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By Paul Gewirtz and Jeffrey Prescott 10.03.24 17:02

# U.S. Pre-Trial Detention: A Work in Progress

*Through trial and error, the U.S. justice system has learned the value of limiting the use of pre-trial detentions and promoting fairness*

(Caixin Online) As China considers reforming its pre-trial detention system, a brief examination of the U.S. experience might prove helpful. Our systems are different, and our solutions to common problems differ as well. But we can always learn from the successes and failures of others – a precise benefit of international exchange.

In the United States, the issue of pre-trial detention has attracted much attention in recent years because terrorist suspects have been detained at Guantanamo Naval Base. These suspects were held for years without trial. Extreme methods of interrogation were sometimes used, and there have been charges of other abuse.

Guantanamo detentions aroused robust debate in the United States and incited considerable criticism of the U.S. government from around the world. Eventually, a major policy change came when President Barack Obama, on his second day in office, signed an order to begin the shutdown of Guantanamo.

The Guantanamo detentions generated a great deal of debate in the United States precisely because they were so unusual. But the Guantanamo experience, which began in the context of a 2001 terrorist attack on the United States, is much less valuable as a reference than typical U.S. detention practices and rationales.

Typical practices offer better examples for exploring and seeking solutions for detention-related problems. And at the heart of any solution should be efforts to reduce the use of pre-trial detention as much as possible, not simply to strengthen the management of detention centers.

In this essay, therefore, we address two questions about U.S. pre-trial detention in criminal cases: 1) how and why criminal defendants are detained or released before trial; and 2) confinement conditions for detained suspects.

## Presumption: No Pre-Trial Detention

In the course of an ordinary criminal case in the United States, there is a presumption that a criminal suspect, once arrested by the police, will be brought before a neutral and detached judge who will decide whether he or she should be released pending trial. Law and practice allow police to hold a suspect after arrest only a short time, usually no more than 24 hours, and almost never more than two days. At this first court hearing, the judge reviews the arrest, formally notifies the defendant of charges and the right

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to have a lawyer, and makes a decision about whether to allow pretrial release.

This is not just a U.S. rule. International standards require that: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and... it shall not be the general rule that persons awaiting trial shall be detained in custody."

Most of the time in the United States, the defendant is released. A pre-trial release includes conditions, of course, to assure that the defendant does not flee the area and remains available for trial. There are a few exceptions to presumption in favor of pre-trial release – most importantly, at times when a defendant has been charged with serious, violent crime. But in most cases, the presumption is in favor of pre-trial release.

Why does the U.S. system favor release? Doesn't the arrest of a defendant establish a strong likelihood that the defendant is guilty? Isn't it unwise or dangerous to release a defendant from detention?

There are many reasons why the United States favors conditional pre-trial release. The most obvious reason is that if an individual has not yet been "convicted," then "punishment" is inappropriate. This principle is part of what we call a defendant's "presumption of innocence."

But limited use of pre-trial detention in the United States is about more than a presumption of innocence. Detention, even in modern facilities, is serious and harsh. It deprives an individual of liberty. The American Bar Association, in its Standards for Pre-Trial Release, notes that pre-trial detention "subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support."

In addition, the U.S. experience suggests that when defendants are held prior to trial, the coercive atmosphere of detention may pressure them to agree to plead guilty to crimes they did not commit. False convictions are a major injustice, and one that the U.S. system seeks to guard against.

### Pre-Trial Release in Practice

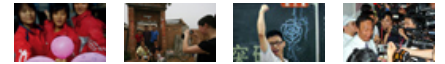
How can it be guaranteed that a released defendant will later show up for trial? In the United States, an abstract concern that the suspect might flee if released is not sufficient to justify detention. This is because actual experience has demonstrated that judicial authorities have a range of techniques designed to make defendant flight highly unlikely.

The court may require that a suspect report on a regular basis to police or a special "pretrial services agency" that can keep track of him or her before trial. Someone designated as a custodian might be asked to supervise the defendant, maintaining close contact. There may be restrictions on where the defendant may go, or orders for him or her to stay away from witnesses or the crime scene. Courts sometimes use "electronic bracelets" or other monitoring technology. And a defendant or relatives may be required to deposit money or post a "bail bond" as a guarantee, creating a financial incentive to appear for trial.

The court can monitor these conditions and adjust as necessary. If any conditions are violated, an arrest order will be sent to the police, and the defendant will be re-arrested and may be punished for the violation.

Years of experience have demonstrated that pre-trial release conditions are sufficient to ensure that most defendants show up for their trials without using detention.

