* n. 42 at 310 (“The detention experience incapacitates detainees, in that it does not allow utilisation of usual coping skills, and constitutes a meaningless environment. Detainees are therefore preoccupied by time and experience extreme boredom and frustration as well as a sense of having no future ... detention itself is an ongoing trauma”).

¹⁵³ Robbins *supra* n. 42 at 408. See also Ichikawa, *supra* n. 82 at 345 (reporting that “post-migration detention of Afghan asylum seekers in Japan was independently related to their worsened mental health”).

authorities.”¹⁵⁴ Many detainees responded to the stress of detention by becoming pathologically passive; others engaged in aggressive behavior against themselves or others, resulting in a high prevalence of self-harm.

Over the years, several groups of researchers have hypothesized that the worsening of asylum seekers’ mental health and the development of more debilitating symptoms was “clearly linked to a sense of helplessness and hopelessness which is an integral aspect of indefinite detention.”¹⁵⁵ As one clinician noted, “[t]he experience of detention compounds the misery of refugees. Captivity is stressful in any context but is particularly debilitating when it occurs over an indeterminate period and to people who have had previously traumatic experiences of detention.”¹⁵⁶

One explanation for the exacerbating effect of indefinite detention is the extent to which the trauma of being taken into custody triggers memories of the trauma an asylum seeker endured – or witnessed a loved one endure – in his country of origin.¹⁵⁷ For example, unlawful disappearance is a common method employed by security forces to control a civilian population through fear and a mistrust of authority. An asylum seeker who suffers from PTSD caused by having being unlawfully disappeared (or from having lost a family member to an unlawful disappearance) is likely to re-live that underlying trauma upon being suddenly and unexpectedly taken into custody and handcuffed by US officials, sent to an unknown location and provided with no information about whether or when he will be released or deported. Moreover, as the research suggests, individuals who are genuinely shocked at finding themselves in custody (as opposed to the detention of individuals who engage in activities they know are likely to result in detention) are the most vulnerable to the damaging effects of uncertainty and unpredictability.¹⁵⁸

For asylum seekers, the uncertain duration of their detention, with all of its attendant health and social consequences, is compounded by the fact that conditions and events surrounding immigration detention are unpredictable, thus aggravating the detainees’ sense that their situation lacks any control. Immigration detainees, including many legal immigrants, are “transferred heedlessly,” with ICE “subjecting detainees to a chaotic game of musical chairs [that can only be described as] haphazard.”¹⁵⁹ Many of these transfers take place in the middle of the night and with full knowledge (on the part of ICE) that the transfer will place the detainee out of reach of his attorney, family, and community support, distant from exonerating evidence, and into jurisdictions that interpret federal legislation in ways more hostile to immigrants’ rights.¹⁶⁰ There is also evidence that ICE has deported people in the middle of the night, without prior notice to deportees, their lawyers, or family members, and, on occasion, with the forced admin

154 Sultan and O’Sullivan, *supra* n. 149 [noting that “[p]re-detention factors such as torture or a predisposition to depression play a critical role” in certain stage of depression in detained refugees].

155 Robbins *supra* n. 42 at 408. See also Silove, *supra* n. 36 at 367 [noting “the evidence suggests that the indeterminacy of detention makes detention considerably more difficult to endure”].

156 Pourgourides, *supra* n. 42 at 673.

157 Steel and Silove, *supra* n. 42.

158 Saab, *supra* n. 27 at 1250. See also Koopowitz, *supra* n. 47 at 499.

159 Bernstein, *supra* n. 8. Compare Griffeth, *supra* n. 27 at 259 [noting that one team of researchers working with Iraqi citizens and prisoners of war realized significant gains of cooperation and improvement in mental health status when they were able to provide detainees in their care with warnings about transfers, written information about where exactly they were being detained and where exactly they were being transferred to, information that measurably decreased anxiety and “helped defuse fear of the unknown”].

160 Bernstein, *supra* n. 8 [reporting that “the jurisdictions receiving the most transferred detainees is the Federal Court of Appeals for the Fifth Circuit, covering Louisiana, Mississippi, and Texas – which is widely known for decisions hostile to the rights of noncitizens and has the worst ratio of immigration lawyers to detainees”].

istration of drugs.¹⁶¹ Footsteps approaching a detainee's bunk at night may therefore herald an unexpected transfer to another location or a plane ride back to the country where he was persecuted.

The diffuse and partially-privatized nature of the immigration detention system has consequences, insofar as they heighten and amplify the consequences of stress, anxiety, and social isolation associated with the indeterminacy of indefinite detention. Many immigration detention centers housing asylum seekers are located in rural areas, long distances from urban communities and even further from whatever familial, social, or linguistic ties an asylum seeker may have.¹⁶² Asylum seekers would appear, therefore, to be particularly susceptible to the physical risks of social isolation, including the aggravation of cardiovascular disease, rises in stress-related hormones and physiological changes that can adversely affect the body's immune symptom, and to its psychological risks, which threaten to compromise the detainees' ability to cope and adapt to the stress and distress associated with being in an uncertain, uncontrollable, and unpredictable situation.¹⁶³

Because asylum seeking detainees are often held in prison facilities, detainees who are suicidal or experiencing acute episodes of mental illness risk being placed in segregation units intended to discipline or punish prisoners, a practice that even the Office of Inspector General (OIG) recognizes "exacerbates mental illness, ... is counterproductive to stabilizing a detainee ... [and is associated with] increased levels of depression and anxiety."¹⁶⁴ Indeed, the OIG has warned that "[i]t is not possible to make segregation into a therapeutic setting in which a mentally ill [asylum seeking] detainee's condition would improve."¹⁶⁵

Finally, a problem unique to asylum seekers is the fact that not only do some family connections shatter on account of the forced separation, but family connections can be shattered by the trauma of being indefinitely detained together. Observations from Australia, a country that instituted mandatory detention of asylum seekers long before such policies were instituted in the United States, reveal that parents age visibly as they suffer the physical and psychological consequences of the uncertainty of detention, and are wracked by guilt at having exposed their family to such conditions, situations that may lead to "role reversal – where young children ha[ve] to care for distressed or incapacitated parents."¹⁶⁶

Legal Analysis

PHR has issued several reports documenting evidence that national security detainees were subjected to torture and abuse at the hands of US personnel, and in those reports, PHR has outlined the ways in which this ill-treatment violates US domestic law as well as international treaties to which the US is a signatory.¹⁶⁷ In addition, many NGOs have forcefully argued that in-

161 AMERICAN GULAG, *supra* n. 9 at 69-84 (describing report of detainee being forcibly sedated in order to be subdued for deportation and another deportation being accomplished in the middle of the night).

162 OIG Report, *supra* n. 89 at 10; HRF, SEEKING PROTECTION, FINDING PRISON, *supra* n. 65 at 55.

163 Government and non-governmental organizations have also raised concerns about ICE's ability to manage and even keep track of the mental health of the asylum seekers in its care. To the limited extent ICE is responsible for staffing detention centers (i.e., 18 out of nearly 250 total centers), mental health vacancies are reportedly hovering at 50%, with remote and undesirable locations blamed for some of those vacancies. In addition, ICE exercises little oversight and collects very little data about the mental health of detainees held at the approximately 230 detention centers that are run by private contractors or other state or local entities. See OIG Report, *supra* n. 89 at 1, 5-6; HRF, SEEKING PROTECTION, FINDING PRISON, *supra* n. 65 at 52.

