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LENGTH: 27720 words**ARTICLE:** NOMADS UNDER THE TENT OF BLUE: MIGRANTS FUEL THE U.S. PRISON INDUSTRY**NAME:** By Lee Hall***BIO:** * Lee Hall, a member of the Adjunct Faculty of Law at Rutgers University (Newark), thanks Priscilla Feral, Dan Kowalski, and Stephen H. Legomsky for providing indispensable advice and resources during the completion of this article, and dedicates what is best in it to the memory of Joan Fitzpatrick.**SUMMARY:**

... The September attacks did, however, serve to augment an already established practice of earmarking certain communities as appropriate candidates for detention. ... The attorney general's new law enforcement policy is in many ways a domestic mirror image of the president's foreign policy, which justifies pre-emptive attack in the name of national security. ... It also took over two years for a federal appeals court to decide that a non-citizen detainee held in the U.S. naval base in Guantanamo Bay, Cuba is entitled to habeas corpus review to determine the propriety of the detention. ... Imprisonment became de rigeur, under the "mandatory detention" provision of the Immigration and Nationality Act (INA), for an expanded class of inadmissible or deportable non-citizens and even for certain long-time permanent residents with old, and often minor, police records. ... In August of 1993, Esmor won a \$54 million contract to open a detention hall for the INS in the town of Elizabeth, New Jersey. ... Newark Immigration Judge Daniel A. Meisner granted Butt voluntary departure from the prison directly to Pakistan. ... Between November 2002 and September 2003, 177,260 men and boys from North Korea and 24 predominantly Muslim countries in Asia, North Africa, and the Middle East appeared at immigration offices as a result of the requirements. ...

TEXT:

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INTRODUCTION

Is the current phenomenon of mass detentions of non-citizens in the United States a response to crisis, or part of an historical pattern? The detentions and the constitutional confusion they represent cannot be explained solely as a response to the terrorist attacks of 2001, particularly after the passage of months, even years, since the emergency. The September attacks did, however, serve to augment an already established practice of earmarking certain communities as appropriate candidates for detention. Crisis-driven enforcement and detention policies benefit the detention business, keeping the industry in the forefront when budgets are planned and contracts are signed. Once these policies are in place, political incentives abound for legislators and executive branch officials to encourage reliance on state and private detention projects. This article provides a summary of the recent trends in establishing mandatory and frequently open-ended detention policies for certain non-citizens, and the way in which fear of terrorism serves the interests of those who stand to benefit from filling detention halls.

Part I of this essay will provide a brief overview of the U.S. political response to the 2001 attacks on the Pentagon and the World Trade towers. Part II will discuss the establishment of mandatory detention policies for certain non-citizens. Part III will discuss the interests of parties such as lawmakers, corporations, and county governments in relation to the profit potential of detention halls. Part IV will look at the arrests of non- [*266] citizens in the immediate aftermath of the September attacks, in a dynamic sustained through a variety of selective registration and law enforcement campaigns. Part V will offer an analysis of the message those campaigns carried for Muslim and Arabs in the United States, and

how that message might keep members of these and other non-citizen groups jailed indefinitely. Part VI discusses the repressive trends in domestic counter-terrorism law and the growth in international opportunities for commercial military services – parallel drives that are, in summary, symbiotic with the detention enterprise.

I. DOING TIME FOR THE TOWERS

"John, you make sure this does not happen again," George W. Bush instructed the attorney general. n1 Within two months, hundreds of dark-haired men found themselves detained by the U.S. Immigration and Naturalization Service, doing their time for a hideous crime of international proportions, although none of them had committed it. n2

[*267] Then, in the winter of 2002/2003, Immigration and Naturalization (INS) officials in Los Angeles and various cities nationwide detained many hundreds more – this time, pulling from large groups of people instructed to voluntarily register with local INS offices. n3 Today, the searchlight of law enforcement does not focus its light to expose individual culprits; instead, it moves in broad sweeps over the land. Assistant attorney general Viet Dinh acknowledged, "It's a 180-degree shift in the way we do business." n4

In November 2002, Congress abolished the 110-year-old INS and announced that the Service's role would be assumed by the new Department of Homeland Security. n5 The "S" in [*268] the new acronym no longer stands for "service" – "security" is the current mandate. The new department's approach transcends prevention, and boldly enters a zone where groups are regulated on the basis of characteristics some of which, when used to discriminate amongst citizens, incur vigorous judicial scrutiny. n6 How has it happened? Although the legislature did not officially declare war on any nation following the September 2001 attacks, n7 the Bush administration framed its reaction [*269] as a "war on terrorism" and subsequently invoked draconian rules of war in order to sidestep normal civil-rights protections. n8 Siobhan Gorman observes:

The attorney general's new law enforcement policy is in many ways a domestic mirror image of the president's foreign policy, which justifies pre-emptive attack in the name of national security. Just as Bush talks of promoting peace by using the nation's war machine, Ashcroft talks of preserving liberty by using the government's police powers. n9

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If the rules of war would now apply domestically, to people in civilian clothing, how does the executive branch determine who should be apprehended as an enemy? n10 Ashcroft aide Adam Ciongoli answered that question by saying "You don't detain people unless you've got a pretty good reason to believe that these people are going to destroy American lives." n11 But that pronouncement rests on circular logic. Who are "these people" and on what authority does the current administration decide?

Two months after the notorious September attacks, George W. Bush issued a military order proclaiming that non-citizens, including legal residents, may be transferred to military custody – creating a new option for circumvention of the criminal courts. n12 Adding to the war-zone ambience, the administration later posited that even a citizen may be classified as a combatant and detained without access to a lawyer or the courts. n13

U.S. forces reportedly descended on Yaser Esam Hamdi in Afghanistan in November 2001 after a prison uprising by suspected Taliban and al Qaida members. n14 At the U.S. Navy [*271] base at Guantanamo Bay, Cuba, it came to light that the detainee Hamdi, whose parents are Saudis, was born in Louisiana. n15 Yet in January 2003, the Fourth U.S. Circuit Court of Appeals agreed with the Bush administration that Hamdi's U.S. citizenship was of lesser legal import than the circumstances of his capture. n16 "Judicial review does not disappear during wartime," a three-judge panel wrote, "but the review of battlefield captures in overseas conflicts is a highly deferential one." n17 The court said that as a U.S. citizen Hamdi would be entitled to due process if he had been charged with a crime. n18 But held under military authority as an enemy combatant, he is subject to "the well-established laws and customs of war." n19 Attorney General John Ashcroft called the decision "an important victory for the president's ability to protect the American people in times of war". n20 Although Hamdi was legally a member of "the American people," he was construed as the other, depersonalized. n21

[*272] Ashcroft's comment did not exaggerate the case's importance. A federal circuit court pronounced the executive branch free, in effect, to decide whom to hold indefinitely. n22 To do this, its judges deferred to an executive branch policy that, taken in its context, knows no precedent. The World Trade Center was bombed in 1993; then, the incident

was addressed as a crime rather than an act of war. And Timothy McVeigh, arrested in 1995 during a search for the politically-motivated bomber of a federal building in Oklahoma City, was charged and convicted in the domestic criminal courts. n23 But in September of 2002, when Bush administration officials convened for a secret video conference to decide how to handle six U.S. citizens suspected of conspiracy with al Qaida, Vice President Dick Cheney and Defense Secretary Donald Rumsfeld were quick to argue that the suspects should be detained indefinitely as "enemy combatants," Newsweek reported in April [*273] 2004. n24 The news magazine also reported that Bush officials privately debated whether to name more U.S. citizens as enemy combatants – including a truck driver from Ohio and a group of people from Oregon. n25

To add a flourish of historical support for the Bush administration's new procedures, Vice President Richard Cheney has stated: "This is the way we dealt with the people who assassinated Abraham Lincoln and tried to assassinate part of the Cabinet back in 1865." n26 Rebuffing the challenges to Bush's Order, the administration has also invoked Ex parte Quirin, the Supreme Court's condonation of the use of a military tribunal to try a group of eight "German saboteurs" who had secretly entered the United States with intent to attack U.S. installations during World War II. n27 In the summer of 1942, [*274] after the FBI arrested the eight and charged them with the intent to blow up U.S. factories, bridges, and department stores, President Franklin Roosevelt authorized a military commission, shutting civilian courts off to "unlawful combatants" who entered to advance the objectives of any nation at war with the United States. At least one of those charged, Haupt, had a claim to U.S. citizenship, and was arrested, as noted, on U.S. soil. n28 Despite Haupt's U.S. citizenship, Supreme Court upheld Roosevelt's decision in a brief order on 31 July. n29 The Court resolved that military tribunals could be [*275] used against citizens or non-citizens; the crux of the matter is whether the individual is an "unlawful combatant." n30 By the 8th of August, six "were electrocuted and the other two were sentenced to long prison terms." n31 Justice Stone subsequently "devoted six weeks to writing an opinion." n32 Justice William O. Douglas would later criticize the Court's announcement of a "decision on the merits without an opinion accompanying it"; n33 and scholar John Frank, who [was] a clerk to Justice Black during the Quirin case, wrote: "The Court allowed itself to be stampeded." n34

The Bush administration's claim of authority to declare a U.S. citizen on U.S. territory an enemy combatant, subject to indefinite deprivation of liberty, has drawn particularly pointed criticism from across the political spectrum. n35 Yet over two years would pass before the courts would begin to assert themselves on the issue of the executive detentions. In the summer of 2004, the Supreme Court decided that the political branches [*276] could lawfully permit the President to seize and hold a U.S. citizen as an alleged enemy combatant. n36 Justice O'Connor said that Yaser Esam Hamdi "unquestionably has the right to access to counsel" and insisted that due process requires "a meaningful opportunity to contest the factual basis for that detention" n37 but also wrote: "The standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal." n38 In the wake of the Supreme Court's decision, Hamdi's case returned to the lower court, where Hamdi was finally freed without ever being charged with any terror-related activity, but forced to renounce U.S. citizenship and to agree not to travel to extensive number of countries. n39

[*277] The Supreme Court sidestepped the issue completely in another key anti-terrorism case brought against U.S. citizen Jose Padilla. In December 2003, a two-to-one decision by a panel of the U.S. Court of Appeals for the Second Circuit gave the [*278] Bush administration one month to charge al Qaeda suspect Padilla, declare him a material witness, or set him free from the Navy brig in which he was confined incommunicado since May 2002; the decision prompted Vice President Cheney to demand a showdown at the Supreme Court. n40

"Presidential authority does not exist in a vacuum," wrote Judges Rosemary S. Pooler and Barrington D. Parker, rejecting the claim that the Constitution gives the President sole authority to decide the boundaries of a battleground. n41 Rather, the court ruled, Bush needs authorization from Congress to detain U.S. citizens as enemy combatants. n42 The court noted that a federal law passed in 1971, in part to make amends for the mass detention of Japanese-Americans during World War II, bans the detention of citizens without express congressional authorization. n43 But before Padilla's release order took effect, a brief filed by the Justice Department with the Supreme Court, listing Defense Secretary Rumsfeld as sole petitioner, claimed that the Second Circuit's ruling "undermines the constitutional authority of the Commander in Chief to protect the United States against additional enemy attacks launched [*279] within the Nation's borders." n44 Asking that Padilla's release be put on hold pending the Supreme Court's action, Deputy Solicitor General Paul D. Clement wrote to the Second Circuit, defending Bush's "power to order the military to capture and detain enemy combatants, including United States' citizen enemy combatants, that enter the United States determined to conduct hostile and warlike acts." n45

The critical disagreement between the Second Circuit and the Bush administration went unresolved when the Supreme Court declared that the Padilla's lawsuit was improperly filed in New York, incorrectly naming Rumsfeld instead of a lower-level military officer in charge of the Navy brig in South Carolina. n46 This, although it was the government that moved Padilla, without notice to the detainee's court-appointed attorney, to that brig. n47 With no charges to answer, Padilla – still, practical effect, held in indefinite detention – had to start from scratch, with no guarantee that the government would not simply move him to yet another party's custody.