But what about dangerous defendants? In the United States, it is not sufficient to be generally concerned about danger to the community; there must be a proof that a specific defendant is particularly dangerous. (As might be expected, those charged with murder are among the least likely to be released before trial.) Actual experience shows most defendants who



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are released do not flee or commit new crimes. A 14-year survey of the 75 most populous American counties found about 14 percent of those released were re-arrested for serious offenses.

Who decides whether to release a suspect? In the U.S. system, it is of primary importance that a judge – not the police alone – decide whether to detain or release. Our experience shows police tend to see substantial risks in releasing suspects, even when risk is minimal. To justify pre-trial detention, the police or prosecutor generally need to show "clear and convincing evidence" that there are no conditions nor any combination of conditions of release that will ensure the defendant does not appear for trial and that will not protect the safety of the community.

Is this system perfect? No. On rare occasions, suspects do flee. And sometimes suspects are re-arrested for committing new crimes (and if that happens, they are likely to get especially severe punishment, if convicted). Such violations are not considered the fault of police, prosecutors or courts. As long as they do their jobs correctly, they are not reprimanded for failing to prevent some suspects from fleeing or committing new crimes.

The system is designed with knowledge that a certain percentage of cases will result in violations. But given the high success rate of alternatives to detention, and given the harshness and negative effects of prolonged pre-trial detention, the United States strongly favors using proven alternatives to detention before conviction.

### Conditions of Detention

Important safeguards are built into the system for defendants detained prior to trial. After a very short initial period in police custody – usually less than 24 hours – a defendant determined to warrant pre-trial detention will be transferred to a facility that's not directly controlled by the police. Usually, this is a jail run by a special agency or an equivalent of the U.S. Department of Justice. Detention centers are not pleasant, and some have problems with overcrowding and abuse. But there are detailed standards governing minimum operating conditions.

Four aspects of pre-trial detention in the United States are worth highlighting:

- Lawyers have access to defendants in pretrial detention. Criminal defense lawyers are hired by a defendant or provided at government expense if a defendant is poor. Lawyers can freely arrange appointments to meet with a defendant so that detention does not interfere with the preparation of his or her case, and to help prevent mistreatment. Family members are also allowed access.
- Interrogations by the police or prosecutors are subject to strict standards and oversight to reduce the likelihood of coercion and torture. During a trial, the court carefully investigates any claim that a confession was coerced and prevents prosecutors from using coerced confessions and any important investigative "fruits" of those confessions. Although the police may ask questions after arrest, a suspect does not have to answer. Once a defendant has been presented to the court, his criminal defense lawyer is present for all interrogations, and the defendant is still not required to answer questions. The public is well aware of an arrested person's "right to remain silent" because it has been widely demonstrated in movies and on television programs.
- The pretrial detention period is limited by a requirement that defendants be offered a "speedy trial." Detention is not open-ended; on average, cases are resolved within 45 days of arrest. The U.S. government passed the Speedy Trial Act in 1974 in response to problems with prolonged detention and case backlogs. Experience confirms such deadlines do not interfere with a prosecutor's need to adequately investigate a case, or with a defense lawyer's need to prepare a defense. Moreover, these deadlines can be extended in especially complicated cases.

– Finally, in cases of unlawful arrest or detention by the police, defendants may use "habeas corpus" to ask a judge for release. This is a tradition that extends back hundreds of years to the "Great Writ" in England, and is one of the safety nets against injustice built into the U.S. system.

### Reforming the U.S. System

To best understand the U.S. criminal justice system from the outside, it is important to remember that its practices are not fixed. They have changed over time in response to problems and abuses that were uncovered and targeted for correction.

For example, in 1961 many experts recognized that the U.S. system of pretrial release had become unfair. Release on bail at that time usually required a money bond or payment, regardless of the seriousness of the crime. As a result, many poor defendants spent long periods of time in detention waiting for trial. This was unfair, and it was also expensive because so many defendants were in detention.

A group of scholars and reform advocates started a pilot project in New York City called the Manhattan Bail Project. Our current system of interviewing defendants, examining ties to the community and other risk factors, making release recommendations, and monitoring the results, are based on the results of that major reform effort.

A more recent example is the Prison Rape Elimination Act. Sexual abuse in detention and prison is a shocking problem that for many years was quietly acknowledged but considered impossible to resolve. In 2003, the U.S. Congress passed this act, requiring that a commission study the problem and make recommendations. In 2009, the commission issued a comprehensive report. Now, according to the law, the U.S. Attorney General must issue binding national standards for addressing this problem comprehensively. Reforms are now under way.

These examples show that the U.S. system still has problems. But this review also demonstrates that the U.S. justice system is not standing still. Lawyers, scholars, government officials, the media and non-governmental organizations all have major roles to play in promoting reforms, which are part of an ongoing process.

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