

Punishment Before Justice: Indefinite Detention in the US

Executive Summary

This report demonstrates 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.

Indefinite detention refers to a situation in which the government places individuals in custody without informing the detainee when—if ever—the detainee will be released. Indefinite detention therefore creates a situation of profound uncertainty that sets it apart from other types of governmental custody. The term encompasses other custody arrangements, including “preventive detention,” “executive custody,” “security detention,” “military detention,” “prolonged detention,” “administrative detention,” “conditional detention,” or, under the March 7 Executive Order, “continued law of war detention.”¹

The US currently has approximately 170 individuals indefinitely detained at Guantánamo Bay. While only 15 of these individuals have been designated “high value detainees,”² many of these detainees have already spent roughly 7-9 years³ in the harshest, most restrictive, and isolating conditions available⁴ and were subjected to torture.⁵ 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.⁶ Many asylum seekers arrive on US soil traumatized by persecution in their home country as well as by the act of exile, while many non-refugee seekers have languished in detention for years vainly waiting for the day that they will finally be deported.⁷

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.⁸ Similar evaluations of asylum seekers have established that many were tortured at the hands of state and non-state actors within their home countries.⁹ In addition, NGOs have collectively and powerfully made the case that mandatory, indefinite detention violates domestic and international laws concerning the civil and political right to be free from arbitrary arrest and detention.¹⁰

The Obama 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. The administration also has made statements of intent to reform the civil detention scheme applicable to immigrants and asylum seekers.¹¹ However, a system that permits the govern-



A detainee walks in the outdoor recreation area at Camp 6, Naval Station Guantánamo Bay, Cuba, March 1, 2011. (U.S. Navy photo by Mass Communication Specialist 2nd Class Jordan J. Miller/Released)

ment to hold people year after year, review after review, on the grounds that the individual poses a threat to the nation without the government ever being required to prosecute or release the detainee, does not transform an indefinite detention into a detention of a fixed term.

Methodology

Little clinical research has focused specifically on the health effects of the indefinite duration of detention.¹² This report draws on research concerning

- i. the experiences of analogous populations such as political prisoners and prisoners of war,¹³ the wrongfully convicted,¹⁴ and inmates held in administrative segregation for non-disciplinary reasons;¹⁵
- ii. the physical and psychological effects of uncertainty, uncontrollability, and unpredictability as evidenced by those subjected to conditions of sensory deprivation¹⁶ and confronted with medical uncertainty;¹⁷ and
- iii. the physical and psychological effects of being isolated from one's social, linguistic, cultural and familial networks.¹⁸

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, cardiovascular, and central nervous systems
- Depression and suicide
- Post-traumatic stress disorder
- Enduring personality changes and permanent estrangement from family and community that compromises any hope of the detainee regaining a normal life following release.

Furthermore, the harms associated with indefinite detention threaten to severely exacerbate existing severe physical and psychological symptoms and perpetuate mental suffering, thereby foreclosing any opportunity for healing.

Conclusions and Recommendations

In light of these unavoidable and serious health effects, policies mandating or permitting indefinite detention must be abolished. Physicians for Human Rights urges the US government to take affirmative steps to end indefinite detention in those contexts and proposes the following recommendations toward that goal.

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, the United States government should 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:

- 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 significantly expanding the total number of immigrants under some form of 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.

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NOTES

1. March 7, 2011 Executive Order, *supra* n. 1. See also A. Caldwell, *Executive Order for Detainee Review Being Drafted*, WASHINGTON POST, Dec. 22, 2010.
2. The Guantánamo Docket: High Value, NY TIMES available at <http://projects.nytimes.com/guantanamo/detainees/high-value>.
3. The first detainees were transferred to Guantánamo on January 11, 2002. The Guantánamo Docket: A History of the Detainee Population, NY TIMES, available at <http://projects.nytimes.com/guantanamo>.
4. G. Brenner, *The Expected Psychiatric Impact of Detention in Guantanamo 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").
5. PHR, *BROKEN LAWS, BROKEN LIVES: MEDICAL EVIDENCE OF TORTURE BY US PERSONNEL AND ITS IMPACT 2008*, available at http://brokenlives.info/?page_id=69; PHR, *BREAK THEM DOWN: SYSTEMATIC USE OF PSYCHOLOGICAL TORTURE BY US FORCES, 2005*, available at: <http://physiciansforhumanrights.org/library/report-2005-may.html>; PHR/HRF, *LEAVE NO MARKS: ENHANCED INTERROGATION TECHNIQUES AND THE RISK OF CRIMINALITY, 2007*, available at <http://physiciansforhumanrights.org/library/report-2007-08-02.html>.
6. Immigration and Customs Enforcement (ICE), the agency within the Department of Homeland Security, responsible for administering U.S. 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*, NY TIMES, 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).
7. 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").
8. 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.
9. See, e.g., PHR, *FROM PERSECUTION TO PRISON*, *supra* n. 9.
10. See, e.g., Human Rights Watch, "US: Prolonged Indefinite Detention Violates International Law Current Detention Practices at Guantanamo Unjustified and Arbitrary," January 24, 2011, available at <http://www.hrw.org/en/news/2011/01/24/us-prolonged-indefinite-detention-violates-international-law>.
11. March 7, 2011 Executive Order, *supra* n. 1; A/HRC/WG.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").
12. 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").
13. 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).
14. See, A. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME AND JUSTICE 1 (2005).
15. 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].
16. See, e.g., C. Haney, *Issues in Solitary, Supermax Confinement*, 49 CRIME & DELINQUENCY 124 (2003); PHR/HRF, *LEAVE NO MARKS*, *supra* n. 7.
17. 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).
18. Griffeth *supra* n. 27 at 258.



Woman in immigration detention. Getty Images.

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