

GUANTANAMO BAY: THE GLOBAL EFFECTS OF WRONGFUL DETENTION, TORTURE & UNCHECKED EXECUTIVE POWER: ARTICLE: CITIZENSHIP AND LOCATION IN A WORLD OF TORTURE

Summer, 2007

Reporter

10 N.Y. City L. Rev. 411

Length: 10869 words

Author: Julie Mertus * and Lisa Davis +Julie Mertus * and Lisa Davis +

* Julie Mertus received her J.D. from Yale Law School. She is a professor of Ethics and Human Rights at American University and has published several books, including BAIT AND SWITCH: HUMAN RIGHTS AND U.S. FOREIGN POLICY (2004) and THE UNITED NATIONS AND HUMAN RIGHTS (2005).

+ Lisa Davis, a graduate of the masters program in International Affairs at American University, is the 2007-2008 Editor-in-Chief of the New York City Law Review. The authors would like to thank Jennifer M. Kirby for her invaluable research and editorial assistance.

LexisNexis Summary

... This Article uses the intersection of citizenship and location as a lens for analyzing the impact of the post-September 11th use of torture in United States detention facilities including Guantanamo Bay. ... The "Bybee memo" reached three conclusions: first, that President Bush could authorize torture even though our laws and treaties prohibit it; second, the interrogators could cause a lot of pain without crossing the line to torture; third, that even if those interrogators were later prosecuted for engaging in torture, there were legal defenses they could use to avoid accountability. ... The MCA largely undid the protections established in Hamdan ; detainees could not access their rights under the Geneva Conventions, and they would face trials with much lower standards of justice than U.S. courts provide. ... Substantial evidence exists that the United States has been covertly transferring terrorism suspects to other countries--notably Jordan, Egypt, and Syria--which are known for employing coercive interrogation methods. ... Moreover, INS officials "may refuse to release asylum-seekers even though an Immigration Judge has determined that they meet the definition of a refugee, a person the USA is bound by treaty to protect." ... While the Bush administration's open and publicized expression of extreme executive power raises red flags for human rights and civil liberties advocates, unchecked executive secrecy also plays an extremely significant role in creating an environment conducive to these violations.

Text

[*411] Citizenship. Those who have it have the luxury of taking it for granted--treating passports as tickets across borders, complaining about the length of lines in airports, envying those who can breeze through the fast-pass lines with their sparkling new little European Union (EU) identity cards. This Article uses the intersection of citizenship and location as a lens for analyzing the impact of the post-September 11th use of torture in United States detention facilities including Guantanamo Bay. The main point of the Article can be summed up in one sentence: citizenship and location matter. There are two concepts here worthy of definition: citizenship and location.

As explained in this Article, individuals have relationships to citizenship, and citizenship has its own relationship with individuals. It shapes who people are, what they do, how they perceive and how they are perceived. In

considering United States' involvement in post-September 11th torture and other state-sanctioned abuse of human rights,¹ how citizenship impacts us greatly depends upon [*412] our location.

Location matters in two different ways--placement on the globe and placement in the state. To put it simply, citizenship is attached to a particular state. In other words, states grant citizenship and states take it away; states also physically patrol borders and decide who enters and exits.² Activists have long challenged the authority of the state to exercise control over their lives. In places like Kosovo, dissenting populations have gone so far as to create their own parallel state structures, including their own public welfare system, schools, hospitals and popularly elected government.³ Yet as long as states control borders, state-free citizenship will remain a fantasy. As Americans, when analyzing the impact of U.S.-condoned human rights abuses in Guantanamo Bay and elsewhere,⁴ we cannot escape our location in the international community and our place--as new migrants, descendents of the Pilgrims, perpetrators and survivors of genocide, survivors of the slave trade, Protestants, Catholics, Jews, Muslims, Hindus, Buddhists, Taoists, Sikhs, Wiccans, Baha'is, self-defined--at the center or at the edges of American life.

This Article makes two arguments about citizenship, location, and rights, which each have great importance to everyone who cares about the reports of torture coming out of Guantanamo Bay. First, *outside our state, citizenship matters*. Second, *inside our state, citizenship matters*.

Outside our state, our citizenship is a label that identifies us with a state, its leader, its people, its ideology, and its programs, past and present. Try as we might to distance ourselves from our government, we still bear a citizenship status linking us to certain actions and ideologies with which we might not agree. The first section of this Article argues that, due to the United States' treatment of prisoners in Guantanamo Bay and other detention camps, we, as Americans, have a default identity as hypocrites and "exceptionalists" [*413] at best,⁵ and, at worst, international criminals.⁶

Within our state, citizenship matters. It entails much more than an admission ticket to a country; it is an entry pass to a way of life. Our citizenship clarifies the relationship between the individual and the state, as well as relationships between and among individuals and groups. The guidebook for citizenship comprises the regulations

¹ The initiative taken by the U.S. to bolster national security against the threat of terrorism has sparked an international trend in grave violations of prisoners' civil and human rights. See DEP'T OF DEF., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DEPARTMENT OF DEFENSE DETENTION OPERATIONS 12-13 (2004) [hereinafter DOD, FINAL REPORT 2004], available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>; DEBORAH PEARLSTEIN & PRITI PATEL, HUMAN RIGHTS FIRST (formerly The Lawyers Committee for Human Rights), BEHIND THE WIRE: AN UPDATE TO ENDING SECRET DETENTIONS (2005), http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf; HUMAN RIGHTS WATCH, ENDURING FREEDOM: ABUSES BY U.S. FORCES IN AFGHANISTAN (2004), <http://hrw.org/reports/2004/afghanistan0304/afghanistan0304.pdf>; AMNESTY INT'L, UNITED STATES OF AMERICA: HUMAN DIGNITY DENIED: TORTURE AND ACCOUNTABILITY IN THE 'WAR ON TERROR' (2004), <http://web.amnesty.org/library/pdf/AMR511452004English/>

² See, e.g., Margaret E. Montoya, *Border Crossings in an Age of Border Patrols: Cruzando Fronteras Metaforicas*, 26 N.M. L. REV. 1, 2 (1996) (explaining the importance of crossing borders). See generally Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 120 (2007) (discussing racial profiling in joint state and federal immigration investigations on the U.S.-Mexico border).

³ See, e.g., Chris Hedges, *Albanians Inside Serbia Set to Fight for Autonomy*, N.Y. TIMES, Oct. 19, 1991, at A1 (describing Albanian creation of parallel hospitals, schools, and unofficial governments in Kosovo).

⁴ See *supra* note 1 and accompanying text.

⁵ See, e.g., DAVID ROSE, GUANTANAMO: THE WAR ON HUMAN RIGHTS (The New Press, 2004) (providing examples of American exceptionalism).

⁶ See Nicolas J.S. Davies, *The "R" Word: Reparations for Iraq*, ONLINEJOURNAL, Feb. 5, 2007, http://www.onlinejournal.com/artman/publish/article_1714.shtml.

that both govern the everyday relations between the ruler and the ruled and construct and regulate the institutions that mediate between government and society. In liberal democracies, the codes of conduct created through citizenship are designed to ensure equality before the law: all who achieve the status of "citizen" become rights-holders with equal entitlements to bring claims against the duty-bearing state.⁷

The case of the mistreatment of prisoners in Guantanamo Bay,⁸ along with other "spillover" discrimination and abuse of ethnic and racial minorities in the United States,⁹ demonstrates that these equality guarantees are not so equal in practice. In fact, there is an inverse relationship between our place in society and our reliance upon citizenship status to access our rights. The closer we are to the center, the less we need to rely upon our citizenship guarantees. When at the "center" of society, we start taking for granted our ability to be free from persecution from the state and to participate in social and political decision-making. In contrast, when at the "margins" of society, we must continually be on guard against state-perpetrated and state-condoned oppression, and we can never relent in our struggle to be heard by decisionmakers. Thus, the further we are from the center of society, the more we need our citizenship guarantee. In the immediate aftermath [*414] of September 11th, everyone from the margins to the center lived in a climate of fear and mistrust, but those at the margins were most susceptible to government-sanctioned abuses.¹⁰ Today, despite a somewhat less fearful environment, the disparities in experiences between those at the margin and center continue.