164 OIG Report, *supra* n. 89 at 15.

165 *Id.*

166 Silove, *supra* n. 24 at 368.

167 See, e.g., PHR, BREAK THEM DOWN, *supra* n. 7 at 101-122; PHR/HRF, LEAVE NO MARKS, *supra* n.7 at 37-41.

definite detention violates prohibitions against arbitrary detention under both domestic and international law.¹⁶⁸ The legal arguments advanced by these organizations provide a blueprint for advocates and policy makers alike on these two critical and troubling aspects of United States immigration, foreign and national security policy.

The legal discussion that follows supplements these prior analyses with an argument focused specifically on the physical and psychological harms associated with indefinite detention. This discussion begins by arguing that individuals in indefinite detention – i.e., individuals who are not being detained for the purpose of prosecuting alleged crimes – are entitled to the most vigorous protections of the due process clause of the Fifth Amendment, which prohibits the government from subjecting detainees to treatment that has a punitive purpose or effect, and that they should not be limited to the much weaker protections of an imported Eighth Amendment standard.¹⁶⁹ The discussion goes on to argue, however, that the amplifying and exacerbating effect of indefinite detention on the physical and psychological health of previously traumatized populations rises to the level of cruel, inhuman, or degrading treatment, and thus violates even the Eighth Amendment's deliberate indifference standard, as well as domestic and international law prohibiting such treatment.

Indefinite Detention Violates the Due Process Rights of Detainees

Evidence that the indeterminacy of indefinite detention causes serious physical and psychological harm in healthy individuals and exacerbates pre-existing psychological injuries in vulnerable individuals raises the question whether government policies purportedly justifying such detentions are unlawful and whether government officials implementing such policies are liable for the resulting harms. Answering these questions in a complete and comprehensive way would require an exhaustive analysis of legal considerations that define the scope of the detaining authority's obligations to detainees, the nature of detainees' rights, and the array of available remedies, as well as an exhaustive analysis of the fact-specific considerations that would affect that legal analysis – both of which are beyond the scope of this report.¹⁷⁰

168 Inter-American Commission on Human Rights, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS, December 30, 2010, available at <http://cidh.org/countryrep/USImmigration/TOC.htm>; HRF, SEEKING PROTECTION, FINDING PRISON, *supra* n. 65 at 33; PHR, From Persecution to Prison, *supra* n. 9 at 156-166.

169 See *infra*, Part VI(A)(4) for a discussion of the applicability of the Eighth Amendment's "deliberate indifference" standard to the treatment of detainees.

170 The detaining authority's obligations and the scope of detainees' rights ultimately turns on factors not otherwise covered in this paper, including legal consideration such as

- (i) whether the detainee is being held pursuant to immigration or national security legislation or policies;
- (ii) whether, apart from the mental and physical injuries it causes, indefinite detention is ever constitutional, see, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (declining to consider constitutional concerns raised by possibility of indefinite detention under the AUMF on the facts presented); *Zadvydas*, 533 U.S. at 689 (avoiding constitutional question); Note, *Indefinite Detention of Immigrant Parolees: An Unconstitutional Condition?* 116 HARV. L. REV. 1868, 1870 (2003) (arguing that the entry fiction, which treats aliens paroled into the United States as being forever knocking at the gate and hence not entitled to the protection of Fifth Amendment, violates the unconstitutional conditions doctrine, which forbids the government from "condition[ing] entry into the United States on the relinquishment of one's right to be free from indefinite detention"); as well as
- (iii) whether statutes (such as § 7 of the Military Commissions Act of 2006 (MCA)) which purport to strip federal courts of jurisdiction to hear claims concerning the treatment and conditions of detention of certain classes of detainees, are constitutional. See, e.g., *al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 109 (D.D.C. 2010) (ruling that jurisdiction stripping provision of MCA prohibited court from reaching merits of detainee's claims). But see R. Fallon, Jr. and D. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights and the War on Terror*, 120 HARV. L. REV. 2029, 2063 (2007) (arguing that the MCA's "total preclusion of judicial review of challenges to conditions of confinement is unconstitutional").

Those legal considerations would, in turn, be affected by fact-specific considerations including, e.g.,

- (i) whether the detainee is being held within the geographic boundaries of the United States, at Guantánamo Naval Bay in Cuba, at Bagram Airfield in Afghanistan or at some other site controlled to some degree by US personnel, see, e.g., B. Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 481-95 (2010) (building the case for why *Boumediene's* reasoning that the Constitution applies to Guantánamo Naval Base should apply with equal force to Bagram Airfield in Afghanistan);

The goal of this section is therefore to develop a general framework for how claims based on the injuries identified in this report ought to be evaluated and how such claims might be prosecuted. This framework is grounded principally in the substantive liberty interest protected by the Due Process Clauses of the Fifth Amendment.

Indefinite Detention Implicates the Due Process Clause of the Fifth Amendment

The Fifth Amendment to the United States Constitution provides that “No person shall be ... deprived of ... liberty ... without due process of law.” The right to liberty protected by this clause is implicated when federal authorities detain individuals who have not been convicted of crimes.¹⁷¹ More important for present purposes, it is the substantive aspect of this constitutional right that is implicated when government authorities detain these individuals in a way that places them at a substantial risk of serious harm.¹⁷² In other words, if a detention scheme is unconstitutional as a matter of substantive law because it causes serious harm, then the scheme itself is illegitimate, and no amount of process by which a detainee can demonstrate that he is an inappropriate victim of that scheme can cure the constitutional defect. Accordingly, the Periodic Review Boards established by the Obama Administration’s March 7 Executive Order, which merely add layers of process to what will continue to be detention of an indefinite nature, cannot cure the substantive constitutional defects of such a scheme.

Most of the individuals indefinitely detained by the United States are currently entitled to claim due process protections; *all* should be. The use of the term “person” in the Due Process Clause has long been understood to include all persons within the territory of the United States, regardless of their legal status.¹⁷³ And while the Supreme Court has not entirely settled the question regarding the extent to which constitutional guarantees apply to aliens detained at Guantánamo,¹⁷⁴ where the Court has recognized that

1) Article 1, § 9, c. 2 of the Constitution applies to Guantánamo Bay on account of the United States exercising *de facto* control over the base,¹⁷⁵ and that

(ii) whether the detainee is a citizen and if not, what his legal status is;

(iii) who the custodians of the detention facility are and, importantly,

(iv) whether there is evidence that, in addition to suffering the harms associated with the uncertainty of their detention, a detainee has been subjected to torture or other cruel, inhuman, and degrading treatment or punishment.

171 *Bell v. Wolfish*, 441 U.S. 520 (1979). Parallel proscriptions apply to state custodians under the Fourteenth Amendment.

