

Editorial Board Memo on Preventive Detention September 21, 2009

Indefinite Detention Without Charge or Trial

Establishing a system of indefinite detention without charge or trial would break with more than 200 years of American constitutional tradition. Nevertheless, there are disturbing reports that President Obama and key members of his administration are considering the continuation or even expansion of the indefinite detention policies that began during the Bush administration. Under such a regime, people who have never committed a crime, or for whom the government lacks reliable evidence of criminal conduct, could be imprisoned indefinitely—perhaps for their entire lives—without charge or trial.

Any system of indefinite detention of suspected terrorists in the United States, without trial and beyond the bounds of the Geneva Conventions would be unnecessary, unwise, and unconstitutional. Individuals who pose a genuine danger to the United States can be prosecuted in our existing courts under our existing laws. And any statute that purports to authorize the long-term detention of suspected terrorists on the basis of perceived future dangerousness rather than past criminal conduct will likely be invalidated by our federal courts. Finally, a system of detention without trial for terrorism suspects would rightly be viewed by Americans and throughout the world as an illegitimate continuation of the Guantánamo detention regime that so damaged our credibility as a nation that adheres to the Constitution and the rule of law.

- **The premise that there exists a significant class of terrorism suspects who are too dangerous to release but cannot be prosecuted is groundless.**

If a detainee's conduct indicates potential guilt or dangerousness, it would likely be covered by American laws. There are extremely broad laws covering a wide range of conduct associated with terrorist activity, perhaps the broadest of which criminalize the provision of "material support" to terrorism. These laws allow the government to secure convictions without having to show the defendant actually intended to further terrorism and without having to show a specific act of terrorism took place or was being planned. In recent years, defendants have been convicted of "material support" for attending terrorist training camps and even for supplying funds for terrorist groups. In addition, the crime of conspiracy is both backward and forward looking. Under US law, a conspiracy can occur whether or not an intended illegal act has been carried out. All that must be proved is that two or more people agreed to pursue an illegal plan and took at least one step to advance it. Other crimes include the use of weapons of mass destruction, harboring and concealing terrorists and assault and homicide. It is difficult to believe that there are people who present real risks to national security who could not be successfully prosecuted under these laws. Furthermore, if evidence is too "tainted" by torture or abuse to support criminal charges under our laws, it is surely too tainted and unreliable to support detaining people indefinitely.

- **The fact that evidence derived from torture, abuse or other coercion is not allowed in federal courts does not mean guilty defendants would go free.** The government has repeatedly stated that there is substantial evidence against high-level terrorism suspects that was not obtained through these means. The government convicted in civilian courts Al Qaeda and Taliban members who were tortured or subjected to coercion, including Ali al-Marri, Jose Padilla, and Zacarias Moussaoui.
- **Criminal prosecutions in ordinary federal courts would not expose national security “sources and methods.”** Federal courts are fully capable of protecting classified information. The Classified Information Procedures Act (CIPA) generally permits the government to substitute classified information at trial with an unclassified summary of that information. The successful history of terrorism trials in criminal courts and the reported experience of prosecutors themselves (see *“In Pursuit of Justice”* by Richard Zabel and James Benjamin) demonstrate that our justice system can protect sensitive information while providing fundamental rights.
- **A law allowing detention without trial until the end of the “war on terror” is untenable and amounts to the authority to detain indefinitely.** This conflict has no temporal or geographical boundaries and its end might be impossible to define.
- **The idea of “preventive” detention is a misnomer.** If a person has never committed a violation covered by even the broadest of laws there is no credible way to know that such an individual is dangerous.
- **Indefinitely detaining terrorist suspects is not equivalent to holding POWs or civilians in a traditional war.** In traditional wars, it is relatively easy to be sure that the person was actually engaged in the armed conflict. And since the “war on terror” may go on indefinitely, it is wrong and counterproductive to allow detainees to be held “until the end of the conflict.”

Federal criminal courts and federal prisons work, even for international terrorism cases. The Justice Department has charged, tried, and convicted approximately 200 defendants for international terrorism crimes, using the same federal courts that hold criminal trials every day. These defendants have ranged from a coconspirator in the 9/11 attacks to persons convicted for their roles in the 1993 World Trade Center bombing and the bombing of U.S. embassies in Africa. Acting within the rule of law and applying federal criminal law, the Justice Department was able to obtain convictions that resulted in long prison sentences for these defendants— and the Federal Bureau of Prisons has made sure that there have been zero escapes. There is no reason to believe that the Justice Department cannot convict and obtain prison sentences for those who have committed acts of terrorism or other serious crimes.

No one should be indefinitely detained without charge or trial based on the president's belief that the person is "dangerous." No president—and certainly no government bureaucrat—should ever be given the power to order a person indefinitely detained without charge or trial solely on the basis of perceived future danger and beyond the detention authority provided for in wartime by the Geneva Conventions. Although different presidents and different administrations may handle their powers differently, we cannot give any political leader or government official the power to violate the Constitution.

Coerced evidence should not be a basis for detention. Proponents of a system of indefinite detention, including President Obama, have argued that the criminal justice system may be incapable of adjudicating some terrorism cases because the necessary evidence is too "tainted" by coercion to be admissible in U.S. courts. But evidence obtained through torture or coercion is inadmissible not only because it was secured immorally and illegally, but also because it is inherently unreliable.

The entire world is not a battlefield. The Bush administration claimed the authority to detain militarily any alleged enemy, whether citizen or noncitizen, whether captured in Afghanistan or in Illinois, until the "end" of the so-called "war on terror." But the fight against terrorists has no definable geographic or temporal limitations and may thus take place everywhere and forever. Terrorists are criminals, not soldiers, and the entire world is not a battlefield. No president should have the power to declare the entire globe a war zone and then seize and detain terrorism suspects anywhere in the world—including within the United States—and to hold them forever without charge or trial.

Even a long list of procedural safeguards for indefinite detention is no substitute for criminally charging and trying suspects. Various think tank analysts and government lawyers have come up with long lists of supposed "procedural safeguards" that they insist would ensure that an indefinite detention program will not imprison the innocent. But there is no substitute for the Constitution or for the criminal process that the federal courts have refined over the last 200 years. Even an indefinite detention scheme with dozens of procedural bells and whistles will not provide the kind of process that the Constitution requires.

Congressional approval will not make indefinite detention constitutional. The president has said that he will not pursue an indefinite detention policy without congressional approval. But pulling Congress into the scheme will not make it constitutional, and it won't make it more acceptable. Indefinite detention without charge or trial violates due process, with or without a congressional stamp.

American Civil Liberties Union
Human Rights Watch
Human Rights First
National Institute of Military Justice
National Association of Criminal Defense Lawyers