I. THE TAINTED AMERICAN IMAGE ABROAD

At one point in time--in the late Tito era in then Yugoslavia--an American traveling in the Balkans was likely to hear someone from Yugoslavia cheerfully declare: "We have the best passport in the world!"¹¹ More importantly, no one would snicker. After all, there was something to be said for Yugoslav citizenship at that time. Neither aligned East nor West, North nor South, the Yugoslav people had friendly relations with most states and could travel just about everywhere.¹² Not only were they welcomed by almost all people and governments, but numerous political movements and government coalitions in all corners of the globe also sought their association.¹³ In the aftermath of the Balkan wars, however, the Yugoslav passport has become one of the least popular emblems of citizenship; it certainly no longer guarantees ready access and respect in all corners of the world.

The United States appears to be headed in the same direction. The love of American citizenship has become tainted as well, resulting in the similar displacement of positive myths about what it means to be American. In a few

⁷ See, e.g., Leti Volpp, *The Culture of Citizenship*, 8 THEORETICAL INQUIRIES L. 571 (2007) (discussing the relationship between citizenship and culture in democracies); Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447 (2000) (discussing the relationship between citizenship and the nation-state).

⁸ Press Release, ACLU, FBI Inquiry Details Abuses Reported by Agents at Guantanamo (Jan. 3, 2007), <http://www.aclu.org/safefree/torture/27816prs20070103.html> (releasing over 200 pages of documents obtained from the FBI, detailing 26 eyewitness accounts by agents of detainee abuse).

⁹ *The Impact on Civil Rights in the United States of the September 11 Attacks* (Human Rights First, Working Paper prepared for the International Conference on Terrorism and Human Rights, 2002), http://www.humanrightsfirst.org/us_law/after_911/after_911_09.htm (providing examples of impact of response to 9/11 on civil rights in the U.S.).

¹⁰ See, e.g., Christopher Edley, Jr., *The New American Dilemma: Racial Profiling Post-9/11*, in THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 170-74 (Richard C. Leone & Greg Anrig, Jr. eds., Public Affairs 2003) (providing overview of racial profiling since 9/11); Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 867-68 (2003) (providing an overview of the impact of 9/11 on discrimination and other mistreatment of Mexican immigrants).

¹¹ This observation is drawn from author Julie Mertus' firsthand observations from living in the Balkans in the early- and mid-1990s.

¹² *Id.*

¹³ *Id.*

terrible moments, with the broadcasting of the brutal images of prisoner mistreatment in Abu Ghraib¹⁴ and reports of similar abuse at Guantanamo Bay,¹⁵ the [*415] image of America-as-human-rights-savior was replaced with America-as-torturer.¹⁶ The post-September 11th climate has witnessed a deepening of the contemptuous attitude of the United States to international law,¹⁷ and especially to international organizations charged with the implementation of human rights.¹⁸ By acting as if United States compliance with international law is optional and subject to reinterpretation, and by adopting a confident you're-with-us-or-against-us attitude,¹⁹ the Bush administration has projected abroad the image of the selfish playground bully. The following section explains how the United States' position on its obligations under international law--specifically those related to torture and to the Geneva Conventions generally--and the down-grading of U.S. involvement in international agreements contribute to the image of American citizenship.

A. *The Tortured Law of Torture*

The Bush administration's guiding principle regarding the status [*416] of the detainees in Guantanamo Bay and detainee rights under international law was best summarized in a *Washington Post* editorial that said that the "Bush administration would respect international law only so far as it chose to."²⁰ Indeed, President Bush flatly declared that he could ignore international treaties, stating, "I have the authority to suspend Geneva [Conventions]

¹⁴ E.g., CNN GALLERY: ABUSE AT ABU GHRAIB PRISON (2005), <http://www.cnn.com/2004/WORLD/meast/05/13/iraq.abuse/index.html>; ABC NEWS IRAQI PRISONER ABUSE PHOTOS: HORRORS AT ABU GHRAIB, <http://abcnews.go.com/International/News/popup?id=133596> (last visited Oct. 14, 2007); WASHINGTONPOST.COM, at <http://www.washingtonpost.com/wp-dyn/world/mideast/gulf/iraq/> (last visited Nov. 14, 2007).

¹⁵ Former Guantanamo detainee statements have set out details of their mistreatment. See CTR. FOR CONSTITUTIONAL RIGHTS, COMPOSITE STATEMENT: DETENTION IN AFGHANISTAN AND GUANTANAMO BAY (2004), available at <http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf>; HUMAN RIGHTS WATCH, WORLD REPORT 2005: UNITED STATES COUNTRY SUMMARY REPORT, 499-509 (2005), available at <http://hrw.org/wr2k5/wr2005.pdf>.

¹⁶ See DEP'T OF DEF., FINAL REPORT 2004, *supra* note 1, at 18-19 ("The damage these incidents [of abuse] have done to U.S. policy, to the image of the U.S. among populations whose support we need in the Global War on Terror and to the morale of our armed forces, must not be repeated.").

¹⁷ Robert K. Goldman, *Trivializing Torture: The Office of Legal Counsel's 2002 Opinion Letter and International Law Against Torture*, 12 No. 1 HUM. RTS. BR. 1 (2004), available at <http://www.wcl.american.edu/hrbrief/12/1goldman.cfm>. Goldman describes this contemptuous attitude:

Apart from ignoring Supreme Court decisions rejecting such exorbitant claims of executive powers, the Office of Legal Counsel's arguments reflect either an appalling ignorance of, or sheer contempt for, international law. . . . It would be difficult to construct legal arguments that could be more exquisitely antithetical to and utterly destructive of the underlying object and purpose of the Torture Convention than those contained in the Office of Legal Counsel's opinion.

Id. at 3-4.

¹⁸ HUMAN RIGHTS WATCH, U.S.: PENTAGON DENIES ACCESS TO GUANTANAMO TRIALS: HUMAN RIGHTS GROUPS SHUT OUT OF MILITARY COMMISSIONS (Feb. 24, 2004), <http://hrw.org/english/docs/2004/02/24/usdom7585.htm> ("The Pentagon has refused to allow three leading human rights groups to attend and observe military commission trials of detainees at Guantanamo Bay.").

¹⁹ *Bush Says It Is Time for Action*, CNN, Nov. 6, 2001, <http://archives.cnn.com/2001/US/11/06/gen.attack.on.terror/>; see also Michael Kramer, *Waging War on Two Fronts*, DAILY NEWS (NEW YORK), Sept. 16, 2001, at 16; Youssef M. Ibrahim, *The Mideast Threat That's Hard to Define*, WASH. POST, Aug. 11, 2002, at B1; *Leaders: A World and Its Losses: One Year on, Lessons Remain Unlearned*, THE GUARDIAN (LONDON), Sept. 11, 2002, at 19.

²⁰ Editorial, *The Guantanamo Story*, WASH. POST, Jan. 25, 2002, at A24.

as between the United States and Afghanistan . . . [and] I reserve the right to exercise this authority in this or future conflicts." ²¹

The issue of torture was taken up by the U.S. Justice Department in the summer of 2002, after the Central Intelligence Agency (CIA) sought guidance as to how it should treat prisoners held at Guantanamo Bay and elsewhere. ²² The Justice Department's Office of Legal Counsel, under the direction of Jay Bybee, produced a fifty-page memo that gave the green light to torture. ²³ The "Bybee memo" reached three conclusions: first, that President Bush could authorize torture even though our laws and treaties prohibit it; second, the interrogators could cause a lot of pain without crossing the line to torture; third, that even if those interrogators were later prosecuted for engaging in torture, there were legal defenses they could use to avoid accountability. ²⁴

The Bybee memo attempted to create a truly remarkable "self-defense" exception for torture. ²⁵ It reasoned that an interrogator's actions would be "justified by the executive branch's constitutional authority to protect the nation from attack." ²⁶ This was contrary to well-established international law. There simply is no self-defense exception to torture, either by an individual or by the state. The U.N. Convention Against Torture, Article 2 provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, [*417] may be invoked as a justification for torture." ²⁷

To reach its conclusions, the Bybee memo had to redefine torture in a manner that departed radically from both U.S. and international understandings of the prohibition against torture. The memo came up with what Bybee called an "aggressive interpretation as to what amounts to torture," ²⁸ asserting that for an act to constitute torture, it must be of an "extreme nature" in that it "must inflict pain that is difficult to endure." ²⁹ The memo explained that "[p]hysical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death." ³⁰ The memo severely limited the possibility that mental pain or suffering can amount to torture, stating that "it must result in significant psychological harm of significant duration, e.g., lasting for months or even years." ³¹

²¹ Matt Kelley, *Justice Dept. Repudiates Torture Memo: Bush Reserved Specific Right to Ignore Geneva Conventions*, CHARLESTON GAZETTE, June 24, 2004, at A1.