It also took over two years for a federal appeals court to decide that a non-citizen detainee held in the U.S. naval base in Guantanamo Bay, Cuba is entitled to habeas corpus review to determine the propriety of the detention. n48 It was January of 2002 when U.S. authorities began transporting people taken [*280] into custody abroad to a military base in Guantanamo Bay, Cuba, and confined them in wire mesh. n49 Eerie photos appeared, showing the shackled and blindfolded detainees kneeling, heads bent down, with U.S. soldiers standing over them. n50 As of this writing, about 600 prisoners – men and teens from around 40 countries – remain locked inside the base, which the BBC News called "a legal limbo, a Kafka-esque travesty of [*281] justice where they were not told the charges against them." n51 Finally, in the last month of 2003, an opinion in the case of Libyan Salim Ghorebi declared that a district court has jurisdiction to address the

constitutionality of their detention. n52 The court would not accept the government's theory – a theory which the lower court had accepted – under which the Executive Branch "may hold uncharged citizens of foreign nations in indefinite detention in territory under the 'complete jurisdiction and control' of the United States while effectively denying them the right to challenge their detention in any tribunal anywhere, including the courts of the U.S." n53 The Supreme Court agreed in November 2003 to hear the case of the detainees at Guantanamo, placing Ghorebi's case on hold. n54

[*282] In June of 2004, the Supreme Court said the Cuban base is not beyond the reach of U.S. courts. n55 Nevertheless, the matter provides a striking case of justice delayed for hundreds of people held without trial for months or years. Charged with no crimes, they were shouldered with the burden to prove that they were not fighting against the U.S. or preparing to do so. n56 The Court offered no clear guidance about when and where the detainees would be heard, or how they could get witnesses to appear. n57

Clarity is in short supply in the midst of the continuing "war on terrorism." n58 The target of such "wars" are perils which cannot be pinpointed to a country on a map. With whom has the U.S. gone to war? The Military Order of 2001 began: "International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces." n59 The reference to a state of "armed conflict" between the U.S. and "al Qaida" elides the legal significance of the target group's separateness from any government or [*283] state. n60 Given traditional conceptions of war, it would be more precise to say that the United States has embarked upon a police action against ideologically-motivated crime syndicates operating in various regions. n61 One main significance of the distinction is that an actual, declared war has an end, a cue to release captives. The intimidation and detention of non-citizens and citizens alleged to have some manner of association with a number of countries where terrorists are deemed most likely to operate does not address such matters – except, perhaps, to exacerbate them by increasing international tension and reinforcing the arguments of those who claim that the U.S. government is motivated by anti-Islamic sentiments. n62 Thus [*284] runs the cycle of mistrust by which the Executive branch justifies the further swelling of its authority.

By early 2003, rights advocates were accusing the United States of gradually embracing torture techniques. n63 Well before the May 2004 emergence of the infamous series of [*285] photos from Abu Ghraib, reporters had stated that interrogation techniques used by U.S. officials abroad included covering suspects with black hoods for hours at a time and forcing them into painful positions, applying extremes of cold and heat; isolating detainees; withholding basic human needs such as sleep, food, water, clothing, and light; denying medical attention even in extreme circumstances; and battering them senseless. n64 37 detainee deaths were reported in Iraq and Afghanistan by May 2004. n65 Two former Bagram prisoners said their hands were chained to the ceiling in the isolation cells. n66 Intelligence officials also acknowledged that some detainees in the U.S. had been turned over to foreign agencies long known to employ torture. n67

[*286] By April 2003, approved interrogation techniques for use at Guantanamo Bay reportedly included the interruption of sleep patterns, use of extremes of heat and cold, and "sensory assault" including loud music and bright lights. n68 A team of intelligence officers from the Guantanamo complex went to Iraq in late 2003 to teach new interrogation techniques. n69 Abuse tantamount to torture was subsequently ordered by Army intelligence officers,

Central Intelligence Agency agents, and private contractors at Abu Ghraib, which holds a majority of the detainees in Iraq. n70

II. THE DOMESTIC IMAGE: INS STEPS UP ITS WAREHOUSING FUNCTION

North American law students commonly learn that the criminal law functions to incapacitate, to deter, to exact retribution, [*287] or rehabilitate individual offenders. The modern reality, argue scholars who analyse developments in the field, is that government manages certain segments of society in herds. n71 According to Malcolm M. Feeley and Jonathan Simon, the goal is "not to eliminate crime but to make it more tolerable through systemic coordination." n72 This systematic marginalization of whole groups may work to deny a voice to those aggregates most likely to challenge the status quo.

Immigration attorneys and professors have chronicled events tending to show that the herding method comprises an important facet of immigration policy as well, in which it has gained particular prominence since 1996. n73 Where non-citizens are concerned, it has become politically acceptable to round up groups of people who are, in many cases, suspected of no crimes at all. n74 In February of 2003, a Utah town reported an INS raid on a safe factory resulting in the detention [*288] of about 120 workers. n75 Friends and family of the plant's workers described officials putting U.S. citizens as well as documented residents in handcuffs and into an INS bus. n76 An INS representative remarked: "There will be several opportunities for U.S. citizens and authorized workers to seek job opportunities with the company now." n77

Even asylum seekers have, historically, received no particular empathy in U.S. detention halls. It was 1998 when Nigerian student Oluwole Aboyade requested asylum in the U.S. and found himself jailed by the INS at Elizabeth. n78 In a hearing over his treatment, Aboyade later explained that his hunger strike stirred Corrections Corporation of America (CCA) guards to isolate him and order him to eat excrement. n79 Regarding his claim that guards hit him, a former CCA guard would testify that Aboyade "ran into the supervisor's hand." n80 The hearing also included the case of Palestinian Salah Dafali, who wanted to get to Canada to request asylum but was instead incarcerated by the INS for nearly four years. n81 Dafali would report in court that guards at Elizabeth threatened him with sexual assault. n82 According to CCA's own records, water to Dafali's cell was cut off. n83 A former transportation supervisor [*289] with CCA subsidiary TransCor America testified to having seen the flesh on Dafali's chin split open, a boot print on his face. n84 Dafali would explain that the chief of security, a seven-year CCA veteran, "stomped" on him while he was tied to a bed. n85 The warden defended Mitchell for performing his duties "as outlined for the chief of security and... in a consistent manner with established procedures." n86 CCA officials also noted that Elizabeth has been accredited by the American Correctional Association; and INS officials say the renewed problems at Elizabeth amount to a rough patch in an otherwise well-run detention hall. n87 To charges that CCA's institutional practices "promoted individuals who demonstrated a willingness to use excessive force and harsh behaviors toward the detainee population," CCA countered that "illegal immigrants" came up with "fantasies" that guards had beaten and isolated them in order to sue for damages, and argued that the corporation "has the right not to be extorted." n88 In September of 2003, after a two-week trial, a New Jersey district court jury exonerated CCA of Aboyade's charges, and awarded Dafali one dollar. n89 In a letter to investors, CCA has warned about the "risks" of "public scrutiny". n90

The culture of the detention halls may encourage guards to see prisoners as enemies, which means they must negate empathy for them, break their spirits, and fight any impulse to see them as persons with individual hopes and human connections. n91 [*290] It is not co-incidental that this approach echoes norms of conduct usually associated with military training. n92 Regarding the substantial percentage of military-affiliated staff at Corrections Corporation of America locations, CCA claims that "the intense atmosphere in corrections - with the element of risk - attracts these people, and wearing the uniform and maintaining a dress standard gives them a sense of continuity after they leave the military." n93 Guards and supervisors working [*291] for CCA at Elizabeth must have military experience if they have not worked in law enforcement or security, suggesting that management views these backgrounds as similar. n94 CCA's co-founder, Tom Beasley, attended West Point and worked for the U.S. Army in Vietnam, the Panama Canal Zone, and Nicaragua. n95 Chief development officer Lieutenant Colonel William T. Baylor has taught at the Army's Command and General Staff College, including a course in 2001 on "Sudan and its terrorist regime." n96

In some cases, detention patterns follow vague fears that criminality and terrorism result from uncontrolled foreign influences. That phenomenon appeared starkly in 1995, after the bombing of the Murrah Federal Office Building in Oklahoma City. n97 Although a U.S. citizen would confess to the [*292] bombing, a public fear of foreign terrorists motivated the legislature's response - the Antiterrorism and Effective Death Penalty Act of 1996. n98 Imprisonment

became de rigeur, under the "mandatory detention" provision of the Immigration and Nationality Act (INA), n99 for an expanded class of inadmissible [*293] or deportable non-citizens and even for certain long-time permanent residents with old, and often minor, police records. n100

For non-citizens, mandatory detention is a particularly vicious destroyer of rights. Deprivation of liberty renders other rights meaningless or unenforceable. One can hardly be expected to find and pay a lawyer from a locked cell and with no foreseeable date of release. n101 The pair of laws has also netted [*294] people who violate their visa provisions, and refugees awaiting hearings or summary exclusions, n102 separated them from their families, and left them languishing in prison cells alongside people convicted under the criminal laws, while their businesses crumble and their community ties unravel. n103 Accordingly, the Immigration and Nationality Act includes a longstanding general rule that the decision whether to detain [*295] or release a non-citizen pending removal proceedings follows from the Immigration Judge's exercise of discretion. n104

In the wake of the Oklahoma City bombing, however, the mandatory detention provision expanded dramatically. n105 Facially neutral, its effects have nevertheless impacted ethnic minorities harshly; and combined with other sections of the 1996 legislation it has led to an unremitting stigmatization of Arabs, Arab-Americans, Muslims, n106 and others likely to be mistaken as members of one or more of these groups. n107 [*296] Moreover, some of the mandatory detention provisions lack even facial neutrality. In early 2003, the Department of Homeland Security's Operation Liberty Shield mandated detention pending asylum or removal for anyone who arrives from a country designated as harboring terrorists – again, nearly all of them predominantly Arab or Muslim or both – and applies for asylum at a U.S. port of entry without valid entry documents, which is a common situation with asylum seekers at ports of entry. n108

[*297] Also in early 2003, the Supreme Court applied only rational-basis scrutiny to allow the government to mandate detentions for non-citizens facing removal for having been convicted of an "aggravated felony" as defined under the immigration law. n109 The provision amounts, in effect, to a new penalty for those who have already served their sentences under the criminal laws. n110 The provision is triggered by convictions which can incur a prison sentence of a year or more, whether the sentence was suspended or not, n111 and encompasses such activities [*298] as an attempted use of physical force against the property of another n112 – thus including such peccadilloes as the possession of stolen bus transfers n113 and shoplifting. n114 By upholding [*299] mandatory detention, the Supreme Court overturned the Ninth Circuit's finding that the provision was unconstitutional with respect to lawful permanent residents, who, the Circuit said, had due process rights to their day in court and to get out of jail if they show that they are not a flight risk and that they pose no danger to their communities while the deportation proceeding goes forward. n115

The Court in *Demore v. Kim* rejected the argument that mandatory detention violates due process, in a holding that sent shockwaves through the Third Circuit, which has held most of the political detainees since September 2001. n116 Attorney [*300] Judy Rabinovitz had argued on behalf of the petitioner that "we don't allow people to be locked up based on averages." n117 The Supreme Court, to the contrary, accepted the government's argument that Congress is "justifiably concerned with evidence that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers". n118 The Court rejected the argument that mandatory detention violates due process under [*301] the landmark case of *Zadvydas v. Davis*, n119 in which the detention faced by the plaintiffs had no discernable end. n120

Professor Margaret Taylor has argued that a sensible understanding of the Supreme Court's *Zadvydas* opinion would move Congress to repeal mandatory detention, and return to immigration judges their traditional discretion to decide [*302] whether a criminal offender presents a risk of flight or danger to the community, or has a viable claim for relief. n121 The mandatory incarceration provision strips away the Immigration Judge's traditional role of reviewing the circumstances of non-citizens with criminal records; and recently, where individual attention from judges can be sought, it becomes increasingly rare to obtain as the Department of Justice cuts its benches n122 and continues to augment its prosecutorial role. n123 The INS received Congressional approval of a \$4.8 billion budget for fiscal year 2001, a 220 percent increase over eight years. n124 By 2002 the budget rose to \$5.6 billion. n125 The fiscal year 2003 budget swelled to \$6.3 billion, with most of the additional funding requested for enforcement efforts. n126

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III. PRISON AS PROFIT

A. The Corporate Drive

This bright, ballooning budget has become attractive to the commercial prison industry. Yet the lucrative potential of prisons is not a new discovery. A broader context of such potential is vital to an understanding of the current administration's classification of certain segments of society as dangerous.