172 *Wilkins v. May* 872 F.2d 190, 195 (7th Cir. 1989) (“[I]f ever there were a strong case for ‘substantive due process,’ it would be a case in which a person who had been arrested but not charged or convicted was brutalized while in custody. If the wanton or malicious infliction of severe pain or suffering upon a person being arrested violates the Fourth Amendment – as no one doubts – and if the wanton or malicious infliction of severe pain or suffering upon a prison inmate violates the Eighth Amendment – as no one doubts – it would be surprising if the wanton or malicious infliction of severe pain or suffering upon a person confined following his arrest but not yet charged or convicted were thought consistent with due process”). See also *Miller v. Fairman*, 872 F.Supp. 498, 503 (N.D. Ill. 1994) (“the pretrial detainee’s right against punishment is a substantive due process right. No matter what procedures are used to punish an unconvicted pretrial detainee, [the Supreme Court’s decision, *Bell v. Wolfish*] would hold such punishment unconstitutional”).

173 *Zadvydas*, 533 U.S. at 693 (“the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent”); *Rosales-Garcia v. Holland*, 322 F.3d 386, 409 (6th Cir. 2003) [rejecting government’s contention that detention of excludable aliens did not implicate the Fifth Amendment: “We could not more vehemently disagree. Excludable aliens – like all aliens – are clearly protected by the Due Process Clauses of the Fifth and Fourteenth Amendments”].

174 Jennifer K. Elsea, CRS Report for Congress, “Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Courts,” 3 (January 26, 2010).

175 See *Boumediene v. Bush*, 553 U.S. 723, 770-71 (2008): It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history. The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our

2) Guantánamo detainees have a right to habeas corpus,¹⁷⁶ “any limitations on the applicability of the Constitution ... fly in the face of this Court’s long-held ... commitment to apply the Constitution’s due process and equal protection guarantees to all individuals within the reach of our sovereignty.”¹⁷⁷

Detainees Are Entitled to More Protective Treatment Than Convicted Prisoners

Indefinite detention implicates the Fifth rather than the Eighth Amendment.¹⁷⁸ This is significant for purposes of determining the scope of the government’s obligations as the detaining authority and the nature and scope of an individual’s rights as a detainee.

The government is entitled to great deference in its administration of prisons and its care and treatment of prisoners (i.e., individuals who have been convicted of crimes), and the hurdle that prisoners must clear to successfully challenge those conditions is concomitantly high.¹⁷⁹ A prison sentence is intended to be punitive and accordingly the government’s care and treatment of prisoners must simply satisfy the Eighth Amendment’s prohibition against punishment that is “cruel and unusual.” To succeed on their claims that prison conditions violate this prohibition, prisoners must establish that

- 1) the conditions are objectively foul and inhuman,¹⁸⁰ and
- 2) that prison officials were “deliberately indifferent” to the physical and mental risks these conditions created.¹⁸¹

This latter subjective element effectively requires that prisoners establish a malicious or sadistic intent on the part of prison officials in order to prevail.

The deference to which the government is entitled in its administration of facilities in which individuals who have *not* been convicted of crimes are detained and the concomitant hurdle detainees must clear to successfully challenge those conditions must therefore be lower. Indefinite detainees are ordinarily detained pursuant to civil or regulatory, not criminal, proceedings and hence their detention may not have either a punitive purpose or effect.¹⁸² Accordingly, the conditions of detention for detainees and the harms to which they are vulner-

Government. Under these circumstances the lack of a precedent on point is no barrier to our holding. (internal citation omitted).

176 *Id.*

177 *Jean v. Nelson*, 472 U.S. 846, 874 (1985) (Marshall, J., *dissenting*). See also *In re Guantánamo Detainee Cases*, 355 F.Supp.2d 443, 464 [D.D.C. 2005] (ruling that Guantánamo detainees are entitled to due process under the Fifth Amendment). This ruling was subsequently brought into doubt by several decisions of the DC Circuit, but later still it formed part of the context for the Court’s decision in *Boumediene*, in which it held that the Suspension Clause of the Constitution indeed applied to Guantánamo Naval Base.

178 *Ingraham v. Wright*, 430 U.S. 651, 671-72, n. 40 (1977) “[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law”).

179 See, e.g., *Alfred v. Bryant*, 378 Fed. Appx. 977, 980 (11th Cir. 2010) (affirming dismissal of inmate’s “frivolous” claim that sleeping on the ground for 18 days and lacking a functioning toilet violated the 8th Amendment, citing as support other dismissed conditions-related claims including, e.g., “sleeping on [an] unsanitary eating table or on a dirty mattress on the floor,” spending one month “in a filthy roach-infested cell without toilet paper for five days or soap, a toothbrush and toothpaste for ten days,” “sleeping on a steel bed without a mattress for eighteen days;” being housed in a blood and excretion covered cell where “prisoner received cleaning supplies”).

180 *Hudson v. McMillan*, 503 U.S. 1, 9 (1992) (conditions must constitute “extreme deprivation” to violate the Eighth Amendment).

181 See, e.g., *Hernandez v. Velasquez*, 522 F.3d 556, 560-61 (5th Cir. 2008) (rejecting inmate’s claim that being denied access to the outdoor recreation for more than a year violated the 8th Amendment because even if the inmate established that he suffered serious harm as a result of this deprivation, he was unable to establish that the prison officials were aware of facts from which they could draw an inference concerning the harm he was personally suffering but that they actually drew the inference and then ignored it).

182 See, e.g., *Hamdi*, 542 U.S. at 509 (reviewing authorization for non-penal detention of prisoners under the Authorization for Use of Military Force [AUMF], 115 Stat. 224); *Zadvydas*, 533 U.S. at 690 (deportation proceedings “are civil, not criminal, and we assume that they are nonpunitive in purpose and effect”).

able as a consequence are measured not by the Eighth Amendment's "minimum standard of care"¹⁸³ but by the "more protective fourteenth [or fifth] amendment standard."¹⁸⁴

The Supreme Court has identified two lodestars for guiding courts' analysis with respect to whether the conditions of detention violate detainees' due process rights:

*First, persons who have been involuntarily committed [in a civil proceeding] are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish. Second, when the state detains an individual on a criminal charge, that person, unlike a criminal convict, may not be punished prior to an adjudication of guilt in accordance with due process of law.*¹⁸⁵

Unfortunately, the Court has offered little in the way of concrete guidance to lower courts about how much latitude they can factor into their assessment without veering entirely off course.¹⁸⁶ Indeed, Justice Marshall questioned whether at least one of these lodestars might not be fundamentally flawed: Because incarceration and its effects represent an "infamous punishment," "determining whether a given restraint constitutes punishment is an empty semantic exercise [where the incarceration of pretrial detainees] is in many respects no different from the sanction society imposes on convicted criminals."¹⁸⁷

Consequently, applying the due process standard in a way that fulfills the promise of it being "more protective" of detainees' rights has proved to be a challenge for courts heavily schooled in Eighth Amendment jurisprudence – i.e., courts inundated with complaints from prisoners and yet often inured to the deplorable conditions in which so many of our country's prisoners are held.¹⁸⁸ Evidence of this is found in the countless decisions from jurisdictions all over the country in which, after noting that detainees retain Fifth Amendment liberty interests (interests that are somewhat sacrificed by prisoners upon conviction), courts test the objective constitutionality of conditions of detention against cases upholding the constitutionality of conditions in which convicted prisoners are held. These cases often go on to inappropriately require detainees to meet the Eighth Amendment's subjective component by establishing that custodians were deliberately indifferent to the harms that resulted from those conditions.¹⁸⁹

183 *Padilla v. Yoo*, 633 F.Supp.2d 1005, 1035 (N.D. Cal. 2009) ("In light of the Supreme Court's observation that the due process rights of pretrial detainees are at least as great as the Eighth Amendment protections available to a convicted prisoner, we have recognized that, even though the pretrial detainees' rights arise under the Due Process Clause, the guarantees of the Eighth Amendment provide a *minimum standard of care* for determining their rights") (emphasis in original).