²² See Christopher Kutz, *Torture, Necessity, and Existential Politics*, 95 CAL. L. REV. 235, 240 (2007).

²³ See Memorandum from the Justice Dep't Office of Legal Counsel on Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A to Alberto R. Gonzalez, Counsel to the President (Aug. 1, 2002) [hereinafter Bybee Memo], available at http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/memo_20020801-JD_%20Gonz_.pdf.

²⁴ See *id.* at 1-3.

²⁵ *Id.* at 39 ("[S]elf-defense could justify interrogation methods needed to elicit information to prevent a direct and imminent threat to the United States and its citizens."); see also *id.* at 42-46.

²⁶ *Id.* at 46.

²⁷ U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987), available at <http://www.ohchr.org/english/law/pdf/cat.pdf> [hereinafter CAT]. For this and other international law provisions on torture, see AMNESTY INT'L, WHAT DOES INTERNATIONAL LAW SAY ABOUT TORTURE?, http://web.amnesty.org/48256B3A0045BBF3/torture_internationallaw_page_eng (last visited Nov. 14, 2007).

²⁸ Bybee Memo, *supra* note 23, at 31.

²⁹ *Id.* at 1.

³⁰ *Id.*

³¹ *Id.*

Applying the Bybee torture definition, interrogation techniques that clearly went beyond earlier practice³² were approved by the Secretary of Defense on December 2, 2002. These techniques include: using stress positions such as standing continuously for four hours at a time; detention in isolation for up to thirty days; placing a hood over a detainee's head during questioning; depriving a detainee of light and auditory stimuli; removing clothing; interrogations lasting for up to twenty hours; and using individual phobias, such as a detainee's fear of dogs, to induce stress.³³

After intense international and national pressure, the above list of tactics was reconsidered and rescinded.³⁴ Instead, the Secretary [*418] of Defense authorized the following techniques for treatment: incentives and removal of incentives, like comfort items; "change of scenery," which might include exposure to extreme temperatures and deprivation of light and auditory stimuli; environmental manipulation, or altering the environment to create moderate discomfort by adjusting temperature or introducing an unpleasant smell, for example: sleep adjustment, or adjusting the sleeping times of the detainee by reversing sleep cycles from night to day; and isolating the detainee from other detainees while still complying with basic standards of treatment.³⁵

The legal validity of this list was immediately questioned.³⁶ These techniques met four of the five elements in the Conventions' definition of torture--the acts in question were perpetrated by government officials; the acts had a clear purpose, such as intelligence gathering or extracting information; the acts were committed intentionally; and the victims were in a position of powerlessness.³⁷ Although it is difficult to assess in the abstract whether treatment was aimed at humiliating victims, it can be asserted that stripping detainees naked--particularly in the presence of women and taking into account cultural sensitivities--can cause extreme psychological pressure and can amount to degrading treatment or even torture.³⁸ Some of the techniques--in particular the use of dogs, exposure to extreme temperatures, sleep deprivation for consecutive days, and prolonged isolation--can cause severe suffering.³⁹

B. "Creative" Interpretation of International Law

Throughout its entire second term in office, the Bush administration has been vigorously pursuing legal validity for interrogation practices that violated the Geneva Conventions. In late October [*419] 2005, Vice President Cheney

³² See *supra* note 1; see also Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department's Legal Contortions on Interrogation*, WASH. POST, June 20, 2004, at B3.

³³ Memorandum from Jerald Phifer, Dir., J2, Dep't of Def., to Commander of Joint Task Force 170, Request of Approval of Counter-resistance Techniques (Oct. 11, 2002), attached to memorandum from William J. Haynes II to Sec'y of Def., Counter-resistance Techniques (Nov. 27, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dodmemos.pdf>.

³⁴ See U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Situation of Detainees at Guantanamo Bay*, P 50, U.N. Doc E/CN.4/2006/120 (Feb. 15, 2006), available at http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.120_.pdf [hereinafter U.N. *Guantanamo Report*].

³⁵ *Id.* (citing Memorandum from U.S. Sec'y of Def. on Counter-Resistance Techniques in the War on Terrorism to Commander, U.S. Southern Command (Apr. 16, 2003), available at <http://www.gwu.edu/nsarchiv/NSAEBB/NSAEBB127/03.04.16.pdf>). See also Executive Summary from Albert T. Church to Sec'y of Def., 4-6, 12-14 (Mar. 11, 2005), available at <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf> (disclosing the results of the U.S. Department of Defense review of detention operations and interrogation techniques at Guantanamo Bay).

³⁶ U.N. *Guantanamo Report*, *supra* note 34, at PP 49-52.

³⁷ *Id.* at P 51; see also CAT, *supra* note 27, art. I, P 1.

³⁸ U.N. *Guantanamo Report*, *supra* note 34, PP 51-52.

³⁹ *Id.* at P 52; DEP'T OF DEF., ARMY REGULATION 15-6: FINAL REPORT: INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTANAMO BAY, CUBA DETENTION FACILITY 2 (amended June 9, 2005).

and CIA Director Porter Goss urged Congress to exempt the CIA from the McCain amendment,⁴⁰ which banned torture of any detainee in U.S. custody.⁴¹ In the wake of publicized prisoner-abuse committed by the U.S. military in Afghanistan and Iraq, the energetic lobbying effort led by Cheney and Goss heightened concerns among lawmakers and human rights groups about the treatment of detainees in the secretive CIA system.⁴² The Bush administration did little to alleviate suspicions when President Bush attached a "signing statement" to the McCain amendment, declaring that the President had the right at any point not to comply with the ban on cruel, inhumane, and degrading punishment.⁴³ The executive branch, he declared, would interpret the Amendment "in a manner consistent with the constitutional authority of the President to supervise the unitary Executive Branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power."⁴⁴

Vice President Cheney's office also voiced strong opposition to regulations of a new U.S. Army Field Manual, released September 6, 2006, that barred torture and upheld the Geneva Conventions.⁴⁵ Their stiff opposition delayed the manual's publication for a year.⁴⁶ At a morning briefing for the manual's release, Pentagon officials [*420] denounced the use of torture, pointing out its ineffectiveness in obtaining reliable intelligence.⁴⁷ The bans against cruel and degrading treatment in the manual did not apply, however, to CIA officials. Indeed, any hopes that the briefing portended significant changes to the treatment of detainees in the so-called war on terror were summarily dashed by President Bush's speech that afternoon. In his address, he confirmed the existence of a secret CIA detention program, defended CIA officials' use of "alternative" interrogation methods, and called on Congress to pass proposed legislation on military commissions to try detainees at Guantanamo Bay.⁴⁸ Included among its many problematic provisions, the legislation would permit trials in which secret evidence and statements secured under coercion could be used.⁴⁹

Anyone who believed that the federal checks-and-balances system might halt President Bush's extreme use of executive power and his placement of the United States plainly among the list of nations that abuse human rights

⁴⁰ Liz Sidoti, *McCain: Detainee Torture Ban Must Stay: The White House Wants to Loosen a Provision Approved by the Senate, but May Disagree*, PHILADELPHIA INQUIRER, Oct. 26, 2005, at A11. Cheney and Goss suggested excluding "overseas clandestine counterterrorism operations by agencies other than the Pentagon" from the provision. Reasonably, McCain concluded that such an exemption "would basically allow the CIA to engage in torture." *Id.*

⁴¹ R. Jeffrey Smith & Josh White, *Cheney Plan Exempts CIA from Bill Barring Abuse of Detainees*, WASH. POST, Oct. 25, 2005, at A1.

⁴² See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons: Debate Is Growing Within Agency About Legality and Morality of Overseas System Set-Up After 9/11*, WASH. POST, Nov. 2, 2005, at A1.