Halliburton subsidiary Kellogg Brown & Root – known by its initials KBR – began doing business with the U.S. military in the Second World War; it recently obtained a contract for constructing the detention compound at Guantanamo Bay. n127 Notably, Vice President Cheney was chief executive of Halliburton from 1995 to 2000, and continued after that time to receive substantial deferred compensation and stock option benefits from the company. n128 Wackenhut also became involved with Guantanamo. n129 A classified advertisement in the [*304] September 2003 employment section of the Gazette, "the authorized publication for members of the military services stationed at Naval Base Guantanamo Bay," announces:

WCC has been awarded a contract by the Department of Homeland Security Bureau of Immigration and Custom Enforcement for the security operation of the Migrant Operations Center at Guantanamo Bay. Wackenhut Corrections is now hiring approx. 20 positions, including: custody officers; supervisory custody officer; recreational activities coordinator and administrative clerk. Full and part time positions ARE available. n130

Similarly, most of the federal immigration detentions on U.S. territory are farmed out to local jails and private security companies. n131 Commercial detention operates largely without public scrutiny, and, given current trends, promises to be an integral component of the Homeland Security Department's policy of punishing lawbreakers and emphasizing a prosecutorial role. n132 The privatization trend continues although [*305] government agencies have not found consistent or clear evidence of cost savings in private prisons. n133 A 2001 study found that at least 73% of the big, privately-built and operated prisons have received subsidies such as tax-advantaged financing, property tax reductions, infrastructure assistance, and training grants and tax credits. n134 At the same time, governments pay the companies to operate the prisons. n135

The industry has nurtured relationships with politicians through campaign contributions, and the National Institute on Money in State Politics found that in a number of states, private-prison companies employed such tactics to establish and [*306] preserve their contracts with state corrections systems. n136 Private-prison corporations also spend substantial amounts on lobbyists, in some cases hiring top-of-the-line firms. n137 The corporations contribute to both parties, knowing that the winning legislators and governors control corrections department appropriations and pass criminal-sentencing legislation in their states. n138

The American Legislative Exchange Council, or ALEC, has risen to the occasion, offering bills to support privatization and ensure a flow of detainees. n139 By 1994, ALEC was pressing its [*307] policies in Pennsylvania with the assistance of William Barr, Attorney General from the first Bush administration. n140 Through his Special Session on Crime, called immediately after his inauguration in January 1995, Governor Tom Ridge, an active ALEC member, oversaw a legislative session that produced more than three dozen new crime bills – many based on ALEC proposals – and channelled more than \$87 million in state funding for construction of new public prisons. n141 Tom Ridge was Pennsylvania's governor from 1995 – when the state's corrections budget was approximately \$600 million – to 2001, by which point the legislature approved a Corrections Department budget exceeding a billion dollars. n142 Ridge also implemented a \$2.3 million, state-of-the-art data system preferred by the Federal Bureau of Investigation (FBI). n143 After the September 2001 attacks, George W. Bush nominated Ridge to head the newly created Department of Homeland Security [*308] (DHS), a Cabinet-level position. n144 Tom Ridge accepted the job in the midst of severe national anxiety about people perceived as outsiders. An awareness of Tom Ridge's view of detention's connections with business development is vital in order to transcend the view of political incarcerations as a war effort and see them as part of a dynamic set into motion before the fatal Tuesday in September of 2001.

In January 2001, Florida's Governor Jeb Bush presented lawmakers with a budget plan that included \$313 million in tax cuts. n145 Governor Bush proposed to increase in the corrections budget by \$114 million, simultaneously cutting the education budget by the same amount – \$114 million. n146 The same year, State Senator Cal Hobson of Oklahoma blamed the millions in requests from private prison officials on "rotunda dynamics," whereby lobbyists from private-prison firms regularly appear at the state capitol, "and all are after the same resource: additional incarcerants to put into

their systems." n147

Speaking at the Deutsche Bank Global High Yield Conference in October of 2003, Irving J. Lingo, chief financial officer of U.S. industry leader Correction Corporations of America (CCA), valued the U.S. detention market at \$50 billion; and as only 6.1% of that amount had so far been outsourced, Lingo observed, private corrections companies have "barely scratched the surface." n148 The company expects to gain new [*309] federal contracts, added Lingo, to meet the needs of the new immigration enforcement department. n149 CCA is unlikely to be disappointed. Professor Michael Welch estimates, based on government figures, that roughly 24,000 people, including juveniles, are being held in immigration detention today. n150

International tensions have clearly proved beneficial for business. CCA currently has a contract to provide for "overflow housing needs" at Luke Air Force Base in Phoenix, Arizona, from whence the U.S. has regularly dispatched soldiers in F-16s to the Middle East. n151 Business with the armed services "may expand in the future," according to the November 2001 issue of Private Line, CCA's employee newsletter. n152 From a business perspective, such expansion spells success. As Siobhan Gorman noted, it may also define the persona of the U.S. in its current approach to foreign relations. n153 After all, [*310] when detainees are deported, they have experienced a most rigorous example of cultural exchange. n154

B. Heartbreak Hotels

The federal Immigration and Naturalization Service's first private prison contract was signed two decades ago with the Corrections Corporation of America (CCA), the country's largest private-prison corporation. n155 J. Michael Quinlan, a [*311] former director of the federal Bureau of Prisons under presidents Ronald Reagan and George H. W. Bush, became the company's chief operations officer. n156 By the late 1990s, a trade publication for investors would liken CCA to "a hotel that's always at 100% occupancy...and booked to the end of the century." n157

Another company chosen for the business of warehousing immigration detainees was Esmor Correctional Services Corporation whose partners, James Slattery and Morris Horn, had managed The Brooklyn Arms Hotel, which one lawyer described as "a warehouse for desperate families that allowed the ownership to reap substantial profits by providing minimal services." n158 Slattery and Horn, with no correctional expertise, first branched out to prisons when they obtained a contract to operate the Brooklyn Community Corrections Center in 1989. n159

[*312] In August of 1993, Esmor won a \$54 million contract to open a detention hall for the INS in the town of Elizabeth, New Jersey. n160 The second runner-up in the bidding, Wackenhut Corrections Corporation, immediately filed a protest with federal contracting officials, asserting that Esmor's bid was unrealistically low. n161 After a strongly worded response from the INS, Wackenhut withdrew its protest. n162 Later events would show that Wackenhut did not protest too much. In 1995, the INS contract attracted a brief burst of media attention when an uprising of detainees - visa-related cases and asylum-seekers - shut down the New Jersey prison just ten months after it opened. n163

Pursuant to orders from Doris Meissner, INS Commissioner at the time, an investigation of the Esmor contract was already [*313] underway when the riot broke out on the 18th of June. n164 The INS Assessment Team found considerable evidence of degrading treatment of detainees by Esmor guards. n165 Its report also stated: "It appears that the level of salary was not realistic and could not, in the area where Esmor is located, insure the availability of well-qualified applicants." n166

Among the flaws it cited a "corporate policy" of withholding problems from the INS; harassment and abuse were rampant. n167 Female detainees complained that they had been issued male underwear with large question marks on the crotch. n168 Guards reportedly roused detainees in the night under the guise of security checks and arbitrarily used shackles and punishment cells. n169 During the uprising of June 18, when Esmor guards fled the buildings or hid, a police SWAT team responded with tear gas, and rounded up detainees. n170 Detainees went to other INS detention halls or various county jails where physical abuse by correctional staff persisted. Twenty-five detainees from Albania, India, Ghana, and elsewhere were brought to New Jersey's Union County Jail where they were made to crawl naked on their hands and knees past guards, and forced to chant "America is Number One." n171 The guards shoved heads into toilets and broke one inmate's collarbone. n172 One detainee reported that guards used pliers to [*314] squeeze his tongue and the skin on his genitals. n173 A former warden ascribed the chain of events to the cost-cutting by the Esmor executives: "Money, money, money. That's all that was important to them." n174 In 1996, Corrections Corporation of America took over the Elizabeth operation. n175

C. Competition from the Counties

Given the recent high-profile critiques of shortages and abuses in private detention halls, the current mood of fear may be critical to the continued expansion that is crucial to a private industry's future. n176 But privately-owned and operated detention halls are not the only ones attracted to the considerable revenue generated by the flow of detainees; hundreds of county jails scattered across the nation accept immigration cases. n177 At the 7,000-bed New Orleans Parish Prison, for example, INS detainees are referred to as a "cash crop" because [*315] for each one, the prison receives approximately twice the daily compensation rate "Louisiana pays for criminal inmates." n178

Five years ago, York County, Pennsylvania enjoyed an end-of-year surplus of \$8 million; and in 2003, by which time the surplus had dropped dramatically, commissioners devised an agreement to house detainees for the INS at York County Prison, a project worth \$17 million in revenue. n179 Officials in Kankakee County, Illinois, hoping to reopen the Sheridan Correctional Center, submitted a bid to detain non-citizens but the INS chose McHenry County, where a new 256-bed jail addition would take only INS and other federal prisoners' cases for 10 years. n180 "Federal money could cover up to 90% of the \$10.3 million construction cost," and annual revenues to McHenry County would reach about \$6 million. n181

In 2000, after the New Jersey Corrections Department had reduced the flow of inmates into the Bergen County Jail, a \$1.2 million loss developed. n182 But in 2001, the Sheriff's Department made a pact with INS officials to incarcerate non-citizens. n183 Because county officials wanted to fill new bed space expected at the final phase of a planned jail expansion, the acting sheriff supported taking up to 300 such inmates. n184 Republican sheriff candidate Joel Trella also supported the idea. "In light of the tragic events on Sept. 11, the sheriff has the responsibility to keep the illegal aliens and federal detainees off the streets and locked up," said Dan Quinonez, Trella's [*316] campaign manager. n185 In January of 2003, as part of a \$3.75 million agreement, Bergen County accepted 85 new INS detainees, for a total of 130, each one representing a \$65 per diem from the federal government. n186 The county undertook a separate, fifteen-year agreement in 2002 to house 150 non-citizen detainees over fifteen years. n187 Since then, the guards have been worked under the pressure of a dangerously quick influx of detainees, including political cases with indefinite terms. n188

IV.