184 *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004). See also *Youngberg v. Romeo*, 457 U.S. at 316 ("If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntary committed – who may not be punished at all – in unsafe conditions").

185 *Jones*, 393 F.3d at 931-32 (emphasis in original), quoting *Youngberg*, 457 U.S. at 321-22, and *Bell*, 441 U.S. at 535.

186 *Seling v. Young*, 531 U.S. 250, 266 (2001) illustrates this point. *Seling* concerned a challenge to Washington's sexually violent predator statute and was decided 22 years after the seminal case of *Bell v. Wolfish*, yet the *Seling* court noted that much about this area of the law remained unsettled: "This case gives us no occasion to consider how the civil nature of a confinement scheme relates to other constitutional challenges, such as due process, or to consider the extent to which a court may look to actual conditions of confinement and implementation of the statute to determine in the first instance whether a confinement scheme is civil [i.e., non-punitive] in nature."

187 *Bell*, 441 U.S. at 569 & 569 n. 7 (Marshall, J., *dissenting*) [citing *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)].

188 See, e.g., *Stevenson v. Carroll*, 495 F.3d 62, 69 n. 4 (3rd Cir. 2007) (reinstating pretrial detainees' complaint concerning conditions of detention after it was improperly analyzed by District Court according to Eighth Amendment standard); *Wilson v. Cook County Board of Commissioners*, 878 F.Supp. 1163, 1167 (N.D.Ill. 1995) (noting that the 7th Circuit looks to Eighth Amendment cases "to define the term punishment and the state of mind required to find that a detention facility official's actions amount to punishment.")

189 See, e.g., *Manarite v. Springfield*, 957 F.2d 953, 957-58 (1st Cir. 1992) (affirming ruling that, despite undisputed evidence that police chief

(i) had promulgated suicide prevention policies that required police to confiscate shoelaces from all individuals taken into custody, and

(ii) had been briefed on four shoelace-related suicides since the policy had been put in place, indicating that policy was not being enforced,

Cases construing the Eighth Amendment's requirements may, in egregious circumstances, be useful in illustrating the floor below which conditions of detention may not sink. However, if "detainees cannot be punished because they have not yet been convicted, then [they] cannot be subjected to conditions of confinement substantially worse than they would face upon [conviction]" or, as one court put it, "purgatory cannot be worse than hell."¹⁹⁰ To be true to the spirit of the Supreme Court's teaching, therefore, meeting the Eighth Amendment's lowest common denominator cannot be the end of the due process inquiry:

*[T]he Supreme Court in Bell did not endorse the notion that jail authorities have carte blanche to subject pretrial detainees to the same level of discomfort that would be acceptable under the Eighth Amendment for convicts. The proper inquiry under due process is whether the jail conditions bear a reasonable relationship to a legitimate goal, or whether they are arbitrary and purposeless.*¹⁹¹

Where a detention scheme has a civil rather than a penological purpose, the conditions should not have a punitive effect.¹⁹²

Application of Due Process Factors Suggests that Indefinite Detention is Unconstitutionally Punitive

Among the factors that courts have identified as relevant to the determination whether a detention scheme that is civil or regulatory on its face is unconstitutionally punitive, three stand out as particularly applicable to the problem of indefinite detention:

- a) whether detainees are treated worse than convicted prisoners;¹⁹³
- b) whether detainees are exposed to the challenged conditions for an extended period of time;¹⁹⁴ and
- c) whether the sanction "has historically been regarded as a punishment."¹⁹⁵

Applying these factors to policies purporting to justify indefinite detention, the balance tips powerfully toward a conclusion that the effects of such policies render them unconstitutionally punitive.¹⁹⁶

estate of individual who hung himself with laces [who had been taken into protective custody on account of public drunkenness] failed to prove that police chief had actual knowledge of the risk of suicide and hence had not been "deliberately indifferent". *But see Jones*, 393 F.3d at 933 ("If an incapacitated *criminal* defendant need not prove 'deliberate indifference' to state a substantive due process claim, then neither should a *civil* detainee, who retains greater liberty protections than his criminal counterpart") [emphasis in original].

190 *Jones*, 393 F.3d at 933, quoting *Lynch v. Baxley*, 744 F.2d 1452, 1461 [11th Cir. 1984].

191 *Miller v. Fairman*, 872 F.Supp. 498, 504 [N.D. Ill. 1994].

192 *Hamdi*, 542 U.S. at 518 ("It is now recognized that [c]aptivity [in war] is neither a punishment nor an act of vengeance, but merely a temporary detention which is devoid of all penal character") (internal quotation marks and citations omitted); *Zadvydas*, 533 U.S. at 690 (detention of individuals pending deportation proceedings "are civil, not criminal, and we presume that they are nonpunitive in purpose and effect"); *Basardh v. Obama*, 612 F.Supp.2d 30, 34 (D.C. 2009) (relying on *Hamdi* and granting Guantánamo detainee's habeas petition on grounds that AUMF "speaks only to the prevention of *future* acts of international terrorism against the United States; it does not authorize unlimited, unreviewable detention. Instead, the AUMF requires some nexus between the force [i.e., detention] and its purpose [i.e., preventing individuals from rejoining the enemy to commit future hostile acts]").

193 *Jones*, 393 F.3d at 932.

194 *Bell*, 441 U.S. at 524, n. 3 & 542-43.

195 *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169, 161, n. 16 [1963] (holding that "civil" statute stripping citizenship from individuals who left the country for the "purpose of evading or avoiding training and service" in times of declared war was undeniably punitive, a conclusion supported by the fact that the "drastic consequences of statelessness have led to reaffirmation in the [UDHR] of the right of every individual to retain a nationality").

196 Indefinite detention may also meet the definition of unlawful punishment for purposes of a claim that it constitutes an unlawful Bill of Attainder. See, e.g., *Artway v. New Jersey*, 81 F.3d 1235, 1247 [3rd Cir. 1996] ("Under the Bill of Attainder Clause, legislatures are forbidden to engage in legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial") (internal quotations omitted).

> Are detainees treated worse than convicted prisoners?

Indefinite detention exposes detainees to harms from which convicted prisoners are protected.¹⁹⁷ Individuals convicted of crimes serve sentences of fixed terms of a known duration, and are therefore able to avoid the psychological harms (e.g., the dread, chronic anxiety, and uncertainty) and the physical consequences (e.g., the physiological changes associated with chronic stress) of indefinite detention. Even inmates sentenced to life terms without parole are granted the privilege of knowing more about their immediate and long-term fate than the detainee who is indefinitely detained. This knowledge can provide the inmate with at least a starting point from which he can learn to cope and adapt to his circumstances.