⁴³ See Charlie Savage, *Bush Could Bypass New Torture Ban: Waiver Right Is Reserved*, BOSTON GLOBE, Jan. 4, 2006, available at http://www.boston.com/news/nation/articles/2006/01/04/bush_could_bypass_new_torture_ban/. See also John W. Dean, *The Problem with Presidential Signing Statements: Their Use and Misuse by the Bush Administration*, FINDLAW, Jan. 13, 2006, <http://writ.news.findlaw.com/dean/20060113.html> (last visited Oct. 11, 2007).

⁴⁴ Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 42 Weekly Comp. Pres. Doc. 1918 (Dec. 30 2005).

⁴⁵ Jim Lobe, *Bush Yields to Geneva Conventions on Detainees*, ANTIWAR.COM, Sept. 7, 2006, at 2, <http://www.antiwar.com/lobe/?articleid=9663>; DEP'T OF THE ARMY, FM 222.3 (FM 34-52) DEPARTMENT OF THE ARMY FIELD MANUAL: HUMAN INTELLIGENCE COL, LECTOR OPERATIONS (2006), available at <http://www.tortureontrial.org/art/Exhibit3filed.pdf>.

⁴⁶ Lobe, *supra* note 45.

⁴⁷ HUMAN RIGHTS WATCH, U.S.: BUSH JUSTIFIES CIA DETAINEE ABUSE: PROPOSED MILITARY COMMISSIONS DEEPLY FLAWED (Sept. 6, 2006), <http://hrw.org/english/docs/2006/09/06/usdom14139.htm> [hereinafter HRW, DETAINEE ABUSE] ("No good intelligence comes from abusive interrogation practices." (quoting Lieutenant General John F. Kimmons, the Army's Deputy Chief of Intelligence)).

⁴⁸ President George W. Bush, *President Discusses Creation of Military Commissions to Try Suspected Terrorists* (Sept. 6, 2006), <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

⁴⁹ HRW, DETAINEE ABUSE, *supra* note 47.

would be sorely disappointed by the actions of the U.S. Congress. While some representatives and senators publicly denounced the administration's efforts to legalize its violations of detainees' rights,⁵⁰ Congress ultimately acquiesced to President Bush's presumed prerogatives.⁵¹ In response to the Supreme Court's June 2006 ruling in *Hamdan v. Rumsfeld*,⁵² which upheld the Geneva Conventions and detainees' right to use habeas corpus,⁵³ Congress, at the urging of the President, passed the Military Commissions Act (MCA).⁵⁴ The MCA largely undid the protections established in *Hamdan*; detainees could not access their [*421] rights under the Geneva Conventions, and they would face trials with much lower standards of justice than U.S. courts provide.⁵⁵ Military commissions with highly questionable impartiality will try detainees,⁵⁶ secret evidence and coerced statements can be used,⁵⁷ and U.S. officials are granted immunity from prosecution for past abuses of detainees.⁵⁸

Every international human rights body has rejected the Bush administration's attempt to classify detainees as "unlawful combatants."⁵⁹ In May 2006, the U.N. Committee against Torture⁶⁰ chastised the United States for violating the human rights of those held captive in the war on terror.⁶¹ The CAT committee rejected U.S. [*422] claims that the Convention against Torture did not apply to U.S. personnel acting outside of the United States or

⁵⁰ See Frank J. Gaffney Jr., *Do the Right Thing*, WASH. TIMES, Sep. 19, 2006, at A16; see also Sheryl Gay Stolberg, *The Reach of War: The Congress*, N.Y. TIMES, Nov. 21, 2005, at A1.

⁵¹ See Christopher M. Evans, Note, *Terrorism on Trial: The President's Constitutional Authority to Order the Prosecution of Suspected Terrorists by Military Commission*, 51 DUKE L.J. 1831 (2002) (examining post-9/11 Bush administrative measures with regard to trying those suspected of terrorism).

⁵² [126 S. Ct. 2749 \(2006\)](#).

⁵³ [Id. at 2756-57](#).

⁵⁴ MILITARY COMMISSIONS ACT OF 2006, Pub. L. No. 109-366, **120 Stat. 2600 (2006)** (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

⁵⁵ U.S. courts have limited jurisdiction to hear *habeas* petitions. See [10 U.S.C.A. § 950j](#); [10 U.S.C.A. § 949a-o](#) (military commission trial procedures generally); [10 U.S.C.A. § 948b\(b\)](#) (inapplicability of other provisions--speedy trial, compulsory self-incrimination and pretrial investigation--to military commission); [10 U.S.C.A. § 948b\(g\)](#) (noting that Geneva Conventions are not a source of rights for those subject to trial by military commission).

⁵⁶ AMNESTY INT'L, UNITED STATES OF AMERICA MILITARY COMMISSIONS ACT OF 2006: TURNING BAD POLICY INTO BAD LAW 8 (Sept. 29, 2006), <http://web.amnesty.org/library/pdf/AMR511542006ENGLISH/>

⁵⁷ *Id.* (reporting on the use of classified evidence against a defendant, without the defendant necessarily having the means or permissibility to challenge the government's "sources, methods or activities" in gathering the evidence).

⁵⁸ [42 U.S.C. § 2000DD-1](#) (codifying the "qualified immunity" defense already available to federal officials; see [Harlow v. Fitzgerald](#), 457 U.S. 800, 818 (1982) ("We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.")). See generally THE CTR. FOR VICTIMS OF TORTURE, FAQs ABOUT THE MILITARY COMMISSIONS ACT, <http://www.cvt.org/main.php/Advocacy/TortureisUnAmerican/FAQs: MilitaryCommissionsAct> (last visited Nov. 14, 2007).

⁵⁹ See Manoocher Mofidi & Amy E. Eckert, "Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels, 36 CORNELL INT'L L.J. 59 (2003) (explaining political use of term "unlawful combatants" and its alternatives).

⁶⁰ The Committee is an international body of experts that monitors state conformity with CAT. For relevant information on the Committee, the Convention, and State Parties reporting, see Office of the United Nations High Commissioner for Human Rights, Committee Against Torture, <http://www.ohchr.org/english/bodies/cat/> (last visited Nov. 14, 2007). See also *supra* note 27.

⁶¹ See U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America*, U.N. Doc CAT/C/USA/CO/2 (July 25, 2006) [hereinafter CAT U.S. Report], available at <http://daccessdds.un.org/doc/UNDOC/GEN/GO6/432/25/PDF/G0643225.pdf?OpenElement>.

during wartime.⁶² CAT called on the United States to close all secret detention centers; hold accountable senior military and civilian officials who authorized, acquiesced or consented to acts of torture committed by their subordinates; and end its practice of transferring detainees to countries with no "diplomatic assurance" that detainees will not be subject to torture.⁶³ It also specifically criticized the indefinite detention of prisoners in Guantanamo Bay and called for its closure.⁶⁴

In its attempt to avoid culpability for its interrogation practices, the Bush administration uses another tactic known as "extraordinary renditions"⁶⁵ --also referred to as "outsourcing torture."⁶⁶ Substantial evidence exists that the United States has been covertly transferring terrorism suspects to other countries--notably Jordan, Egypt, and Syria--which are known for employing coercive interrogation methods.⁶⁷ The United States' involvement in these transfers serves as a poor example to other states and comprises an additional violation of international law and human rights protections.

In September 2006, the Bush administration finally admitted to the existence of secret CIA prisons across the globe, the indications of which had been reported months prior in mainstream news.⁶⁸ While the Bush administration denied using torture, CIA [*423] interrogators are permitted to use agency-approved "Enhanced Interrogation Techniques."⁶⁹ These techniques include actions in violation of both United States' Military Law and the United Nations' Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the United States is a signatory.⁷⁰ Detainees and human rights organizations report that interrogators in the secret prisons have used methods--including "water boarding"⁷¹ --that are deemed torture by the treaty.⁷²

⁶² *Id.* at PP 14 & 15.

⁶³ *Id.* at PP 17, 19, 21.

⁶⁴ *Id.* at P 22.

⁶⁵ See generally Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, [37 CASE W. RES. J. INT'L L. 309, 314-24 \(2006\)](#) (outlining the practice of extraordinary rendition). See, e.g., Andrew Cohen, *Extraordinary Rendition*, CBSNEWS.COM, Feb. 18, 2005, <http://www.cbsnews.com/stories/2005/02/18/opinion/courtwatch/main674973.shtml>.