"WHERE DO WE START?" n189

A. Dying Behind Closed Doors

The hideous attacks of September 2001 and their tragic consequences reverberated through immigrant communities [*317] whose members were singled out to pay for the tragedy. Their treatment transcended political explanation; it stripped targeted individuals of all incidents of human dignity and attacked their personhood. n190 One day after the hijackings, two newspaper vendors, who had taken a flight from Newark on the day of the attacks, were allegedly found carrying box cutters on an Amtrak train. n191 Speaking from the Hudson County Correctional Facility in Kearny, New Jersey, Mohammed Azmath recalled his time at the federal Metropolitan Detention Center in Brooklyn, where he was kept under bright lights day and night. n192 Azmath stated, "I was made to stand in freezing temperatures in the open for four to five hours a [*318] day to force me to confess to a crime I had not committed." n193 Both detainees reported being thrown against walls by guards while shackled. n194 An Indian consulate official in New York stated, "When we went to see them, they were crying profusely." n195

Substantial elements of the pair's allegations would be corroborated in reports released about two years later by the Justice Department's inspector general, in the wake of an investigation that began after the media described abuses. n196 The investigation uncovered videos of guards slamming chained detainees into walls. n197 Exacerbating the inmates' vulnerability [*319] and fear, guards often taped lawyers' visits. n198 In December 2001, federal officials cleared Gul Mohammed Shah and Mohammed Azmath of ties to terrorism and charged them with credit card fraud. n199 The two were eventually deported to India after spending a year in solitary confinement. n200 No Indian nationals were named in the lists of September hijackers, and the number of Indian citizens killed in the attacks on the World Trade Center is the highest India has ever experienced in a single terrorist act. n201

Within weeks of the September attacks, Long Island convenience store clerk Javaid Iqbal (originally of Pakistan) and Times Square restaurateur Ehab Elmaghraby (originally of Egypt) arrived at the Metropolitan Detention Center, and, in a federal lawsuit filed in May of this year, the two would provide [*320] the first accusations against specific guards and wardens. n202 The lawsuit charges that the two were repeatedly slammed into walls and dragged across the floor

while shackled and manacled, kicked with steel-toed shoes, cursed as "terrorists" and "Muslim bastards," and subjected to multiple unnecessary body-cavity searches, including one during which correction officers pushed a flashlight into Elmaghraby's rectum, then denied him medical help. n203 According to the suit, guards mockingly displayed Elmaghraby naked. n204 Regarding his deported stepfather, Paul Harrison, the eldest of Iqbal's U.S. citizen stepchildren, told a reporter, "I never knew what happened. I felt like he fell off the face of the earth." n205

Elmaghraby was taken from his apartment in Queens, when federal agents were investigating the owner of the building, apparently because the latter had applied for pilot training years earlier. n206 Iqbal was arrested in his Long Island apartment by agents who were apparently following a tip about false identification cards. n207 In his apartment they found a Time magazine showing the trade towers in flames and an immigration receipt indicating that he had been in Manhattan on the eleventh of September. n208

The government accepted these twists of fate and suggested that they formed a part of a coherent design, explained by the "mosaic" theory. n209 A boilerplate affidavit from an FBI agent [*321] was enough to hold a person in prison, because the investigation of terrorism is a "mosaic," and seemingly innocent facts might at some future time be useful. n210 Observing a case based on similar logic, The New York Times reported in February 2002 that the Justice Department was blocking the departures of 87 foreign citizens who were waiting to leave, because it had not yet satisfied itself that they were innocent, even though they were charged with no crimes. n211

Four days after the attacks on the Pentagon and New York, agents apprehended Ali al-Maqtari, a French teacher from Yemen, accompanying his U.S. citizen spouse to Fort Campbell, Kentucky, where she was reporting for Army duty. n212 Investigators separated the couple, searched al-Maqtari's car with bomb-sniffing dogs, repeatedly accused al-Maqtari of having a fake marriage and abusing his spouse, and stated that Islam was the religion of beating and mistreating women. n213 [*322] An FBI investigator told al-Maqtari that the recruiting office where his spouse had received military orders had been blown up by terrorists twenty minutes after the couple left it. n214 After interrogating al-Maqtari for over 12 hours and finding no involvement with terrorism, officials held him on the charge that his status had lapsed for ten days while being adjusted from visitor to permanent resident, then submitted a boilerplate affidavit from an FBI agent urging continued detention under the mosaic theory. n215 Two months later, al-Maqtari was released. n216

Local law enforcement officials, under pressure of the tone set by Attorney General Ashcroft and federal authorities, paid attention to those who appeared to be Arabs and Muslims. n217 Ahmed Alenany, an Egyptian doctor, was approached by a New York City police officer in late September 2001 after stopping in a no-parking zone to check a map, then detained for more than five months over a visa irregularity. n218 Thar Abdel-Jaber was stopped in North Carolina for driving four miles over the speed limit, then detained two months over an address notification failure. n219 And a full decade after [*323] Cameran Sadeq assisted in a U.S.-encouraged Kurd rebellion against Saddam Hussein, he was arrested during a visit to a friend of another refugee, then detained for more than four months. n220 Sadeq, whose job was gone by the time he emerged from Miami's Krome Detention Center, slept in the office of a produce market until he could borrow money for a ticket to Canada. n221

The national government's palpable anxiety was internalized, perhaps, by much of the general public. In late September of 2001, polls reported that most people backed ethnic profiling, if directed at Arabs and Muslims. n222 Some people [*324] were forced to follow the government's lead, as more than 200 college administrators have been asked to provide information on their Middle Eastern students. n223 Other people anticipated the government's interests without prompting.

Two days after the terrorist attacks, Reverend James Mueller of the Church of St. Anthony of Padua informed the FBI that two vans containing Middle Eastern males had pulled up to the nearby apartment of Muhammed Rafiq Butt, a Pakistani national who worked in a popular Pakistani cafe. n224 Six days later, an FBI agent, an INS officer, and two New York City detectives knocked on Butt's door and asked to see his papers. n225 Within a day, Butt was cleared of terrorism charges, but was turned over to INS agents for a visa overstay, and thus arrived at the Hudson County Correctional Center of New Jersey. n226 Butt had no attorney. n227 Newark Immigration Judge [*325] Daniel A. Meisner granted Butt voluntary departure from the prison directly to Pakistan. n228 Although he was useless to the investigation and wanted to be sent home, Butt was still in his cell eight days later when he died with no known witnesses; the jail's medical director said Butt's fatal coronary arrest could have been "precipitated by stress." n229

There may have been others like Butt. Because government officials stopped releasing tallies of detainees, n230 there is no definitive public record of how many have been and are being detained indefinitely, how many have been and are

being sent out of the country, and if the political context of repatriation will endanger the detainees' lives. n231 Attorney General John [*326] Ashcroft and other officials have released fragments of information but withheld names and locations of detainees. n232 After substantial public pressure, a Freedom of Information Act lawsuit, and requests from members of Congress the Justice Department released limited information in November 2001 regarding certain persons in federal custody. n233 The documents [*327] showed that 317 detainees were held for more than 48 hours before being charged, and 45 were held more than a month without charges. n234

The Justice Department began denying families, the media, and the public access to any immigration courts hearings it marked as "special interest" cases just after the September attacks, although the decision regarding privacy in hearings had [*328] previously been the province of the Immigration Judges. n235 In April 2002, federal district judge Nancy G. Edmunds rejected the government's claim that the courts lacked authority to hear challenges to the closure order with respect to the First Amendment rights of the public and press to observe the trials. n236 In August, the government's claim that the new procedures could not be challenged was described as "profoundly undemocratic" by Judge Damon J. Keith in the Sixth Circuit court of federal appeals, who stated: "The Executive Branch seeks to uproot people's lives outside the public eye, and behind a closed door. Democracies die behind closed doors." n237 But, in January of 2004, the Supreme Court turned down a request to review the Bush administration's withholding of names and other details about the detainees. n238

[*329] One problem with mounting a court challenge in the "special interest" cases, then, is that lawyers consistently lacked the basics about these individuals that would indicate a starting point in the matter of addressing violations of rights. Injustices have costs, and unjust treatment of non-citizens has global effect. If the Administration really wishes to address the unrest in the world, it has so far failed to permit us to start where we must: here.

B. Refilling the Pool: Interviews, Absconders, Special Registrations

As 2001 drew to a close, the Justice Department announced its intention to interview 5,000 young non-citizens, based solely on their age, sex, date of arrival, and the country from which they came. n239 Virtually all of those interviewed were [*330] Arabs or Muslims. n240

Early 2002 brought the "Absconder Apprehension Initiative," in which government agents were instructed to methodically track down people with outstanding removal orders. n241 [*331] The operation was announced as an initiative to obtain information about terrorism, but not all legal experts accepted the official justification. "They're going after the weakest link right now, the Muslims," said Regis Fernandez, a New Jersey lawyer whose practice focuses on non-citizen detainees. "Next they'll go after Hispanics and Asians." n242

As 2002 rolled into 2003, John Ashcroft directed the application of registration laws to visitors, aged 16-45, from 25 listed countries, in a proposal designed to trace over a hundred thousand people. n243 Registration provisions entered the Immigration [*332] Act of 1952 as part of the McCarthy era legislation, but had gathered dust until Ashcroft decided to revive them. n244 This time the government would scoop up people in the very process of attempting to comply with the law. The boys and men were required to appear at local offices of the Immigration and Naturalization Service to be fingerprinted, photographed and interviewed. n245 Some registrants were questioned about their religious and political beliefs and had to provide names and contact details for family members, and other personal data such as credit card numbers, video rental cards and bank account information. n246

The regulation took effect on the eleventh day of September 2002, one year to the day from the attacks. n247 The regulation, [*333] John Ashcroft said, "will provide a vital line of defense in the war against terrorism." n248 First to be called in were visitors from Iran, Iraq, Libya, Sudan and Syria. n249 People from fourteen more predominately Muslim countries, plus North Korea, were required to register by early 2003 in a second round of calls, and additions continued, for a total of four waves. n250 Justice Department figures showed that the largest group already facing political detentions was from Pakistan - a key U.S. political ally in anti-terrorism policy. n251 When Ashcroft moved to list Pakistan, the country's foreign minister objected to Washington. n252 Immediately following Washington's listing of Indonesia, the Indonesian government advised its nationals to postpone travel to the U.S. n253 Armenians campaigned strenuously [*334] until Armenia was removed from the list. n254 The ominous tone of registration was clear to people of the selected nationalities.

The scheme made little sense in the context of actually preventing terrorism, given the unlikelihood that those who voluntarily report to the authorities would pose a danger. n255 Instead, it effected the detention of large numbers of people

who were on their way to obtaining legal status and who posed no threat to society. According to Juliette Kayyem, a terrorism expert at Harvard University, "what this has become is an immigration sweep. The idea that this has anything to do with security, or is something the government can do to stop terrorism, is absurd." n256 Here again, actual examples illustrate the point. n257

[*335] In one instance, a U.S. citizen originally from Lebanon and his legal permanent resident spouse were fingerprinted, interviewed and photographed at the Texas border upon their return from a holiday trip. n258 An Iranian-born naturalized Danish citizen with a U.S. citizen mother – and an approved petition for U.S. permanent residence – was detained, denied bond, and informed that he would be summarily removed because he entered, in full compliance with regulations, under a provision that expressly waives the visa requirement. n259 A bricklayer with a deaf daughter in the U.S. for special medical treatment was threatened, after registration, with removal to Bangladesh – until a public outcry motivated the U.S. Labor Department to expedite his pending employment visa. n260 After registering in New Jersey, an Iranian father and sole wage-earner was ordered removed although flying would result in the death of Tara, his nine-year-old daughter whose neurological condition necessitates a ventilator and intravenous feeding. n261 His employment application had the necessary approval from the Labor Department, and his immigrant worker petition (Form I-140) had already been awaiting action by immigration officials at the California Service Center well beyond the time period allowed by the government's own processing policy by the time he was called in for Special Registration. His lawyer convinced the government's lawyer to support a request [*336] for a continuance; as of this writing, the family faces an uncertain future.