National security detainees are treated worse than convicted prisoners in another significant respect. The US

- i) created the opportunity for national security detainees to be abused by placing them in the legal black hole of indefinite detention;¹⁹⁸
- ii) countenanced the abuse to which these individuals were subsequently subjected while indefinitely detained;¹⁹⁹ and is now
- iii) exacerbating the physical and psychological harms caused by that abuse by subjecting them to a detention of an indeterminate duration.

The legitimacy, transparency and accountability evidenced by our judicial system in meting out prison sentences of a fixed term following a properly obtained conviction, along with the legal standards that protect prisoners from abuse stand in sharp contrast to the cycle of abuse and unconscionable mistreatment of indefinite detainees.²⁰⁰

> What is the duration of detainees' exposure to these conditions?

This factor represents the linchpin of the analysis. As several courts have recognized, a detention of indefinite duration raises serious due process concerns because it violates detainees' liberty interests.²⁰¹ As this report demonstrates, however, in addition to violating a detainee's liberty interests, indefinite detention causes serious physical and psychological harm. The question in this context is therefore whether the duration of detainees' exposure to these harmful conditions is punitive, a question that operates on two levels.

First, the fact that detainees have no way of knowing how long they will have to endure the dread, chronic anxiety, and uncertainty caused by the indeterminate duration of their detention makes them vulnerable to – or, in the case of national security and asylum detainees, exac-

197 *Jones*, 393 F.3d at 932 (treatment of civil detainee is presumptively punitive when he is "confined in conditions identical to, similar to, or more restrictive than, those in which his criminal counterparts are held").

198 D. Cole and J. Dempsey, *TERRORISM AND THE CONSTITUTION: FIRST AMENDMENT FOUNDATION* 2006, at 177 (arguing that "policy of preventive detention led to the practice of coercive interrogation").

199 Iacopino and Xenakis, *supra* n. 115 at 3.

200 *See, e.g., Ford v. Clarke* -- F.Supp.2d ---, 2010 WL 3860635, *11 (D.Mass.) (ruling that detainee's substantive due process rights were violated by placing pretrial detainee in Disciplinary Unit [a restrictive, Supermax-type facility] to "complete" disciplinary sentence he had received while previously incarcerated, where "continuation of a DDU sanction following the completion of a criminal sentence is inconsistent with how all other prisoners are treated").

201 *See, e.g., Hamdi*, 542 U.S. at 521 (explaining, in response to Hamdi's contention that the AUMF does not authorize indefinite detention, "we understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel"); *Zadvydas*, 533 U.S. at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem"). *See also Mezei*, 345 U.S. at 218-19 (Jackson, J. *dissenting*) ("Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial. Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by judgment of his peers or by the law of the land").

erbrates existing – physical and psychological injuries.²⁰² Second, the actual duration of many immigration and national security-related detentions can be measured in years, rather than in days or weeks.

This is one of the few factors about which courts have been more definitive and expansive. For example, in rejecting a claim that double-bunking violated the due process rights of pretrial detainees, the Supreme Court emphasized that detainees were typically released within 60 days, but it cautioned that confining detainees “in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause as to whether those conditions amounted to punishment.”²⁰³ In another case, a 15-day delay in the statutorily mandated transfer of mentally incapacitated criminal defendants to a state mental hospital was deemed presumptively punitive because the defendants “have a high risk of suicide, and the longer they are deprived of treatment, the greater the likelihood they will decompensate and suffer unduly.”²⁰⁴ Indefinite detention meets the durational standard for treatment that has an unconstitutionally punitive effect.

> **Has it “historically been regarded as a punishment”?**

Determining whether a civil sanction is unconstitutionally punitive may turn, in part, on whether the sanction has historically been regarded as punishment – i.e., if it “can only be explained as also serving either retributive or deterrent purposes.”²⁰⁵ Locking individuals in jail or, in the case of the Guantánamo detainees, in facilities modeled on Supermax prisons, and throwing away the key without ever having charged the individual with a crime, would seem the epitome of the kind of treatment historically understood as punishment. Moreover, one of the factors that courts may look to in determining whether a civil sanction has an unlawful retributive or deterrent purpose is whether the sanction is an anomaly in the law – i.e., whether it strays beyond what has come to be understood as within the historic range of acceptable and appropriate civil sanctions.²⁰⁶ Indefinite detention fails that test.²⁰⁷

Indefinite Detention Violates Due Process Rights of Traumatized Detainees Even When Tested Against 8th Amendment’s Deliberate Indifference Standard

Despite widespread recognition that detainees are entitled to better treatment than prisoners, in practice, many courts import the Eighth Amendment standards into their Fifth Amendment analysis by requiring that detainees prove that the detaining authority was deliber-

202 Cf. *Kennedy*, 372 U.S. at 160-61 (emphasizing the risks to individuals who have been rendered stateless by citizenship-stripping statute: “Such individuals as do not possess any nationality enjoy, in general, no protection whatever, and if they are aggrieved by a State they have no means of redress, since there is no State which is competent to take up their case. As far as the Law of Nations is concerned, there is, apart from restraints of morality or obligations expressly laid down by treaty ... no restriction whatever to cause a State from maltreating to any extent such stateless individuals. The calamity is not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever”) (internal quotation marks and citations omitted).

203 *Bell*, 441 U.S. at 524, n. 3 & 542-43.

204 *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1120 (9th Cir. 2003).

205 *Artway*, 81 F.3d at 1257 (quoting *Austin v. United States*, 509 U.S. 602 (1993)).

206 *Id.* at 1258-1259 (discussing *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994), in which the Court held that a tax with rates up to 400 percent on illegal drugs and equipment “constituted ‘punishment’ because it was ‘a concoction of anomalies, too far removed in crucial respects from a standard tax assessment to escape characterization as punishment for purposes of Double Jeopardy analysis’”).

207 See, e.g., *Mezei*, 345 U.S. at 218-19 (Jackson, J. *dissenting*) [“Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial. Executive imprisonment has been considered oppressive and lawless since King John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by judgment of his peers or by the law of the land”]. See also *Hamdi v. Rumsfeld*, 542 U.S. 507 [2004] [declining to consider constitutional concerns raised by possibility of indefinite detention under the AUMF on the facts presented]; *Zadvydas*, 533 U.S. at 689 (avoiding constitutional question).

ately indifferent to a risk of serious harm, creating an often insurmountable hurdle for detainees to clear.²⁰⁸ Where, as here, however, indefinite detention both exacerbates the psychological disabilities and physical distress of populations that have already been traumatized by torture and ill-treatment and perpetuates the mental pain suffered as a consequence of that treatment, even a flawed due process analysis should, with the development of an appropriate factual basis, result in a finding that indefinite detention violates a detainee's right to due process.