⁶⁶ Charles Knight, *Outsourcing Torture and the Problems of 'Quality Control,'* FOREIGN POLICY IN FOCUS, May 18, 2004, <http://www.fpi.org/pdf/gac/0405torture.pdf>. See also Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106; Sadat, *supra* note 65, at 315.

⁶⁷ See David E. Kaplan, *Playing Offense: The Inside Story of How U.S. Terrorist Hunters Are Going After Al Qaeda*, U.S. NEWS & WORLD REPORT, May 25, 2003, available at <http://www.usnews.com/usnews/news/articles/030602/2terror.htm>; Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations: 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1; Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A1.

⁶⁸ E.g., *Bush: CIA Holds Terror Suspects in Secret Prisons*, CNN.COM, Sept. 7, 2006, <http://www.cnn.com/2006/POLITICS/09/06/bush.speech/index.html>. See also *infra* notes 69 & 71.

⁶⁹ See, e.g., Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described: Sources Say Agency's Tactics Lead to Questionable Confessions, Sometimes to Death*, ABCNEWS.COM, Nov. 18, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1322866&page=1>.

⁷⁰ CAT, *supra* note 27.

⁷¹ Ross & Esposito describe the process of "waterboarding":

The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt.

Ross & Esposito, *supra* note 69. E.g., Carol D. Leonnig & Eric Rich, *U.S. Seeks Silence on CIA Prisons-Court Is Asked to*

Though it claims that the CIA does not use torture, the Bush administration still moved in November 2006 to bar detainees from talking to anyone, even their lawyers, about the "alternative interrogation methods" they underwent at the secret CIA prisons.⁷³ The administration argued that under the new Military Commissions Act, these detainees have no right to speak to a lawyer because the Act negates their access to the U.S. criminal court system.⁷⁴

"Excessive secrecy has been a consistent theme of the Bush administration."⁷⁵ In this environment, Americans have no way of knowing if the administration is actually adhering to the law, or if its interrogators are actually limiting their methods to actions [*424] outside of the administration's narrow definition of torture.⁷⁶ As A. John Radsan, former assistant general counsel at the CIA, stated, "I am not against all secrets. Keeping some of them is necessary to our diplomacy, our military policy, and our intelligence activities. But a secret government, segregated from reasonable checks and balances, is contrary to the principles many Americans have nobly sacrificed to protect."⁷⁷ In an atmosphere where revelations of executive secrecy are not met with shame, but with assertions that the so-called war on terror justifies all, there could be no end to the potential wrongful or illegal actions by this administration.

II. TAINTED CITIZENSHIP GUARANTEES AT HOME

The U.S. State Department webpage on asylum depicts the United States as a safe haven:

Every year, thousands of people come to the United States in need of protection because they have been persecuted or fear they will be persecuted on account of their race, religion, nationality, membership in a particular social group, or political opinion. Those found eligible for asylum are permitted to remain in the United States.⁷⁸

The reality, however, is that America has become less secure for all of its residents.⁷⁹ This is especially true for those living at the margins of society, including religious and ethnic minorities.⁸⁰ Accompanying this shift has been

Bar Detainees from Talking About Interrogations, WASH. POST., Nov. 4, 2006, at A1 ("Captives who have spent time in the secret prisons . . . have said the detainees were sometimes treated harshly with techniques that included 'waterboarding,' which simulates drowning."); Douglas Jehl & David Johnston, *C.I.A. Expands Its Inquiry into Interrogation Tactics*, N.Y. TIMES, Aug. 29, 2004, at A10.

⁷² See Ross & Esposito, *supra* note 69 (referencing a 2004 classified report prepared by CIA Inspector General John Helgerwon identifying interrogation techniques as cruel and degrading treatment pursuant to the Geneva Convention).

⁷³ *E.g.*, Leonnig & Rich, *supra* note 71.

⁷⁴ *See id.*

⁷⁵ Geoffrey R. Stone & William P. Marshall, Commentary, *Secrecy, the Enemy of Democracy*, CHI. TRIB., Dec. 17, 2006, at 7. See also *Drowning in a Sea of Faux Secrets: Policies on Handling of Classified and Sensitive Information: Hearing Before the Subcomm. on National Security, Emerging Threats, and International Relations of the H. Comm. on Government Reform*, 109th Cong. (2006), available at <http://www.fas.org/sqp/congress/2006/faux.pdf>.

⁷⁶ A. John Radsan, *The Secret Government*, JURIST, Mar. 10, 2006, <http://jurist.law.pitt.edu/forumy/2006/03/secret-government.php> (last visited Nov. 15, 2007).

⁷⁷ *Id.*

⁷⁸ U.S. Citizenship and Immigration Services, What Is Asylum?, <http://www.uscis.gov/> (follow "Services & Benefits" hyperlink; then follow "Humanitarian Benefits" hyperlink; then follow "Asylum" hyperlink) (last visited Oct. 7, 2007).

⁷⁹ See generally Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767 (2002) (exploring the nature of civil liberties before and after 9/11, focusing on historical events and strategies applied by the government, which affect the security of Americans today).

⁸⁰ *Id.* at Part IVA. See also MICHAEL RATNER, CTR. FOR CONSTITUTIONAL RIGHTS, MAKING US LESS FREE: WAR ON TERRORISM OR WAR ON LIBERTY?,

an increasingly chilly attitude toward [*425] foreigners since September 11th.⁸¹ Although asylum seekers and economic migrants still flock to the United States, they have good reason to be skeptical that American citizenship will provide the kind of legal safeguards that they need.⁸²

A. Targeting Ethnic Minorities

The general tightening of U.S. borders and the fear of terrorists crossing over them has led to many new border protocols.⁸³ Some of the changes are particularly felt by non-U.S. citizens. For example, for non-citizens who travel to the United States, fingerprints and photographs are now standard procedure.⁸⁴ "[P]eople whose demographics and immigration statuses resembled those of the nineteen hijackers" have been subjected to particularly intrusive and discriminatory treatment.⁸⁵ According to "Operation Liberty Shield," a U.S. Department of Homeland Security policy announced in 2003, asylum seekers from a list of Asian, North African, and Middle Eastern nations may be detained for the duration of their asylum proceedings without the possibility of an individualized review before an impartial adjudicator.⁸⁶ Immigrants suspected of entering without proper documentation may be held in detention--without notifying their families and for unspecified amounts of time--while their cases are pending.⁸⁷

In the aftermath of September 11th, the Federal Bureau of Investigation (FBI) and the Immigration and Naturalization Service [*426] (INS), agencies of the Department of Justice, began questioning thousands of people with possible information about or connections to "terrorist activity."⁸⁸ The agencies' choice of whom to interrogate "often appeared to be haphazard, at times prompted by law enforcement agents' random encounters

<http://www.ccrny.org/v2/viewpoints/viewpoint.asp?ObjID=YLhsqUxleu&Content=143> (last visited Oct. 16, 2007) [hereinafter RATNER, MAKING US LESS FREE] ("The government's campaign against non-citizens, particularly Muslims, has at times flowered into explicit religious bigotry."). For discussion on how racial profiling illustrates the increased governmental intrusion into minority communities, see Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 868-69 (2003); Sherry F. Colb, *The New Face of Racial Profiling: How Terrorism Affects the Debate*, FINDLAW, Oct. 10, 2001, <http://writ.news.findlaw.com/colb/20011010.html>; Kim Zetter, *Why Racial Profiling Doesn't Work*, SALON.COM, Aug. 22, 2005, http://archive.salon.com/news/feature/2005/08/22/racial_profiling/index.html.

⁸¹ See LAWYERS COMM. FOR HUMAN RIGHTS (now known as HUMAN RIGHTS FIRST), A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11 (2002), http://www.humanrightsfirst.org/pubs/descriptions/loss_report.pdf [hereinafter A YEAR OF LOSS]. This report discusses new procedures implemented by the Immigration and Naturalization Service (INS) in response to the September 11th attacks, aimed at "gaining greater control over the admission of immigrants and visitors into the country, and tracking and monitoring those in the United States." *Id.* at iii-iv.

⁸² See, e.g., Marie A. Taylor, *Immigration Enforcement Post-September 11: Safeguarding the Civil Rights of Middle Eastern-American and Immigrant Communities*, 17 GEO. IMMIGR. L.J. 63 (2002).