A Pakistani student in lawful status, who submitted to the registration but was not told about the requirement to also submit to an exit interview before international travel, was denied admission upon returning. n262 Similarly, officials refused to re-admit students from various Arab and Muslim countries, including Kuwait, Qatar and the United Arab Emirates, because there were no immigration agents present at the various airports to conduct exit interviews prior to their departure. n263

By January 2003, Immigration and Naturalization Service officials had reported the detention of 1,169 registrants. n264 Some were held overnight, and about 170 were kept in sustained custody. n265 In other cases, people who were apparently in legal status but did not finish the registration process by the closing time were given an appointment to return, and had to hand their passports over. n266 The Department announced yet another round of interviews in March of 2003, this time for 3,000 Arab and Muslim men. n267 The interviews, which caused substantial confusion to law enforcement authorities who had [*337] been trained not to engage in racial or ethnic profiling, produced "not one shred of evidence." n268

Under Ashcroft's plan, the INS was expected to share the registration database with police, thereby allowing state and local police departments to enforce the federal immigration laws. n269 "Willful" failure to register can incur a criminal penalty [*338] of six months in prison; the administrative penalty is loss of legal temporary status which, under legislation passed in 1996, results in substantial bars from returning after removal. n270 Those who have been registered must report to Departure Control each time they leave the U.S., or be barred from rejoining the population of the U.S. n271

As deadlines approached, lawyers and others with responsibilities to Muslim communities agonized over the question of how to notify individuals and communities of the requirement. n272 Some people decided, in confusion and fear, not to register at all. n273 Explained the executive director of the Muslim Public Affairs Council in Los Angeles, "People are scared it's starting out with these groups, and almost everyone will end up in internment camps." n274 Civil rights claims began. n275 [*339] By mid-January 2003, some Congressmembers were agitating to cut off funding for the scheme, n276 in the wake of horrific newspaper accounts of hundreds of men and boys being forced on a harrowing trip in search of empty cells in three states, then strip-searched in underheated detention halls. n277 Lawyers were refused access to the detainees; and families, allowed telephone access, reported that the boys and men were forced to sleep standing up, or on concrete, and that some had been hosed down with cold water. n278 An INS representative would later say that "what happened on December 16th in Los Angeles was undesirable" yet during the same panel described the mens' ordeal as a positive media event:

The only good thing about what happened in Los Angeles is it raised a lot of – a lot of media started covering the story. We were trying to get the word out through press releases and using our public affairs officers in the field to drum interest

on this and it was falling flat. What happened on the eve of that day, December 13th, news stories started circulating, and so the word, I think, is generally out there. [*340] I'd like to hear more comments from you all on ways to get the word out there more. n279

In late 2003 the New York-based Asian American Legal Defense and Education Fund (AALDEF) released a report, "Special Registration: Discrimination and Xenophobia as Government Policy," based on a survey of 219 people who had approached AALDEF for legal assistance related to the registration calls. n280 95% were Muslim, and at least 59% were engaged in working-class professions. n281 Between November 2002 and September 2003, 177,260 men and boys from North Korea and 24 predominantly Muslim countries in Asia, North Africa, and the Middle East appeared at immigration offices as a result of the requirements. n282 The Bush Administration initiated removal proceedings against 13,799 people, and detained nearly three thousand of them. n283 Informal interviews reportedly continued in 2004. n284

[*341]

V. BELONGING BEHIND BARS

A. The Negation of Empathy

The detention of immigrants outlaws them and their situations, and their incarceration reinforces the notion that these are people fit to be caged. n285 That message turns everyday interactions into risks. At the same time Muslims have been subjected to official round-ups and detentions, they have faced thousands of private attacks. n286 Arabs and Muslims are identified as presenting an elevated national security concern, and perceived as un-American, ungodly, a toxin to the body politic. Four days after the September attacks, and after stating that that all Arabs and their children should be rounded up and murdered, Frank Roque of Arizona slayed the owner of a filling station, who was wearing a turban. n287

Several other people of Middle Eastern or Indian descent were killed in the month following the attacks. n288 The month of September alone saw the deaths of Wagar Hasan, a Muslim grocer in Dallas whose killer claimed to have acted out of patriotic [*342] loyalty; Adel Karas, who came to the United States from Egypt to find tolerance for his religion, which was Christianity; Saed Mujtahid, a Muslim of Pakistani descent who worked as a clerk in a convenience store; Jayantilal Patel, a Florida resident of Indian descent found gagged, bound and beaten to death at the motel he owned; California resident Surjit Singh Samra, a Sikh of Indian descent found in an irrigation canal with his turban and glasses missing, but his wallet still in his pocket; and Abdo Ali Ahmed, an Arab resident of California, shot and killed in the store where he worked after being threatened several times since the September attacks. Still other killings, threats, and attacks on mosques would follow. n289 In August 2003, an intentional 3 a.m. fire consumed the Islamic Center of Savannah – a temporary mosque housed in a two-bedroom home – and the rare, handwritten Koran kept there. n290 Earlier in the same month, bullet holes had appeared in one of the property's doors, and one of the congregants' homes was broken into by a perpetrator who left a note demanding that Muslims leave Savannah, and assuring the congregation that Muslims are being watched "24-7." n291 In the summer of 2004, a 19-year-old resident of Buffalo, New York was charged with second-degree assault, second-degree harassment and second-degree reckless endangerment over yelling obscenities at two Muslim teenagers and making threatening remarks about their Islamic background, driving a car at them, and running over and breaking the foot of one of them with the car. n292

[*343] There were subtler attacks in evidence as well. The editor in chief of the Washington Times wrote:

Americans usually find Islam, with all its laws and orders, more fiat than faith, imposed by the state rather than something held precious in the secret places of the heart. It's hard to see how Islam will ever add very much to the established Judeo-Christian traditions of the American culture... n293

In the midst of continued disparagements, threats, and violence, n294 some Muslims and Arab-Americans have changed their names; others have left the country. n295

The idea of Muslims and Arabs as fundamentally alien, as monsters or predators, has appeared on numerous Internet

sites. One, portrayed as a growing concern of an "organization investigating persecution against Christians," paints the picture of Muslim men as sexual predators. n296 Another site invites reader responses to a news article about Zumrati Juma, the mother Feroz Abbasi, a Briton being held as a suspected terrorist at the Guantanamo compound. n297 Several reader responses [*344] follow the article. The author of the fifth comment is a mock interrogation of Juma herself, the name "Zumrati" written with boldface type highlighting the syllable "rat." n298

The alerts of advocacy groups have confirmed the presence of eerie changes in the social atmosphere. In August 2004 in New Jersey, one alert reported an attack on a Muslim driver "by a white male in another car who punched him in the face while he was sitting in his car at a traffic light." n299 During the incident, the attacker reportedly called the driver a "terrorist" and a "sand nigger" who should "go back to whatever fucking Arab country you came from." n300 In the same month, an Arab-American advocacy group pressured the city of Wildwood, New Jersey to close down a publicly-staged "Wack the Iraq" – a game that involved shooting paintballs at live targets dressed as Arabs – by planning a public protest. n301 The New Jersey region has also gained notoriety for political campaigns which deliberately exploited the September 2001 attacks. Leaflets produced by New Jersey Republicans in Bergen County promoting sheriff candidate Joel Trella juxtaposed a photo of the rival candidate with one of Mohamed Atta, a prominent hijacking suspect. n302 The flier indicated that Trella's opponent threatened national security by questioning the idea of detaining "illegal aliens" at the county jail. n303

[*345] In the aggregate, such discourse forms the basis on which the personhood of non-citizens has been undermined. It has proved useful, though, for an industry which profits from a diluted concept of any group's rights. n304 Even asylum seekers with strong community ties and positive initial rulings are now routinely warehoused while their cases are pending. n305 Problems regarding detained refugees seem to be worsening since the Department of Homeland Security absorbed the Immigration and Naturalization Service. n306 Most recent asylum- [*346] seekers from Haiti, for example, were taken into custody once Attorney General Ashcroft invoked new anti-terrorist regulations to declare that whole groups of asylum seekers arriving by sea would face mandatory detention. n307

B. Indefinite Detentions

In early 2003, six people, detained for months on visa charges, began a hunger strike to protest the conditions at the Passaic County Jail in Paterson, New Jersey. n308 Some said they simply wanted the chance to hug their children during visits. n309 Saleh Hamza, a Lebanese man whose daughter was born after he was arrested 13 months earlier on immigration charges, told *The New York Times*, "I'm going to keep going until I'm dead or I see my daughter." n310 Similarly, a recent article discusses some two hundred people being paid one dollar a day to work in the Wackenhut Detention Center in Queens, New York. n311 The article reports that the detainees, some of whom were apprehended shortly after September 2001 attack, but who have not been charged with crimes or terrorism-related activities, began a hunger strike to draw attention to the prolonged detentions and the conditions in the building. n312 The case of another detainee, Farouk Abdel-Muhti, caught the attention of [*347] immigrant-rights groups because, although he was arrested based on a 1995 deportation order, the arrest came one month after he started a New York radio show airing the grievances of Palestinians. n313 As a Palestinian, he has no state to take him back – rendering his detention indefinite. n314

After spending approximately two years in detention, Farouk Abdel-Muhti was released pursuant to an order from federal district judge Yvette Kane, who ruled that, as a Palestinian born before the creation of Israel, Abdel-Muhti was stateless and could not be legally deported. n315 The government [*348] had repeatedly refused to release him or grant bond, first claiming it was on the verge of deporting him, then arguing that Abdel-Muhti was holding up his case by refusing to comply with demands for the identification that would aid in his removal, and that therefore the six-month Zadvydas safeguard against indefinite detention should not apply. n316

In *Zadvydas v. Davis*, the Supreme Court accepted the constitutionality of a provision authorizing the detention of non-citizens who receive a final order of deportation but remain in custody because the government is unable to effect their removal to another country. n317 Yet the *Zadvydas* decision alleviated the provision's harshest effects by interpreting it as presumptively barring potential lifetime sentences. n318 *Zadvydas* was decided just before the attacks of September. Although the subsequent USA-PATRIOT Act does not mention indefinite detention, Section 412 of the Act provides that non-citizens ordered removed on minor visa violations could be indefinitely detained under the law if their country of origin refuses to accept them. n319 The Act hands the Attorney General [*349] the authority to certify "reasonable grounds to believe" that any person fits the broad anti-terrorism provisions of the INA; such certification could incur indefinite detention. n320

At the time of this writing, the Supreme Court is deciding a case taken on certiorari which addresses the indefinite detention of over two thousand migrant Cubans whose initial entry was illegal and who have no country to accept them, and whether they must be released pursuant to the Court's holding in *Zadvydas*. n321 The issue has been smouldering for two decades. Although the people who made up the Cuban exodus initially were hailed by U.S. politicians as courageous dissidents, the INS set up two large relocation camps in south Florida and later transported the Mariel Cubans to other camps around the country. n322 Unlike the middle-income professionals who fled Cuba a generation before, the Mariel boatlift of the 1980s included many people of rich skin tone and poor financial [*350] status. n323 Those with criminal records are currently subject to being recast by the Bush administration as national security threats. n324 Solicitor General Theodore Olson told justices that forcing the release of non-citizens "creates an obvious gap in border security that could be exploited by hostile governments or organizations that seek to place persons in the United States for their own purposes." n325 Similarly, Ashcroft decided in April 2003 that an impoverished Haitian teenager who sought refuge in Florida should not be released on bond, overriding the Immigration Board of Appeals by voicing a "national security" concern that resources were diverted from the war on terror to deal with the young person, who had no criminal history. n326 The Bush administration also invoked national [*351] security to hold scores of undocumented Brazilian emigres based on the notion that the influx of Brazilians poses a threat by consuming resources along the Southwest border. n327 Like the "mosaic" argument, the concept of indefinite detention for non-citizens as filling "an obvious gap" in security translates into a mandate to place more federal inmates into detention halls, county jails, and private prisons. n328

VI. THE ENFORCERS

A. The Establishment of U.S. Counter-Terrorism Law

In 1995, the year of the Elizabeth uprising, most public attention had focused westward, on the country's heartland. n329 [*352] The bombing of a federal building in Oklahoma City killed 168 and left hundreds of children and adults badly wounded. To "prevent this kind of tragedy from happening again," as President Clinton worded it, legislators passed the Antiterrorism and Effective Death Penalty Act (AEDPA). n330 The Act's terrorism-related provisions became the bane of advocates of fair trials and First Amendment rights. n331 Although they would broaden the set of convictions incurring prison sentences, nothing in new laws would prevent the attacks on the Pentagon and the World Trade towers five years later - when the laws were still in effect.