In order to succeed on a claim that the detaining authority was deliberately indifferent to a detainee's health and safety, the detainee must establish that the detaining authority knows "that inmates face a substantial risk of substantial harm and disregards that risk by failing to take reasonable measures to reduce that harm."²⁰⁹ The standard has both objective and subjective components: detainees "must show that the conditions to which they are subjected are 'sufficiently serious' ... and that the defendants are deliberately indifferent to inmates' health or safety."²¹⁰

Indefinite detention presents such a serious condition for national security detainees. In addition to suffering the trauma of torture, of possibly unlawful experimentation and of being detained in facilities even more isolating and restrictive than US Supermax facilities, the uncertainty, helplessness, chronic anxiety, and stress created by the indeterminacy of detention exacerbates detainees' existing psychiatric disorders like depression, suicidal ideation, and PTSD.²¹¹

In order to satisfy the subjective prong of the deliberate indifference test, detainees also have to establish that an

*official [is] both ... aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. If the circumstances suggest that the prison officials were exposed to information about the risk and thus must have known about it, that evidence could be sufficient to allow a trier of fact to find actual knowledge.*²¹²

Establishing this subjective element requires the development of individualized facts, but in these cases, would likely present a substantial but not insurmountable evidentiary hurdle for the following five reasons:

- First, the government's prohibition against independent medical evaluations of national security detainees means that one of the principal sources of information about their mental status is the military's own observations of the detainees.
- Second, those observations indicate that detainees had no prior history of psychiatric disorders when first taken into custody.
- Third, those observations likewise document the fact that detainees have developed severe psychiatric disorders over the course of their detention.
- Fourth, it appears, from evidence obtained by PHR and other NGOs, that the purpose of

208 See, e.g., *Telles v. Stanislaus County*, WL 643358, *6 (E.D.Cal. 2011) (recognizing that it was unclear from the record whether plaintiff was a prisoner or a pre-trial detainee at the time of the alleged mistreatment, and recognizing further that the difference in status entitled him to different protections, yet concluding that "[r]egardless [of his status], with issues related to health and safety, the due process clause imposes, at a minimum, the same duty the Eighth Amendment imposes. Therefore, the Court will look to the Eighth Amendment to determine Plaintiff's right to adequate medical care") (internal quotations and citation omitted).

209 *Jones'El v. Berge*, 164 F.Supp. 2d 1096, 1117 (W.D. Wis. 2001).

210 *Id.*

211 *Id.* at 1118 ("Without exception, Prisoners 1 through 7 have suffered intensified symptoms, whether increased depression, severe hopelessness, attempts at suicide, command hallucinations, or bizarre behavior"); *Madrid v. Gomez*, 889 F.Supp. 1146, 1264 (N.D. Cal. 1995) ("If the particular conditions of [confinement] being challenged are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then defendants have deprived inmates of a basic necessity of human existence – indeed, they have crossed into the realm of psychological torture").

212 *Id.* at 1121 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)).

the multiple abuses to which detainees were subjected was to induce the kind of dread and hopelessness that leads to the harms associated with an indeterminate, indefinite detention.

- Fifth and finally, the more “widely disseminated” information about the harmful effects of indefinite detention, both in the field of corrections and among the military, the more likely a detainee would be entitled to “a fair inference that despite [officials’] denials, they did know” that already traumatized detainees are at a substantial risk of serious harm on account of being indefinitely detained.²¹³

The efforts of PHR and other NGOs along with countless lawyers, advocates, researchers, clinicians, academic scholars, journalists and former detainees to expose the abuse perpetrated by US personnel and to document the physical and psychological suffering that detainees continue to endure while indefinitely detained play a central role in this regard.

Available Judicial Remedies for Constitutional Violations are Unclear

Having a federal right does not, however, necessarily entitle detainees to a federal remedy. There are two principal remedial schemes pursuant to which federal courts might adjudicate a detainee’s claim that indefinite detention violated his substantive due process rights: a petition for habeas corpus and a *Bivens*-type civil rights action.²¹⁴ In addition to being devilishly intricate,²¹⁵ the availability and scope of each of the schemes is the subject of active political debate, pending judicial review,²¹⁶ and an important Supreme Court decision, the full measure of which has not yet been established.²¹⁷ In addition, determining the best mechanism (and likeliest avenue of success) for pressing a claim that indefinite detention violates a detainee’s Fifth

213 See *Scarver v. Litscher*, 434 F.3d 972, 976 (7th Cir. 2006).

214 See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) [recognizing private cause of action against federal officers for Fourth Amendment violation]. See also *Carlson v. Green*, 446 U.S. 14 (1980) [same for Eighth Amendment violation]; *Davis v. Passman*, 442 U.S. 228 (1979) [same for Fifth Amendment violation].

215 *Cook v. Texas Dep’t of Criminal Justice Transitional Planning*, 37 F.3d 166, 168 (5th Cir. 1994) [“The core issue in determining whether a prisoner must pursue habeas corpus relief rather than a civil rights action is to determine whether the prisoner challenges the ‘fact or duration’ of his confinement or merely the rules, customs, and procedures affecting ‘conditions’ of confinement.”]. But see *Bell*, 441 U.S. at 526, n. 6 [“leave[ing] for another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself”].

216 For example, on March 2, 2011, the Supreme Court heard oral arguments in an appeal from a Ninth Circuit decision that recognized a *Bivens* action against former US Attorney John Ashcroft on account of his alleged role in the government misusing the material witness statute for purposes of preventive detention. *Ashcroft v. al-Kidd*, No. 10-98. In addition, the scope of habeas review for Guantánamo and other war-related detainees continues to be the subject of debate and consideration within the judiciary and with Congress.

217 In *Boumediene*, 535 U.S. at 792, the Supreme Court ruled that the procedures available to detainees pursuant to Combat Status Review Tribunals were an inadequate substitute for habeas corpus review, and hence the provision of the Military Commissions Act of 2006 (28 U.S.C.A. § 2241(e)(2)) that purported to strip federal courts of jurisdiction to hear habeas petitions represented an unconstitutional suspension of the writ of habeas corpus. The facts of *Boumediene* did not, however, present any question concerning the scope of the habeas review to which detainees were entitled, nor did it therefore present an opportunity for the Court to decide the constitutionality of a separate provision of the MCA that purports to strip federal courts of jurisdiction to adjudicate claims concerning “any aspect of the detention, transfer, treatment, trial, or conditions of confinement.” District Court decisions of the DC Circuit have since ruled that *Boumediene* cannot be read to have invalidated this separate provision of the MCA and have therefore summarily dismissed claims brought by detainees concerning conditions of detention. See, e.g., *al-Zahrani* 684 F.Supp. 2d at 109. In light of the fact that this question has not been presented squarely before and hence not resolved by the Supreme Court, it can be argued that the DC Circuit’s rulings represent an abdication of judicial responsibility. As one court put it,

[t]hat the Supreme Court’s recognition of a right establishes that right’s existence for lower courts ... tells us nothing about the existence of rights that the Court has not yet addressed. [It is] an indefensible premise that the absence of a Supreme Court opinion on the existence of a particular right means that a particular right does not exist.