⁸³ See generally *Protecting the Homeland Post September 11: Strengthening Border Security*, APOSTILLE U.S., Sept. 8, 2006, http://apostille.us/news/protecting_the_homeland_post_september_11_strengthening_border_security.shtml (last visited Oct. 7, 2007).

⁸⁴ For more on the procedures used in racial profiling see Stephen H. Legomsky, *The Ethnic and Religious Profiling of Non-Citizens: National Security and International Human Rights*, 25 B.C. THIRD WORLD L.J. 161, 170-71 (2005).

⁸⁵ *Id.* at 171 (discussing the so-called "voluntary interviews" coordinated by Department of Justice's Executive Office for the United States Attorneys).

⁸⁶ Letter from Rory Mungoven, Global Advocacy Director, Human Rights Watch, to OHCHR Comm. on the Elimination of Racial Discrimination (CERD) (Feb. 13, 2004), available at <http://hrw.org/english/docs/2004/03/25/global8227.htm>.

⁸⁷ See, e.g., Jodi Wilgoren, *Refugees in Limbo: Ordered Out of U.S., but with Nowhere to Go*, N.Y. TIMES, June 4, 2005, at A1.

⁸⁸ HUMAN RIGHTS WATCH, PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES 3 (Aug. 2002), available at <http://www.hrw.org/reports/2002/us911/USA0802.pdf> [hereinafter HRW, PRESUMPTION OF GUILT] (providing a comprehensive analysis of the mistreatment of non-citizens in the wake of 9/11

with foreign male Muslims or neighbors' suspicions." ⁸⁹ This questioning resulted in arrest and incarceration for approximately 1,200 non-citizens. ⁹⁰ The majority of these detainees were from Arab and Muslim countries. ⁹¹ Of the 762 individuals arrested by the INS, nearly all were charged with immigration violations completely unrelated to terrorism. ⁹²

As Human Rights Watch testified before the United Nations:

Three hundred and seventeen were held without charge for more than forty-eight hours; thirty-six were held for twenty-eight days or more without charge; thirteen were held for more than forty days without charge; and nine were held for more than fifty days without charge. One Saudi Arabian detainee was held [*427] for 119 days without charge. ⁹³

Some of these detainees were also subject to extremely abusive conditions, especially when held at the Metropolitan Detention Center (MDC) in Brooklyn, New York:

Subsequent investigations have confirmed that correctional officers "slammed" these special interest detainees against the MDC walls, causing pain and bodily harm. . . . Detainees had their fingers and wrists painfully twisted, or their restraints pulled to cause pain and injury to their legs and arms, or were tripped so that they fell to the floor. While several investigations were undertaken, the Department of Justice determined that the evidence was insufficient to proceed with prosecutions. ⁹⁴

Although the arrests and detentions were described as part of the government's anti-terrorism offensive, many of the detained were held for weeks only to then be charged with immigration violations. ⁹⁵ They were deported under non-criminal charges of over-staying a visa or working more hours than permitted on a student visa. ⁹⁶ The majority

through interviews with current and former detainees and their attorneys). See RATNER, MAKING US LESS FREE, *supra* note 80, at 5; Anita Ramasastry, *A Fawed Report Card: How DOJ Mishandled the Post-September 11 Detention Process*, FINDLAW, Aug. 1, 2003, <http://writ.news.findlaw.com/ramasastry/20030801.html> (last visited Oct. 16, 2007).

⁸⁹ HRW, PRESUMPTION OF GUILT, *supra* note 88, at 3, 9 (questioning of detainees' link to terrorist activity was based on "indications" which in many cases was little more than nationality, religion or gender).

⁹⁰ *Id.* at 9; see also U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003) [hereinafter DOJ, DETAINEES REPORT] (a comprehensive report on post-9/11 treatment of detainees including arrest and charging, clearing, holding, removal, and confinement).

⁹¹ HRW, PRESUMPTION OF GUILT, *supra* note 88, at 9 ("The largest group of detainees (248) was from Pakistan, followed by Egypt, 100, and Turkey, fifty-two."). See also Jennifer Daskal, Advocacy Dir., U.S. Program, Human Rights Watch, Statement of Human Rights Watch to the United Nations Human Rights Committee: U.S. Compliance with the ICCPR (Mar. 13, 2006), available at http://hrw.org/english/docs/2006/03/14/usdom12942_txt.htm [hereinafter Daskal Statement].

⁹² DOJ, DETAINEES REPORT, *supra* note 90, at 5. See also HRW, PRESUMPTION OF GUILT, *supra* note 88, at 9. For a discussion on the legality of the arrests, see Ronald J. Riccio, *Subjecting War to the Law: Court Rules on Power to Detain Prisoners of the War on Terror and on the Limits of the 'Bush Doctrine,'* 177 N.J.L.J. 321 (2004). For further inquiry into immigration violations, see [8 C.F.R. § 287.3\(d\) \(2003\)](#) (determining proceedings for the disposition of cases of immigrants arrested without warrants); see also Custody Procedures, [66 FED. REG. 48334 et seq.](#), Sept. 20, 2001 (discussing the purpose for codifying the proceeding section of C.F.R.).

⁹³ Daskal Statement, *supra* note 91, at IV(1).

⁹⁴ *Id.* (citing in part THE U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK, (Dec. 2003)).

⁹⁵ See DOJ, DETAINEES REPORT, *supra* note 90, at Ch. III.

⁹⁶ A YEAR OF LOSS, *supra* note 81, at 14.

of those detained were long-term residents, business owners, and taxpayers; many were married to U.S. citizens and had children who are U.S. citizens.⁹⁷ "In Liberty's Shadow," a report recently released by Human Rights First, provides evidence that in many parts of the country--including California, Illinois, Louisiana, Michigan, Minnesota, New York, New Jersey, Texas, and Washington, D.C.--parole from detention is rarely granted to asylum seekers.⁹⁸ In fact, as Amnesty International has documented, "[t]he INS may jail them for months (in one case recorded in this report for over a year) *after* they are granted asylum, while INS attorneys (from the same jurisdiction that jails them) appeal against the granting of asylum."⁹⁹ Moreover, INS officials "may refuse to release asylum-seekers even though an Immigration Judge has determined that they meet the definition of a refugee, a person the [*428] USA is bound by treaty to protect."¹⁰⁰

Attorney General John Ashcroft characterized these arrests and detentions as an important step in the anti-terrorism investigation.¹⁰¹ In October 2001, he stated,

[O]ur anti-terrorism offensive has arrested or detained nearly 1,000 individuals as part of the September 11 terrorism investigation. Those who violated the law remain in custody. Taking suspected terrorists in violation of the law off the streets and keeping them locked up is our clear strategy to prevent terrorism within our borders.¹⁰²

By February 2002, the Department of Justice acknowledged that most of the persons detained in the course of the September 11th investigations and charged with "immigration violations"--what it termed "special interest" detainees--were of no interest to its anti-terrorist efforts because most had been deported for visa violations.¹⁰³ These arbitrary arrests, detentions, and interrogations reflected the Department's unwarranted presumption of their guilt.¹⁰⁴ Such practices also enabled the Department of Justice to keep people of "special interest" jailed while investigating and interrogating them about possible criminal activities,¹⁰⁵ a form of preventive detention not permissible under U.S. criminal law.¹⁰⁶ Most "special interest" detainees were non-citizen Muslim men.¹⁰⁷

Terrorists and immigrants have become synonymous in the culture of fear and uncertainty that pervades the political climate of the United States.¹⁰⁸ Instead of addressing the public's fears and improving protections for immigrants, the Bush administration has only cultivated the climate of fear and downgraded rights. In March 2007, agents of the Homeland Security Department's Immigration and Customs Enforcement (ICE) raided a New

⁹⁷ *Id.*

⁹⁸ Press Release, Human Rights First, Post 9/11, Dramatic Increase in Detention for Asylum Seekers Says New Report (Jan. 15, 2004), available at http://www.humanrightsfirst.org/media/2004_alerts/0115a.htm.

⁹⁹ AMNESTY INT'L USA, UNITED STATES OF AMERICA: LOST IN THE LABYRINTH: DETENTION OF ASYLUM-SEEKERS 6 (1999), available at <http://web.amnesty.org/library/pdf/AMR510511999ENGLISH/>

¹⁰⁰ *Id.*

¹⁰¹ Att'y Gen. John Ashcroft, Prepared Remarks for the U.S. Mayors Conference (Oct. 25, 2001), available at http://www.usdoj.gov/archive/ag/speeches/2001/ag-crisisremarks10_25htm.