One of AEDPA's more obscure provisions - obscure because it has never been invoked n332 - created a removal court for "alien terrorists," which would allow the Secretary of State to consider classified information, including hearsay, when deciding if a person is a risk to "national security or the security of any individual." The law would permit removal of "any [*353] alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity," n333 which encompasses giving material support to anyone "conducting a terrorist activity." n334 But the government has preferred to use the immigration courts, whose administrative judges are not permitted to address the constitutional questions raised by targeted individuals. n335 Relegating the protection of non-citizens' most fundamental interests to an administrative twilight zone deprives such people of the scrutiny of government action which has been a lifeline for isolated minorities since Justice Stone wrote the famous fourth footnote in *Carolene Products*. n336

The government has reacted to emergencies by targeting a specified minority population, permitting the bulk of society to conceptualize the treatment of the targeted group as an exception to the ordinary state of affairs; yet special controls over non-citizens pave the way for the extension of these measures to other ethnic groups, political minorities, and advocates for social change. In the 1940s and 1950s, foreigners of suspect ideology were harassed, detained, and blocked from entry, and politically suspect citizens were excluded from various facets [*354] of public and professional life. Eventually the Supreme Court developed a doctrine of personal culpability to protect political memberships and associations absent specific intent to further illegal ends. n337

Non-citizens, however, faced obstacles when seeking similar political freedoms. n338 In 1987, federal officials arrested a passel of student activists allegedly associated with advocacy of the "doctrines of world communism" through the Popular Front for the Liberation of Palestine. n339 The FBI spent three years investigating these individuals, going so far as to rent the home adjacent to two of them for six months. n340 The FBI especially urged deportation of a group member who, investigators said, "shows great leadership ability." n341 The students organized annual public fundraising dinners, attended by many families and children. n342 Although the federal courts bristled at the argument that non-citizens enjoyed only diminished First Amendment rights of speech and association, in the wake of the 1996 court-stripping provisions, the Supreme Court dismissed the group members' challenge to selective enforcement [*355] of the

immigration law. n343 Over fifteen years after the initial arrests, the government continues to seek deportation for support to a "terrorist group," irrespective of individual culpability – now, under the USA-PATRIOT Act. n344

The Act, enacted six weeks after the September tragedy, effectively broadens AEDPA's provisions by subjecting non-citizens to removal for innocent associations and memberships n345 and makes them excludable for political speech, n346 notwithstanding the Supreme Court's identification of a constitutional right under the First Amendment for "the people" to endorse subversive organizations or activities, so long as [*356] such advocacy is not intended and likely to produce imminent lawless action, because "the right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." n347 Citizens are not exempt from the draconian reach and the harsh consequences of the law's provisions, which not only broaden the government's authority to explore personal records by expanding the definition of foreign agents, n348 but also allow the FBI to undertake secret searches of citizens' medical, library, and academic records, without a warrant and without probable cause, solely because of their exercise of First Amendment rights. n349 In a society defined by growing and constantly overlapping electronic connections, law enforcement agents may well lose perspective of the salient differences between incendiary comments and incendiary devices.

B. The Future: Globalizing Homeland Security

Since the 2001 attacks, the U.S. government has vigorously attempted to have Muslim countries clamp down on Islamic charities, claiming that they channel funds to terrorists. n350 Yet [*357] the issue is not so simply addressed. The Islamic zakah is a religious mandate as well as a humanitarian obligation to the poor; active collection of zakah is meant to foster security by redistributing wealth; as such, the zakah collection institutions are considered tools to prevent violence. n351 Moreover, the administration's proscriptions in this area are so broad that their own members and proponents could not be expected to steer clear of infractions. Two days after Pentagon adviser Richard N. Perle spoke at a charity event at the Washington Convention Center, the Treasury Department froze the assets of the event's prime organizer, the Iranian-American Community of Northern Virginia. n352 Perle said he was unaware of any involvement by the designate terrorist group, known as the Mujahedin-e Khalq (MEK), and believed he was assisting the victims of the Bam earthquake when he delivered the paid speech. n353 One administration official said that the FBI determined that at least three of the sponsoring organizations were associated with the MEK, and the Treasury Department, although admitting it had no proof, sent a letter to the Convention Center warning that the "MEK may have an interest in this event or may attempt to use the event to raise funds." n354 Perle said the hall was full of parents and children and "it did not have an aura of an event with terrorist sponsorship." n355

[*358] In the midst of such confusion, today's administration pushes for still broader law enforcement authority without historical basis to show that sweeping legislation provides the safety which is its ostensible justification. n356 In September of 2003, Attorney General John Ashcroft ordered prosecutors to seek the most serious possible charges for almost all federal cases. n357 Also in September of 2003, George Bush pressed for the "Pretrial Detention and Lifetime Supervision of Terrorists Act of 2003," a proposal to ensure the detention of people awaiting trial under charges of a new range of crimes. n358 In December 2003, Bush signed into law a bill that further expands FBI authority to secretly probe a vast variety of personal records and histories. n359 "By signing the bill on the day of Hussein's capture," wrote Professor David Martin, "Bush effectively consigned a dramatic expansion of the USA Patriot Act to a mere footnote." n360

When the administration succeeds in obtaining legislation that would incarcerate citizens and legal residents based on [*359] ever-widening criminal policy, increased demand for detention halls can logically be predicted. Indeed, in late 2003, the Department of Homeland Security announced a five-year goal requiring enough cells to store up to 8,000 more undocumented non-citizens per day. n361 The Department has included its interest in beginning to catch a "fugitive population of 400,000 illegal aliens ordered removed" in its plan for Fiscal Year 2005. n362

And, just after the Pentagon laid the first charges against two Guantanamo detainees, U.S. military officials said that anyone convicted in military tribunals would have to serve out their sentences – even when the "war on terrorism was deemed to be over" and at the same time suggested that those who were not convicted might be held indefinitely "if it was thought they might launch new attacks on U.S. interests." n363 A new long-term prison is now being built at Guantanamo, reportedly in the interest of holding suspected al Qaida operatives indefinitely. n364

[*360] Moreover, as previously noted, private companies with prison links have become international in scope. Over the past decade, private military services have grown into an industry representing about \$100 billion in revenue. n365 In 2001, the firms spent millions in political campaign donations. n366 Among the leading donors were Halliburton and DynCorp, both with connections in the detentions business. n367 The Blackwater security firm has reportedly retained the

Alexander Strategy Group – an influential lobbying corporation chaired by Ed Buckham, former chief of staff to House Majority Whip Tom DeLay. n368

Of the \$4 billion in monthly expenditures for the occupation of Iraq, as much as a third is going to the private contractors, according to Deborah D. Avant, a political scientist who researches the topic at George Washington University. n369 Key services being sought include prison construction know-how. n370 And there is no dearth of detainees to store. In April 2004, two hundred U.S.-trained Iraqi army personnel, after refusing to fight in Fallujah, were reportedly stripped of their [*361] military badges and confined under military supervision. n371 When a recent mortar attack on the Baghdad Confinement Facility in Abu Ghraib left 22 inmates dead and 92 wounded, n372 reports exposed the numbers of people held indefinitely as the U.S.-led coalition's "security detainees" – thousands in Abu Ghraib alone, n373 where even children as young as 11 are reported to be locked in rooms with no light. n374 As of March 2003, the U.S. military began detaining military police officers themselves: 17 were held in connection with a prisoner-abuse case that included allegations of "indecent acts" and cruelty during a period encompassing a riot which ended with the death of three detainees. n375

Perhaps it bears noting that Lane McCotter, a director of the reopening of the Abu Ghraib prison, resigned under pressure as director of the Utah Department of Corrections in 1997 after a schizophrenic inmate died while shackled naked [*362] to a restraining chair for 16 hours. n376 McCotter later became director of business development for a Utah-based private prison company, one of whose jails was under investigation by the Justice Department when he was sent to Iraq as part of a team of prison officials, judges, prosecutors and police chiefs selected by John Ashcroft to restyle Iraq's criminal law system. n377 A 53-page military investigation report, completed by Major General Antonio M. Taguba and not meant for public release, would later describe numerous instances of "sadistic, blatant, and wanton criminal abuses" at Abu Ghraib, including rapes; beatings; and the use of military dogs to attack inmates. n378 The report urged disciplinary action against two employees of a Virginia-based firm, CACI International, hired to carry out interrogations. n379 A second firm cited in the Taguba report is San Diego-based Titan. n380 Titan, which enjoys connections with U.S. foreign policy architects, recently signed a \$172 million deal to supply "analytical support" for US military operations. n381 Although the company pays some of its employees over \$100,000 a year, such people have vexed experts in legal jurisdictional issues, raising questions about the U.S. government's ability to contract prisoner abuse and torture [*363] out to firms whose employees avoid accountability for the activities they carry out on foreign soil. n382

CONCLUSION

U.S. lawmakers and executive branch officials benefit from symbiotic relationships with detention enterprises. When detention projects can anticipate opportunistic growth, they become a readily available tool for fiscal management and business development; and high-volume, open-ended detentions which are effectively sheltered from judicial scrutiny have particular appeal. An understanding of the built-in political incentives to detain people helps to explain the chronic abuses of certain non-citizen populations, and the tribulations of the legal community that attempts to serve those populations.

A series of laws and policies with increasingly repressive effects on the populace as a whole – most recently symbolized by the USA Patriot Act of 2001 – can serve as a legal basis for stunning losses of privacy and freedom. In the immigration context, the government warehouses large swaths of targeted non-criminal communities by exploiting and perpetuating the idea that many of those caught had posed a latent threat to U.S. communities. Thus, non-citizens are not only a malleable and ultimately disposable pool of workers; many of them are also particularly vulnerable to identification as a pool of prisoners. The storage of such people has become a global phenomenon, as the United States government builds an ever more labyrinthine system of obstacles between freedom and the people it deems fit to be caged.

FOOTNOTES:

n1. Siobhan Gorman, The Ashcroft Doctrine, National Journal, Dec. 21, 2002, at 3712. Bush's command, originally made in the White House within 24 hours of the attacks on the Pentagon and World Trade Center buildings of 11 September 2001, was relayed to Gorman by Assistant Attorney General Viet Dinh, who heads the Office of Legal Policy. Message dated Jan. 28, 2003 from Siobhan Gorman to Lee Hall (on file with the Rutgers Race and the Law Review).

n2. Professor David Cole would later write:

The only criminal conviction involving an actual terrorist incident to stand since Sept. 11 is that of "shoe bomber" Richard Reid, who was captured not through any work by the FBI, Department of Homeland Security or Justice Department but simply because an alert flight attendant noticed him trying to light his shoe with matches.

David Cole, Commentary: The D.C. Gang That Couldn't Shoot Straight, *Los Angeles Times*, Sep. 19, 2004, at M5. See also Niels W. Frenzen, Commentary: INS Misses Mark in Nationwide Arrests; Rules Seem To Be Guided by Political Concerns Rather than Security Needs, *Los Angeles Times*, Dec. 24, 2002 at Part 2, 13. The numbers have varied depending on how the detainees are classified. The Justice Department's Office of the Inspector General observed:

In the weeks and months following the attacks, various totals of the number of people arrested in connection with the September 11 investigation were released by the Department of Justice or appeared in media accounts. A senior official in the Department's Office of Public Affairs told the Office of the Inspector General that in the weeks after the terrorist attacks her office provided frequent updates to the media on the number of persons questioned, arrested, and detained by federal, state, and local law enforcement officials. According to this official, the Public Affairs Office stopped reporting the cumulative totals after the number reached approximately 1,200, because the statistics became confusing.