Johnson v. Cincinnati, 310 F.3d 484, 501 (6th Cir. 2003). Cf. *Munaf v. Geren* 553 U.S. 674, 706-707 [2008] [Souter, J., concurring]. [“where federally protected rights [are threatened], it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief”] (Souter, J., concurring).

Amendment rights will turn on the circumstance-specific factors mentioned earlier including, for example, the location in which the detainee is held, the detainee's citizenship or legal status and the identity of his custodians. For all of these reasons, providing a detailed roadmap to federal court would be an unmanageable feat in the context of this report.

It is important to note, however, that as significant as those procedural and fact-specific issues are, they may not represent the greatest challenge to detainees in securing an effective judicial remedy for violations of their rights to due process. Because the populations being held indefinitely are largely (although not exclusively) made up of non-citizens and individuals appropriately or inadvertently swept into custody in the course of the war with al Qaeda, indefinite detention policies implicate immigration, foreign relations, and national security policies – precisely the kinds of policies whose content and consequences courts are most reluctant to review with any kind of searching inquiry.²¹⁸ Some argue that this represents an abdication of the powerful role that the judiciary ought to play to vindicate the rights of individuals as well as to validate the very principles that underlie such policies.²¹⁹ Others argue that such recusals may be inevitable and, perhaps, appropriate, so long as the legislative and executive branches of government rise to the challenge. However, rising to the challenge requires that the legislative and executive branches act with restraint so as not to exploit the judicial deference they are assured of receiving. As one commentator put it:

*[The judiciary, which is] in normal times peculiarly competent to weigh the competing claims of individuals and government [is] ill-equipped to determine whether a given configuration of events threatens the life of the community and thus constitutes an emergency. A war emergency is even more difficult for a court to navigate. It is for this reason that although we have three branches of government, the deference that a court must give to the other branches means that legislatures and executives must act conservatively.*²²⁰

Such restraint is regrettably absent from the measures proposed and adopted by both political branches in the last several months concerning the transfer, prosecution and continued detention of national security detainees.²²¹

218 See, e.g., *Zadvydas*, 533 U.S. at 696 (although ruling that 8 U.S.C. § 1231(a)(6) of the Immigration and Nationality's Act did not authorize the indefinite detention of certain aliens, the Court left open the possibility that "terrorism or other special circumstances [might warrant] special arguments ... for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security"). See also S. Gladbeck, *The Detention Power*, 22 YALE LAW & POLICY REV. 153, 174 (2004) (noting that despite the fact that cases challenging the internment of Japanese-Americans during World War II were "replete with serious constitutional questions, the dispositive issue in all three, due largely to the Court's reluctance to confront the constitutional issues head-on, was the legality of the exclusion orders themselves and the Act of Congress criminalizing violations thereof, and not the constitutionality of [or authority for] the detention").

219 See, e.g., *Hamdi*, 542 U.S. at 535 ("[T]he position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government"); *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., *dissenting*) (warning against "judicial validation of a policy that is otherwise constitutionally repugnant").

220 Cotter, *supra* n. 36 at 286. See also International Commission of Jurists, ICJ Submission of the Universal Periodic Review of the United States of America 9th Session of the Working Group on the Universal Periodic Review (April 2010) (citing *al-Zahrani v. Rumsfeld*, 684 F.Supp. 2d 103 [D.D.C. 2010], and calling for the Working Group of the Human Rights Council to urge the United States to provide detainees who are victims of human rights violations with effective remedies by, for example, amending the MCA or drafting new legislations).

221 March 7 Executive Order, *supra* n. 1; 112th Congress, 1st Sess., H.R. 1473, §§ 1112-1114, April 14, 2011.

Indefinite Detention of Traumatized Populations Constitutes Cruel, Inhuman, or Degrading Treatment Under Domestic and International Laws

Domestic statutes, including the Detainee Treatment Act (DTA) and the War Crimes Act (WCA), and international treaties to which the United States is a party, including Common Article 3 of the Geneva Conventions, the International Covenant on Civil and Political Rights and the United Nations Convention Against Torture, criminalize torture as well as cruel, inhuman, or degrading treatment.²²² Although these domestic and international laws tend to specifically define what is meant by “torture,” they generally fail to provide distinct or precise definitions for what constitutes cruel, inhuman, or degrading treatment.²²³ Most authorities and courts take the position, however, that the prohibition against cruel, inhuman, or degrading treatment “is conceptually linked to torture by shades of misconduct discernible as a continuum.”²²⁴ Cruel, inhuman, or degrading treatment is therefore understood as including “acts which inflict mental or physical suffering, anguish, humiliation, fear and debasement, which do not rise to the level of ‘torture’ or do not have the same purposes as ‘torture’,”²²⁵ with the determination of whether particular conduct rises to this level turning on case-specific factors.²²⁶

On their own, the physical harms and mental suffering caused by a detention of an indefinite term might not constitute cruel, unusual or degrading treatment. However, where those harms are inflicted upon individuals like national security detainees held at Guantánamo

- i) who have already been subjected to treatment that meets even the Bush-Administration’s operational definition of torture, and
- ii) who are, in addition, subjected to conditions of detention sufficiently isolating to cause severe pathology in health individuals, the exacerbating effect of the dread and uncertainty of not knowing when or whether detention will end unquestionably causes mental suffering, anguish, and fear sufficient to meet both domestic and international standards of cruel, inhuman, or degrading treatment.

222 The Detainee Treatment Act of 2005, 42 U.S.C.S § 2000dd (2006), prohibits the “cruel, inhuman, or degrading treatment or punishment” [acts that violate the Fifth, Eighth, and Fourteenth Amendments] of detainees. The War Crimes Act, as amended by the Military Commissions Act of 2006, 18 U.S.C. § 2441 (2006), prohibits “cruel or inhuman treatment.” Common Article 3 of the Geneva Conventions, an article found in all four Geneva Conventions, defines core obligations to be respected in all armed conflicts and not just in wars between countries. It prohibits violence to life and person including murder, mutilation, cruel treatment and torture, outrages upon personal dignity, and in particular humiliating and degrading treatment.

223 *Tachiona v. Mugabe*, 234 F.Supp.2d 401, 437-38 (S.D.N.Y. 2002) [finding that the dragging of a corpse through a public street constituted cruel, inhuman, or degrading treatment for the loved ones and neighbors of the deceased who witnessed the desecration because it would have inflicted “severe emotional pain and indignit[y]”).

224 *Id.*

225 *Mehinovic v. Vuckovic*, 198 F.Supp.2d 1322, 1348 (N.D. Ga. 2002).

226 See *Doe v. Qi*, 349 F.Supp.2d 1258, 1321 (N.D.Cal. 2004) [although ruling that particular allegations did not rise to level of cruel, inhuman, or degrading treatment, collecting domestic and international cases applying where conduct was found to rise to that level]; *Jama v. United States Immigration and Naturalization Serv.*, 22 F.Supp.2d 353, 363 (D.N.J. 1998) [physical, emotional, and sexual abuse of immigration detainees constituted cruel, inhuman, and degrading treatment].

Conclusions and Recommendations

This paper establishes that the profound uncertainty and lack of control characteristic of indefinite detention causes severe physical and psychological harm, and that these harms follow from the nature of the detention, without regard for the purported legal justification or conditions of a particular detention. In light of these serious health effects, policies mandating or permitting indefinite detention must be abolished.