¹⁰² *Id.*

¹⁰³ See A YEAR OF LOSS, *supra* note 81, at 18.

¹⁰⁴ See generally HRW, PRESUMPTION OF GUILT, *supra* note 88

¹⁰⁵ *Id.* at 4, 10.

¹⁰⁶ For the debate on preventive detention, see Whitney D. Frazier, Note, *The Constitutionality of Detainment in the Wake of September 11th*, 90 KY. L.J. 1089, 1118-23 (2001-2002).

¹⁰⁷ See HRW, PRESUMPTION OF GUILT, *supra* note 88, at 4.

¹⁰⁸ See generally Kam C. Wong, *The USA PATRIOT Act: A Policy of Alienation*, 12 MICH. J. RACE & L. 161 (2006) (detailing the impact of the USA PATRIOT Act).

Bedford, Massachusetts factory where a large population of undocumented Latino immigrants worked, arresting workers while their children [*429] were in childcare.¹⁰⁹ Worried family members were left calling local community organizations to try and find out information about their loved ones.¹¹⁰ This case is just one illustration of how fear and anti-immigrant sentiment is tearing apart entire communities.

B. Eroding Civil Liberties

An erosion of civil liberties has accompanied the targeting of ethnic minorities and recent immigrants. Although all people living in the United States are affected by new intrusions into privacy, the greatest impact falls on those on the margins of society, in particular, racial, religious, and ethnic minorities.¹¹¹ While the Bush administration's open and publicized expression of extreme executive power raises red flags for human rights and civil liberties advocates,¹¹² unchecked executive secrecy also plays an extremely significant role in creating an environment conducive to these violations. Current executive branch secrecy is likely the most extreme this country has witnessed.¹¹³ While President Bush uses national security concerns to justify secrecy around military and CIA prisons; in practice, secrecy is applied to aspects of government that are separate from issues of national security. For example, even when taken to court, the administration refused to release pertinent information about the workings of Vice President Cheney's National Energy Policy Group.¹¹⁴ In addition, Vice President Cheney refused to release the names of the oil, coal, natural gas, and nuclear industry executives who shaped the group's policy recommendations.¹¹⁵

A general blanket of secrecy and information suppression now [*430] covers a vast and growing array of government documents. The Bush administration classified 15.6 million documents in fiscal year 2004, which is 81% more than were classified in the year before September 11, 2001.¹¹⁶ The administration also made information more difficult to obtain under the Freedom of Information Act (FOIA) by devoting fewer federal resources to processing such requests.¹¹⁷ In October 2001, Attorney General appointee John Ashcroft, in a reversal of President Clinton's directive on FOIA requests, instructed federal agencies to withhold information whenever legally possible.¹¹⁸ Indeed, the Information Security Oversight Office (ISOO) reports a marked

¹⁰⁹ See Lisa Wangsness, *Patrick Blasts Feds for New Bedford Immigration Raid*, BOSTON GLOBE, Mar. 8, 2007, available at http://www.boston.com/news/globe/city_region/breaking_news/2007/03/patrick_blasts_1.html. See also Yvonne Abraham, *Activist: 90 People in Custody After Immigration Raid in New Bedford*, BOSTON GLOBE, Mar. 6, 2007, available at http://www.boston.com/news/globe/city_region/breaking_news/2007/03/immigration_off.html.

¹¹⁰ See Yvonne Abraham & Brian R. Ballou, *350 Are Held in Immigration Raid: New Bedford Factory Employed Illegals*, U.S. SAYS, BOSTON GLOBE, Mar. 7, 2007, at A1; Maria Sacchetti & Yvonne Abraham, *Fear Grips Kin After Immigration Raid: Woman Recounts Panic Inside Leather Factory*, BOSTON GLOBE, Mar. 8, 2007, at A1.

¹¹¹ See Louise Cainkar, *Post 9/11 Domestic Policies Affecting U.S. Arabs and Muslims: A Brief Review*, 24 COMP. STUD. S. ASIA, AFRICA & MIDDLE EAST 245, 245-48 (2004).

¹¹² See generally A YEAR OF LOSS, *supra* note 81.

¹¹³ *Id.* at 19-21.

¹¹⁴ See [In re Cheney](#), 406 F.3d 723, 726-27 (D.C. Cir. 2005).

¹¹⁵ [Complaint at 10, Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group](#), 219 F. Supp. 2d 20 (D.D.C. 2002) (disposed of as [Cheney v. U.S. District Court for the District of Columbia](#), 542 U.S. 367 (2004)).

¹¹⁶ OPENTHEGOVERNMENT.ORG, SECRECY REPORT CARD 3 (2005), available at <http://www.openthegovernment.org/otg/SRC2005.pdf> [hereinafter SECRECY REPORT CARD].

¹¹⁷ *Id.* at 5.

¹¹⁸ See American Civil Liberties Union, Attorney General John Ashcroft's Assault on Civil Liberties (Sept. 2003), <http://www.aclu.org/safefree/general/176581eg20021030.html>. See also Memorandum from John Ashcroft, U.S. Att'y Gen., To Heads of All Fed. Dep'ts & Agencies (Oct. 12, 2001), <http://www.doi.gov/foia/foia.pdf>; Lou Dolinar, *Access Denied for Security, Sites with Sensitive Data Are Being 'Scrubbed,' But Government Agencies Are Drawing Some Fire for It*, NEWSDAY, Oct. 23,

decrease in information available to the public.¹¹⁹ Also, the administration has invoked "state secrets" privileges--which allow the President to withhold documents from the courts, Congress, and the public--twenty-three times between September 2001 and May 2006.¹²⁰ "State secrets" privileges were used only four times between 1953 and 1976,¹²¹ a twenty-three year period recognized as "[a]t the height of the Cold War."¹²² The "state secret" privilege has been invoked about twice as many times since 2001.¹²³ The public has no way of knowing the full extent of document classification by this administration,¹²⁴ nor if all these suppressed documents have any bearing on "security."

At the heart of the trend towards expanding the secrecy of government conduct has been a series of executive branch initiatives impinging on public access to information. These efforts [*431] combine to restrict access to information through a simultaneous increase in the classification of documents and a decrease in the declassification of documents.¹²⁵ As a result, information upon which human rights organizations rely for their watchdog roles is more difficult to obtain and, once obtained, is incomplete or distorted.

The ability of U.S. citizens to enjoy lives free from unwarranted government interference has declined rapidly, while the ability of their government to act secretly has been enhanced. The USA PATRIOT Act, one of the first pieces of domestic legislation enacted after the attacks on the World Trade Center, greatly expanded the ability of federal officials to carry out searches and seizures on private homes without prior notice.¹²⁶ Among other measures, this legislation, which set the standard for similar copycat laws in other countries, permitted state authorities to "scrutinize people's reading habits by monitoring public library and bookstore records . . . [while also] allow[ing] for 'sneak and peak' tactics such as physical search of property and computers . . . monitoring of email, and access to financial and educational records," all without the notification of the suspect.¹²⁷ Provisions in the USA PATRIOT Act now allow the FBI to access Americans' personal information without having to show that the target has any involvement in espionage or terrorism.¹²⁸ Prior to the USA PATRIOT Act, the personal records of U.S. persons could only be accessed by the FBI if there were "specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power."¹²⁹ The USA PATRIOT Act

2001, at C8; Mark Helm, *Quietly, Feds Alter Rules on Public Files; Reporters Protest*, SAN ANTONIO EXPRESS-NEWS, Nov. 18, 2001, at A1.

¹¹⁹ See SECRECY REPORT CARD, *supra* note 116, at 3.

¹²⁰ Dana Priest, *Secrecy Privilege Invoked in Fighting Ex-Detainee's Lawsuit*, WASH. POST, May 13, 2006, at A3.

¹²¹ SECRECY REPORT CARD, *supra* note 116, at 1.

¹²² *Id.*

¹²³ *Id.* (noting the use of "state secrets" privilege at least seven times since 2001).

¹²⁴ See, e.g., Michelle Chen, *Cheney's Office Declares Exemption from Secrecy Oversight*, THE NEW STANDARD, June 7, 2006, <http://newstandardnews.net/content/index.cfm/items/3261> (noting that Vice President Cheney's office has refused to provide even basic and quantitative information about how it classifies documents, defying annual reporting requirements).