See 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* (June 2003), n.2, available at <http://www.usdoj.gov/oig/special/0306/chapter1.htm#7> (last visited May 10, 2004). The press stated: "In truth there are hundreds and perhaps thousands of immigrants, mostly Arabs and other Muslims, who would not be in detention but for Sept. 11, and who are now wending their way through a capricious and choked-up immigration system." *Forgotten Detainees*, *The Washington Post* Jan. 17, 2003, at A22. Because they are not classified as special-interest immigration cases, observes the author, they might not appear in the government's counts; yet they have lingered in cells for months. See *id.* An example is Ansar Mahmood, arrested on suspicion of tainting the New York water supply and later cleared by the FBI. He explained that he had only been photographing the scenic mountains near Rochester. *Id.*

n3. See David Rosenzweig, *Los Angeles: 3 Groups Sue Over Arrests of Arab Men*, *The Los Angeles Times* Dec. 25, 2002, at B3 (Metro Desk).

n4. See Gorman, *supra* note 1. Although the current stringent enforcement role is heightened, underlying this trend is a pattern established methodically over the past two decades. See generally Robert S. Kahn, *Other People's Blood: U.S. Immigration Prisons in the Reagan Decade* (1996).

n5. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified in various titles of the United States Code). At the effective date of transition, March 1, 2003, the Immigration and Naturalization Service (INS) was abolished, moving adjustment to permanent residency and naturalization to the Department of Homeland Security's new Bureau of Citizenship and Immigration Services (BCIS) and placing border patrol and removal issues into its Bureau of Immigration and Customs Enforcement (BICE). In contexts prior to the transition, this article will refer to the government agency handling incarceration and removal as the INS; post-transition, this article will use the acronym BICE. The Secretary of Homeland Security, rather than the Attorney General, is now charged with the administration and enforcement of all laws relating to immigration and naturalization. See 8 U.S.C. 1103(a)(1) (2003); Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 105(a), 117 Stat. 11 (2003) (amending the Homeland Security Act of 2002, Pub. L. No. 107-296, 1102, 116 Stat. 2135, 2273-74 (2002)). Yet 8 U.S.C. 1226, retains the Attorney General as the authority who detains and has custody of non-citizens. The functions of the Commissioner of Immigration and Naturalization have been transferred to the Under Secretary for Border and Transportation Security. 6 U.S.C. 251(2004).

n6. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996), observing that the most stringent judicial scrutiny applies to classifications based on race or national origin. *Id.* at 533. Moreover, "all gender-based classifications today" warrant "heightened scrutiny." *Id.* at 555 (internal citations omitted).

n7. Pursuant to Art. I, 8 of the Constitution, and in the interest of preventing the scenario of armies and national resources being committed by a president alone, Congress is the branch authorized to declare war. See *The Federalist*, No. 69, 464-465 & 470 (J. Cooke ed. 1961). U.S. intervention in Vietnam provided a context for debate about whether the president has the authority to commit troops abroad without a declaration of war. In 1973, over a presidential veto, Congress enacted the War Powers Resolution, a framework for the congressional and executive branches in the context of military commitments. P.L. 93-148, 87 Stat. 555 (1973), 50 U.S.C. 1541-1548. *Atlee v. Laird*, 347 F. Supp. 689 (E.D.Pa. 1982), (aff'd sub nom). *Atlee v. Richardson*, 411 U.S. 911 (1973) cited the political question doctrine to dismiss a suit challenging the constitutionality of United States activities in Vietnam; the Supreme Court affirmed without opinion. For further discussion of how courts faced with the constitutionality of U.S. military action tend either to hold such questions nonjusticiable or to find standing defects, see *Recent Case, Constitutional Law; Congressional Standing; D.C. Circuit Holds That Members of Congress May Not Challenge the President's Use of Troops in Kosovo*, 113 *Harv. L. Rev.* 2134 (2000) (examining the court's rejection of a challenge by several legislators to President Clinton's use of U.S. armed forces in Kosovo in *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000), and related prior case law). See also J. Gregory Sidak, *To Declare War*, 41 *Duke L.J.* 27, 93-98 (1991) (suggesting that the risks inherent in armed conflict are too serious to permit the use of military force absent a formal declaration of war).

n8. In November of 2001, Bush decreed by military order that al Qaida members and other non-citizens can be tried exclusively in military tribunals. "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 *Fed. Reg.* 57833 (Nov. 13, 2001). George W. Bush stated, "The option to use a military tribunal in a time of war makes a lot of sense." See James Gerstenzang, *Bush Defends Trying Terror Suspects in Secret Military Tribunals*, *The Los Angeles Times*, Nov. 20, 2001, at A1. Bush added that "those who don't understand the decision" should consider the precedent set during World War II when a similar option was available to President Franklin D. Roosevelt. "Those were extraordinary times as well," Bush said. *Id.* "We're fighting a war," said Bush, "against the most evil kinds of people." *Id.* Interviewed by Tom Brokaw on NBC News, Attorney General John Ashcroft replied to a question on whether the administration regretted not consulting with Congress: "I believe that it's important for us to understand that we're at war, and we've got to do everything we can to protect American lives. And I respect the fact that Congress has a role to play and indeed has an oversight responsibility. And I believe that when they understand the nature of these adjustments that we've made in order to protect lives in accordance with the Constitution, that it will not only be helpful to have that clarity, but they'll - they'll feel good about the kind of adjustments we've made." "Military Tribunals to Try Terrorism Suspects under Fire in Congress," *NBC News Transcripts* (Nov. 19, 2001). Brokaw next asked: "Do you think that some of these more than 1,000 people that are now being detained will stand trial on a military tribunal? That seems to be a major concern." Ashcroft answered that "the president should have the right to try alien war criminals in a commission." After invoking Franklin Roosevelt's actions, Ashcroft states: "This president has said it would only apply to people who are not citizens. I think it's one of the powers he needs. And I think having that tool available to him is one of the things that's going to continue to make his war on terrorism a very successful one." *Id.* Brokaw responds: "Under Franklin Roosevelt there was a formal declaration of war." *Id.*

n9. See Gorman, *supra* note 1.

n10. "But we are at war with an enemy that has flagrantly violated the laws of war. They do not wear

uniforms. They hide in caves abroad, and among us here at home," declared the administration. See "Military Commissions: Testimony of Secretary of Defense Donald H. Rumsfeld and Deputy Secretary of Defense Paul Wolfowitz Before the Senate Armed Services Committee (Dec. 12, 2001) available at <<http://armed-services.senate.gov/statemnt/2001/011212wolf&rums.pdf> (last visited Oct. 8, 2003).

n11. See Gorman, *supra* note 1.

n12. See Fed. Reg. 57833, *supra* note 8. The tribunals preclude independent judicial review of convictions, which may be obtained on the basis of classified evidence. Suspects have no right to a public trial or jury; a death sentence can be imposed by a two-thirds vote of the military officers presiding. *Id.*

n13. "Detention of enemy combatants prevents them from rejoining the enemy and continuing to fight against America and its allies, and has long been upheld by our nation's courts, regardless of the citizenship of the enemy combatant," Ashcroft stated. Detention of 'U.S. Taleban' Upheld, BBC News (Jan. 8, 2003), available at <http://news.bbc.co.uk/2/hi/americas/2640691.stm> (last visited Jan. 21, 2004).

n14. U.S. officials say that in November 2001 Hamdi was fighting as part of a Taliban unit when captured by pro-U.S. Northern Alliance forces in northern Afghanistan. See Michael Isikoff & Mark Hosenball, Out of the Brig: 'Enemy Combatant' Yaser Hamdi Will Soon be Released from a Military Prison without Facing Any Charges, Newsweek at <http://msnbc.msn.com/id/6012286/site/newsweek/> (dated Sep. 15, 2004; visited Sep. 22, 2004). Hamdi has been held incommunicado, but Hamdi's family has maintained that he had gone to Afghanistan on a humanitarian mission and was forced to fight for the Taliban there. *Id.* See generally Hamdi v. Rumsfeld, 316 F.3d 450 (2003); rehearing denied by Hamdi v. Rumsfeld, 337 F.3d 335 (4th Cir. 2003); writ of certiorari granted by Hamdi v. Rumsfeld, 157 L. Ed. 2d 812, 124 S. Ct. 981, 2004 U.S. LEXIS 12, 72 U.S.L.W. 3446 (U.S. 2004).

n15. Hamdi, 316 F.3d at 460.

n16. *Id.* The precedent cited by the Fourth Circuit for this position was *Ex parte Quirin*, 317 U.S. 1, 37 (1942) See Hamdi, 316 F.3d at 468. Hamdi was transferred to a naval brig in Norfolk, Virginia in April 2002, due to the citizenship issue. *Id.* at 460.

n17. See *id.* at 477.

n18. See *id.* at 475.

n19. *Id.*

n20. See Neil A. Lewis, Threats and Responses: The Courts; Detention Upheld in Combatant Case, N.Y. Times, Jan. 9, 2003, at A1.

n21. The United States Constitution is said to protect the liberty interests of all persons on U.S. territory, "whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). And so the Bush administration's initial claim that the tribunals would be used against non-citizens only was constitutionally problematic in itself – not simply because citizens, beginning with Hamdi, were likely to be targeted next. Depriving individuals of the basic liberty interest at the heart of the Due Process Clause is permissible only through the subversion of an individual's constitutional personhood; and identifying certain groups as outsiders to that personhood will vary depending on the objectives of the political administration. As Professor Maxwell O. Chibundu has said in the international law context: "To assert that the interests of individuals, rather than of nation states, have become instrumental in the composition of international community is to perpetuate the fiction that has long shrouded the domination of the other by the us." Maxwell O. Chibundu, "The Other in International Law: 'Community' and International Legal Order," University of Maryland, Pub. Law

Research Paper No. 2004-03 <<http://papers.ssrn.com/paper.taf?abstract id= 504782>> (visited Mar. 13, 2004). Throughout the history of immigration law, the dynamic observed by Professor Chibundu is seen working within the nation as well, between citizens and non-citizens. Likewise, to assert that the interests of individuals, rather than those of the state, control immigration and refugee law and policy is to perpetuate the fiction that has long veiled the historical pattern, associated with the political branches' "plenary power" over immigration matters, that reflects systematic subversion of non-citizen groups' interests for a variety of political and economic goals. See generally Stephen H. Legomsky, *Immigration and Refugee Law & Policy* (3rd ed. 2002), Chapter 1; see also Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Power*, 1984 Sup. Ct. Rev. 255. Professor Chibundu could be speaking just as well of national policy when noting that "the world within which we live today is one that explicitly distinguishes between 'us' and 'them.' "

n22. The judges stated: "Any effort to ascertain the facts concerning the petitioner's conduct while amongst the nation's enemies would entail an unacceptable risk of obstructing war efforts authorized by Congress and undertaken by the executive branch." See 316 F.3d 474-75.

n23. *U.S. v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998).

n24. Michael Isikoff and Daniel Klaidman, "The Road to the Brig," *Newsweek* (Apr. 26, 2004) at 26.

n25. *Id.*

n26. Elisabeth Bumiller and Steven Lee Myers, *A Nation Challenged: The Presidential Order; Senior Administration Officials Defend Military Tribunals for Terrorist Suspects*, *N.Y. Times*, Nov. 15, 2001, at B6. Abraham Lincoln detained thousands; yet Lincoln's actions are distinguishable: During the Civil War, Lincoln stepped in where courts had ceased working. *Padilla v. Rumsfeld*, 352 F.3d 695, 717 (2003). Moreover, a panel of the Second Circuit decided in the *Padilla* case, only Congress can grant the president such an extraordinary expansion of authority. *Id.* *Padilla* is the only U.S. citizen arrested on U.S. soil and declared an enemy combatant; the Fourth Circuit distinguished Hamdi's case on the basis of Hamdi's capture abroad. *Id.* at 699. Yet the government's filings in *Padilla* cited the Hamdi opinion and demonstrated that the government believes similar principles should regardless of where the capture occurred. See Benjamin Weiser, *Threats and Responses: The Courts; U.S. Asks Judge to Deny Terror Suspect Access to Lawyer, Saying It Could Harm Interrogation*, *N.Y. Times*, Jan. 10, 2003, at A11.