While recognizing that these policies are attempts to respond to difficult questions of national security and immigration policy, Physicians for Human Rights nevertheless urges the US government to take the following affirmative steps to end indefinite detention.

Regarding National Security Detainees at Guantánamo and Other Sites

- **The United States government** should reject solutions to national security problems that permit or rely on indefinite detention and take affirmative efforts to end its current practice.

As this paper has demonstrated, indefinite detention causes new, and exacerbates and perpetuates existing, mental suffering in detainees with a history of torture or ill-treatment. The United States government must not adopt indefinite detention as a solution for the handling of detainees it is reluctant to charge or release. Given the serious harms that it causes, the Obama Administration and Congress should ensure that indefinite detention becomes a relic of the past and not a hallmark of US national security policy.

- **The United States government** must support trials in Article III courts for individuals detained at Guantánamo Bay and coordinate the various branches of government to ensure that civilian trials for detainees are a policy priority.

As both recent and historic prosecutions of terrorist suspects demonstrate, United States federal district courts are well-equipped to secure convictions for terrorist activities, thus furthering the government's interest in and obligation to protect the country, its citizens and military personnel from terrorism while meeting its obligation to do so in a timely manner that comports with national and international legal standards of justice.

Federal prosecutors have secured convictions against 400 individuals charged with acts of terrorism in federal courts since the attacks of September 11, 2001, alone. The recent trial of Ahmed Khalfan Ghailani, a Tanzanian citizen who received a life sentence for his involvement in a conspiracy relating to the 1998 bombings of US embassies in Kenya and Tanzania, reaffirms that our legal system is fully capable of, and is a legitimate forum for, trying individuals charged with acts of terrorism. Beginning civilian trials for others currently detained at Guantánamo will end their indefinite detention and provide justice for victims. In order to facilitate civilian prosecutions for terrorism suspects, the United States Congress should end bans on funding transfers of individuals from Guantánamo Bay to facilities in the United States.

- **The United States government** should grant a request from the Special Rapporteur on Torture and Other Cruel, Inhuman, and Degrading Treatment to be allowed to investigate the detention facility at Guantánamo.

The United Nations Special Rapporteur on Torture and Other Cruel, Inhuman, and Degrading Treatment, Juan Mendez, has requested permission from the United States government to conduct a visit to the Guantánamo Bay facility. In support of the Rapporteur's mission of investigating and ending acts of torture and other forms of cruel, inhuman, and degrading

treatment, which the government publicly embraces, the United States should move quickly to facilitate his visit.

- *The United States government should encourage greater international cooperation for both prosecutions and repatriation of detainees at Guantánamo.*

In order to end the indefinite detention of individuals in Guantánamo, the United States should encourage prosecutions and repatriation of detainees under its control. While transfer to the United States for trials should be a clear priority, the US government should also encourage other countries, without violating US international human rights obligations including non-refoulement protections, to assist with prosecuting individuals and to ensure safe repatriation of those detainees who have been cleared by the US government for release.

- *Until the time that indefinite detention is abolished as a matter of policy, the United States government should provide measures that mitigate the social, psychological, and physical harms such detention causes among detainees.*

In order to mitigate the serious harms caused by indefinite detention, the United States government should institute intermediate steps on the path toward abolishing policies that contemplate or permit indefinite detention. Detainees held indefinitely should have greater access to family members, medical and psychological services, religious and spiritual leaders, and each other. Denying detainees access to those with whom they share or might establish meaningful relationships and denying them medical and religious services serves no legitimate national security goal while exacerbating the psychological trauma these individuals have already experienced by heightening the inherent risks associated with indefinite detention. In order to provide a measure of comfort for those detained indefinitely, the US government should encourage these forms of meaningful, positive and healthy contacts.

- *The United States government should permit non-governmental, independent medical and psychological experts to evaluate the mental and physical health of detainees.*

In light of evidence that national security detainees currently suffer from severe physical, psychological, and mental disabilities as a result of the abuse and conditions to which they have already been subjected, and the evidence in this report concerning the exacerbating effects of indefinite detention on those detainees as well as the evidence that indefinite detention increases morbidity and mortality rates from underlying diseases, the United States government should permit non-governmental, independent medical and psychological experts to evaluate and monitor the health of detainees.

Regarding Individuals In Immigration Detention

- *Strictly limit mandatory detention in the immigration setting to ensure that individuals who do not pose a security threat nor flight risk have the opportunity to pursue release from detention.*

Two 1996 laws greatly expanded the use of mandatory detention by the Department of Homeland Security. The Anti-terrorism and Effective Death Penalty Act (AEDPA) required mandatory detention for non-citizens who had certain criminal histories, even those based on minor offenses or very old convictions sustained by people whose records have remained clean. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) expanded the categories of offenses that triggered mandatory detention, and also required the detention of all new and recently-arrived and apprehended immigrants, including asylum seekers and other survivors of abuse requesting protection at or near our borders. These

laws greatly expanded the use of detention for noncitizens who are awaiting removal proceedings. Congress should strictly limit mandatory detention so that individuals who do not pose a security threat nor flight risk will not needlessly face detention for an indeterminate amount of time while their immigration cases are pending.

- *Strictly limit the use of detention for asylum applicants.*
- *Make greater use of alternatives to detention, including community-based monitoring programs, without increasing the total number of immigrants under active DHS supervision.*

Many asylum seekers arrive in the United States after fleeing violence or persecution, and arrive already traumatized, and hence these individuals are particularly susceptible to the harms caused by indefinite detention. Asylum seekers who pose neither a security threat nor a flight risk should therefore not be subjected to any form of indefinite detention, particularly where alternatives to detention not only exist but have established records of ensuring that individuals report for court proceedings. These alternatives, including, for example, community-based monitoring and regular reporting requirements, eliminate any need for the indefinite detention of asylum seekers as well as any ostensible justification for incurring its corresponding health risks.

- *Allow the American Bar Association and the United Nations High Commissioner for Refugees broad access to immigration detention facilities.*

The American Bar Association (ABA) and United Nations High Commissioner for Refugees (UNHCR) annually review the conditions at selected immigration detention centers. These reviews include in-person inspections and interviews with detainees and personnel. Full reports and recommendations are then submitted to the Department of Homeland Security (DHS). Presently these visits only take place on the condition that the reports will be confidentially submitted to DHS and not made public. These visits and their limited scope and audience do not benefit detainees to the greatest extent possible. More frequent visits to a greater number of facilities will not only more accurately assess conditions of detention, but will let detainees held indefinitely know that groups other than the detaining authority have their interests in mind and are aware of their detention.

- *Promulgate regulations that require the Department of Homeland Security to routinely update an individual in immigration detention about the stages of the detention process including, whenever possible, time estimates regarding court proceedings. Congress should amend the Immigration and Naturalization Act to reflect the need for regular status updates for individuals in immigration detention.*

The uncertainty and lack of control those detained indefinitely experience can be ameliorated by routine updates on an individual's case. Regular dissemination of information will mitigate the harms caused by the uncertainty of indefinite detention.

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