¹²⁵ *Id.*

¹²⁶ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, **115 Stat. 272** (to be codified in **18 U.S.C. §§ 215(a)(1); 505(a)(2)-(3); 505(b)(2); 505(c)(1)(B), (2)(B), (3)(B)**).

¹²⁷ Amnesty Int'l USA, Civil Rights and the "War on Terror," <http://www.amnestyusa.org/waronterror/patriotact/> (last visited Oct. 31, 2007).

¹²⁸ USA PATRIOT Act, *supra* note 126, § 215.

¹²⁹ **50 U.S.C. § 1862(b) (2) (B) (2000)** (records at common carriers, public accommodation facilities, physical storage facilities, or vehicle rental facilities); **18 U.S.C. § 2709 (b) (1) (B) (2000)** (subscriber information, billing information, and electronic transaction and communication information from wire or electronic communications service providers); see also **12**

dropped this requirement of individualized suspicion.¹³⁰ With little or no judicial oversight, commercial service providers may be compelled to produce these records solely on the basis of a declaration [*432] from the FBI that the information is for an investigation "to protect against international terrorism or clandestine intelligence activities."¹³¹ In addition, the USA PATRIOT Act makes it a crime to reveal that the FBI has "sought or obtained" such information.¹³² Furthermore, under Section 213 of the Act, the government can delay notice of a search if it can show "reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result."¹³³

As long as the low standard of 'reasonable cause' or 'reasonable necessity' is met, police officers can secretly enter a person's home or office while they are away and search through and seize private belongings.¹³⁴ These new powers are not limited to anti-terrorism investigations, but rather apply to all federal investigations, including routine criminal cases.¹³⁵ Furthermore, Congress did not create a sunset provision for this section.¹³⁶ This means that, unlike some other powers granted in the Act, the Section 213 powers are permanent. Also under new regulations issued by the Attorney General, the FBI can now carry out surveillance on any religious, civic, or political organization in the United States without even the slightest suspicion of wrongdoing.¹³⁷ By casting fear among the very groups that monitor government abuses of citizens, the U.S. government has only furthered its own ability to violate civil liberties with impunity.

III. CONCLUSION: RECLAIMING CITIZENSHIP?

This Article has pointed out the dark side of American citizenship in a world of torture. America wants to be known as a moral nation, a human rights leader, a chief proponent of democracy and freedom.¹³⁸ This simply is not possible as long as the U.S. government [*433] continues to act unilaterally to exempt itself from international human rights law, to turn away asylum seekers from its shores,¹³⁹ and to mistreat captured prisoners and ethnic minorities at home and abroad. Instead of being a leader in the promotion and protection of human rights, the

U.S.C. § 3414(a) (5) (A) (2000) (records at financial institutions); 15 U.S.C. § 1681u(c) (2000) (records at consumer reporting agencies).

¹³⁰ USA PATRIOT Act, *supra* note 126.

¹³¹ *Id.*

¹³² *Id.* § 215.

¹³³ § 213(2).

¹³⁴ *Id.* See also A YEAR OF LOSS, *supra* note 81, at 10.

¹³⁵ A YEAR OF LOSS, *supra* note 81, at 7.

¹³⁶ *Id.* at 17; USA PATRIOT Act § 224(a).

¹³⁷ A YEAR OF LOSS, *supra* note 81, at 10.

¹³⁸ See, e.g., Sec'y of State Condoleezza Rice, Briefing on The State Dept's 2006 Country Reports on Human Rights Practices (Mar. 6, 2007), available at <http://www.state.gov/secretary/rm/2007/mar/81422.htm>. (acknowledging "America's continued support for those fundamental freedoms embodied in the Universal Declaration of Human Rights"); President George W. Bush, Statement by the President on the Situation in Burma (Sept. 27, 2007), available at <http://www.whitehouse.gov/news/releases/2007/09/20070927-4.html#> (calling on "those who embrace the values of human rights and freedom to support the legitimate demands of the Burmese people"); President George W. Bush, Address to the United Nations Gen. Assembly (Sept. 25, 2007), available at <http://www.whitehouse.gov/news/releases/2007/09/20070925-4.html#>.

¹³⁹ See generally HUMAN RIGHTS FIRST, IN LIBERTY'S SHADOW: U.S. DETENTION CENTER OF ASYLUM SEEKERS IN THE ERA OF HOMELAND SECURITY (2004), http://www.humanrightsfirst.org/asylum/libertys_shadow/Libertys_Shadow.pdf (exploring post-9/11 asylum and detention trends).

United States now finds itself lumped with other flagrant human rights violators, such as Sudan and China.¹⁴⁰ The lesson the United States is teaching the world is a dangerous one: profess to believe in human rights universalism while carving out exceptions to the application of human rights norms.

The good news is that even the most negative citizenship practices can be changed. There is nothing natural or static about citizenship.¹⁴¹ The contours of citizenship have been the product of the imagination of politicians, intellectuals, populists, and publicists. Throughout history, borders have been redrawn; populations moved and displaced; the requirements, the benefits, and the responsibilities and implications of citizenship changed. Just as the concept of U.S. citizenship has changed dramatically--negatively in recent years--there is the possibility that it could shift in a more positive direction.

Those who have citizenship have the luxury of taking it for granted. As we discuss the topic of torture, we suggest that we remember our own citizenship and think about what it means when we are far from our state, as well as within our own state. Our citizenship and our location in relation to it greatly inform our personal responsibility to speak out against our own government's in-humane and indecent behavior.

Although citizenship itself is unnatural, there is something intensely natural about wanting what citizenship is said to bestow: a sense of security, a sense that one can always go home, a sense that [*434] there will always be a home.¹⁴² The need to reclaim U.S. citizenship--and what it means at home and abroad--has never been more pressing.

New York City Law Review
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¹⁴⁰ Nora Boustany, *U.S. Has Lost Credibility on Rights, Group Asserts*, WASH. POST, Jan. 12, 2007, at A10.

¹⁴¹ See Dan Smith, *Reconciling Identities in Conflict*, in *EUROPE'S NEW NATIONALISM: STATES AND MINORITIES IN CONFLICT* (Richard Caplan & John Feffer eds., 1996) (providing an excellent discussion on the constructed nature of citizenship).

¹⁴² See, e.g., WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (Oxford Univ. Press 1995).

New York City Law Review Summer 2007. *Guantánamo Bay: The Global Effects of Wrongful Detention, Torture & Unchecked Executive Power* Comment. The unilateral creation of international law during the “War on terror”: murder by an unprivileged belligerent is not a war crime. Noman Goheer. Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir and the Special Rapporteur on the right. A. Deprivation of liberty at Guantánamo Bay B. Detainees captured in the course of an armed conflict C. Detainees captured in the absence of an armed conflict D. The right to challenge the legality of detention before a judicial body E. The right to be tried by a competent and independent tribunal F. The right to a fair trial. III. This article is based on a broad sampling of cases and an examination of hundreds of documents, including court records, military commission transcripts and medical assessments. The Times interviewed more than 100 people, including former detainees in a dozen countries. Back home in Virginia, General Xenakis delved into research on the effects of abusive practices. He found decades of papers on the issue “science that had not been considered when the government began crafting new interrogation policies after Sept. 11.” Still Living in Gitmo™. Today at Guantánamo Bay, the Caribbean landscape is reclaiming the relics of the American detention system. Weeds overtake fences in abandoned areas of the prison complex. Guard towers sit empty. But Guantánamo Bay is more than just a marker for a tangle of competing legal theories. Today, Guantánamo remains home to nearly 400 prisoners, none of whom have been convicted of anything and only ten of whom have even been charged with a crime. [FN5] *394 Most of these men, including more than a dozen of my Yemeni clients, have been held at Guantánamo for more than five years--sleeping on steel beds, cut off entirely from their families, deprived of intellectual stimulation, slowing growing insane. Suggested Citation: Suggested Citation. Falkoff, Marc D., *Guantánamo Bay: The Global Effects of Wrongful Detention, Torture & Unchecked Executive Power* (2007). *New York City Law Review*, Summer 2007, Available at SSRN: <https://ssrn.com/abstract=1502994>.