n27. *Ex parte Quirin*, 317 U.S. 1 (1942), is cited as precedent for the Tribunals in the "Military Commissions: Testimony of Secretary of Defense Donald H. Rumsfeld and Deputy Secretary of Defense Paul Wolfowitz Before the Senate Armed Services Committee," *supra* note 10. Beginning with a graphic description of the Sept. 2001 attack ("Today, three months after the attack, the ruins of the World Trade Towers are still burning – and bodies are still being pulled from the wreckage."), Rumsfeld and Wolfowitz state "We are at war...The September 11th attacks were acts of war." Thus, they insist: "This is not a law enforcement action. It is war." Their testimony continues: "During and following World War II, we didn't bring German and Japanese war criminals to the U.S. for trial in civilian courts. We tried them by military commissions." The testimony adds: "When eight Nazi saboteurs landed on our coast in 1942, with the intention of destroying American industrial facilities, they were tried by military commissions. Indeed in that case, the Supreme Court upheld the constitutionality of military commissions. In *Ex parte Quirin*, the Court ruled, in an 8–0 decision, that the trial of the Nazi saboteurs by a military commission, without a jury, was indeed constitutional, declaring 'unlawful combatants...are subject to punishment by military tribunals for acts which render their belligerency unlawful.'" 317 U.S. at 31. The Rumsfeld & Wolfowitz testimony claims that "it is well established that a foreign national who is engaged in armed conflict against the United States has no constitutional claim to the rights and procedures that would apply to a domestic criminal prosecution" and reasons that military commissions "can better protect civilian judges, jurors and courts from terrorist threats and assure the security of the trial itself. ...It is also important to avoid the risk of terrorist incidents, reprisals or hostage takings during an extended civilian trial. Moreover, appeals or petitions for habeas corpus could extend the process for years." Citing national security, the testimony adds that the Tribunals "would permit speedy, secure, fair and flexible proceedings, in a variety of locations," "more inclusive rules of evidence", and "the use of classified information". For a critique of *Quirin* and tribunals as undermining international law, the separation of powers, and "moral leadership," see Harold Hongju Koh, *The Case Against Military Commissions*, 96 *Am. J. Int'l L.* 337, 339–42 (2002).

n28. See *Ex parte Quirin*, 317 U.S. 1, at 20 (acknowledging that Haupt was not a German citizen). The Court wrote: "Even if it be assumed that Burger and Haupt are citizens of the United States, this does not change their status as 'enemies' of the United States. This rule applies to all persons living in enemy territory, even if they are technically United States citizens. The return of Burger and Haupt to the United States can not by any possibility be construed as an attempt to divest themselves of their enemy character by reassuming their duties as citizens." *Id.* at 1. (internal citations omitted).

n29. The saboteurs landed on the coasts of New York and Florida; a member of the Coast Guard sighted, but then lost track of, the New York group. See Tony Mauro, *Historic High Court Ruling Is Troublesome Model for Modern Terror Trials*, *American Lawyer Media*, Nov. 19, 2001, available at <<http://www.law.com/jsp/statearchive.jsp?type=Article&oldid=ZZZ1430 F4UC>> (last visited Mar. 5, 2004). One of the Germans went straight to Washington and turned the group in to the Federal Bureau of Investigation; but FBI head J. Edgar Hoover announced the captures as the results of magnificent FBI work, and some historians have speculated that the administration's quick bid to try the Germans in secret was an effort to avoid exposing Hoover's embellishments. *Id.* Attorney General Biddle also wanted to obtain executions, which would not have been available in civilian courts. See Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 *Mil. L. Rev.* 59, 63 (1980). Even if the Court possessed the authority to deem Roosevelt's military commission unlawful, actually doing so might have been futile, for Roosevelt had told Biddle, "I won't hand them over to any United States marshal armed with a writ of habeas corpus." See Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 *Cal. W. L. Rev.* 433 (2002) (citing David J. Danelski, *The Saboteurs' Case*, *J. Sup. Ct. Hist. Soc'y* 61, 68 (1996)).

n30. *Ex parte Quirin*, 317 U.S. at 35–37.

n31. Belknap, *supra* note 29 (citing Danelski, *supra* note 29, at 72).

n32. See Mauro, *supra* note 29. Scholar Michael Belknap has denounced the decision as an effort "to justify as best he could a dubious decision." See Belknap, *The Supreme Court Goes to War*, *supra* note 29, at 87 (also cited in Mauro's essay).

n33. See Mauro, *supra* note 29.

n34. *Id.*; See also, John P. Frank, *Marble Palace: The Supreme Court In American Life* 249 (1972) (also cited in Mauro's essay).

n35. For related commentary, see Charles Lane, *War on Terrorism's Legal Tack Is Rejected: Court Challenges Declaration and Detention of U.S. Citizen as Enemy Combatant*, *The Washington Post*, Dec. 19, 2003, at A22.

n36. *Hamdi v. Rumsfeld*, No. 03-6696 (Jun. 28, 2004), provided by the Legal Information Institute Supreme Court Collection, <http://supct.law.cornell.edu/supct/html/03-6696.ZO.html> (visited Jul. 1, 2004).

n37. *Id.*

n38. *Id.* Justice Scalia, joined by Justice Stevens, lambasted O'Connor and the plurality for permitting this situation in a case involving U.S. citizens:

Having found a congressional authorization for detention of citizens where none clearly exists; and having discarded the categorical procedural protection of the Suspension Clause; the plurality then proceeds, under the guise of the Due Process Clause, to prescribe what procedural protections it thinks appropriate. It "weighs the private interest ... against the Government's asserted interest," and – just as though writing a new Constitution – comes up with an unheard-of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a "neutral" military officer rather than judge and jury. It claims authority to engage in this sort of "judicious balancing" from *Mathews v. Eldridge*, 424 U.S. 319 (1976), a case involving ... the withdrawal of disability benefits!

See *id.* (Scalia, dissenting; emphasis in the original; internal citations omitted). The dissent is available at <http://supct.law.cornell.edu/supct/html/03-6696.ZD.html> (visited Jul. 1, 2004).

n39. See Isikoff & Hosenball, *supra* note 14. Questions about the validity of Hamdi's renunciation of citizenship may yet arise – for example, under the INA. The administration invoked the INA at 349(a)(5), codified at 8 U.S.C. 1481(a)(5). See Yaser Esam Hamdi v. Donald Rumsfeld, Settlement Agreement (Sep. 17, 2004), <http://news.findlaw.com/hdocs/docs/hamdi/91704stlagrmnt.html> (settlement agreement between federal prosecutors and a Louisiana-born designated enemy combatant concerning his deportation to Saudi Arabia and revocation of American citizenship). The section provides that:

A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality – making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State...

Pursuant to the terms of the Settlement Agreement, Hamdi went to Saudi Arabia to renounce U.S. citizenship. Yet under the statute, to be deemed to have renounced U.S. citizenship in this manner – or by any of the seven methods enumerated under 349(a) – Hamdi must have done so with "the intention of relinquishing United States nationality." See *id.* Under 349(a)(3), a person could enter or serve in the armed forces of a foreign state engaged in hostilities against the U.S., but the forces of a state are not at issue here. Similarly, under 349(a)(6), a person could provide a "formal written renunciation of nationality in such form as may be prescribed by, and before such office as may be designated by, the Attorney General, whenever the United States shall be in a state of war..." The question in such a case would be whether the U.S. is in such a state in the absence of a formal declaration or war against any state. Where no "foreign state" is involved, the administration could consider the treason provision under 349(a)(7); but loss of nationality would be delayed or precluded as a preliminary matter by its own language, which permits such loss "if and when he is convicted thereof by a court martial or by a court of competent jurisdiction." See *id.* All of these provisions are potentially significant, given that the Settlement Agreement indicates a possible "right of the United States to determine that Hamdi lost United States nationality at an earlier time." See *infra* Yaser Esam Hamdi v. Donald Rumsfeld, Settlement Agreement (Sep. 17, 2004).

In short, when Hamdi or any suspect is charged with renouncing U.S. citizenship, the government is obliged to show that the person did so with intent. See 349(a). Moreover, where a loss of nationality is put in issue, 349(b) indicates that "the burden shall be on the person or party claiming that such loss occurred" and that the person is entitled to rebut the presumption "upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily." See INA 349(b). Attorney Frank Dunham, who represented Hamdi, said "Hamdi had no problem surrendering his American citizenship," according to a media report. See, CNN.com, Hamdi Voices Innocence, Joy about Reunion, (Oct. 14, 2004) at <http://www.cnn.com/2004/WORLD/meast/10/14/hamdi/> (visited Oct. 14, 2004).

Dunham's explanation, however, speaks to the highly questionable nature of Hamdi's capacity to give meaningful consent when the Agreement was signed. "When you've been in solitary confinement for three years and somebody puts a piece of paper in front of you that says you can get out of jail free if you sign it, you don't really worry too much about the rest of the fine print," Dunham said. *Id.*

n40. See Agence France-Press, "Rumsfeld Asks Supreme Court to Overturn 'Enemy Combatant' Ruling" (Jan. 17, 2004). The Supreme Court granted certiorari. See 2004 U.S. Lexis 1011 (2004). The Supreme Court on April 28, 2004 heard arguments in *Hamdi v. Rumsfeld* (03-6696) and *Rumsfeld v. Padilla* (03-1027) challenging their enemy-combatant status.

n41. See *Padilla v. Rumsfeld*, 352 F.3d 695, 724 (2003). Padilla was picked up unarmed by the FBI in Chicago and suspected of planning an attack against the U.S. involving radiological materials on behalf of al Qaeda. *Id.* at 698-99.

n42. See *id.* at 699. The U.S. Court of Appeals for the Second Circuit ruled in the case of Padilla, who was held in the same prison as Hamdi, that "the President's inherent constitutional powers do not extend to the detention as an enemy combatant of American citizens without express congressional authorization." 352 F.3d at 699-724. The Non-Detention Act, upon which the Second Circuit relied in Padilla's case, provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. 4001(a).

n43. Padilla, 352 F.3d at 719. The Supreme Court in *Korematsu v. United States*, 323 U.S. 214, 221 (1944), reh'g denied, 324 U.S. 885 (1945), coram nobis granted, 584 F. Supp. 1406 (N.D. Cal. 1984), infamously upheld President Franklin D. Roosevelt's Executive Order 9066, authorizing military evacuations of all persons of Japanese ancestry from their homes in the western states, despite the petitioner's loyalty and citizenship.

n44. See "Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit; Motion to Expedite Consideration of Petition for Writ of Certiorari and To Establish Expedited Schedule for Briefing and Argument if Certiorari is Granted," submitted by Donald Rumsfeld, at 3; available at news.findlaw.com/hdocs/docs/padilla/rumspad11604usmot.pdf (last visited Mar. 8, 2004).

n45. See Anne Gearan (Associated Press), *Bush Administration Asks Court to Hear Detained Citizen Case*, *The Legal Intelligencer*, Jan. 21, 2004, at 4.

n46. *Rumsfeld v. Padilla*, No. 03-1027, 352 F.3d 695, reversed and remanded (Jun. 28, 2004). See Legal Information Institute Supreme Court Collection, <http://supct.law.cornell.edu/supct/html/03-1027.ZS.html> (visited Jul. 1, 2004).

n47. See *id.*

n48. See *Gherebi v. Bush*, Central District of California, Los Angeles. D.C. No. CV-03-01267-AHM. *Gherebi v. Bush*, 2003 U.S. App. LEXIS 25625 (9th Cir. Cal., Dec. 18, 2003). Habeas corpus, for non-citizens, has required only brief hearings to satisfy the bare requirements of the law. See, e.g., *Ekiu v. United States*, 142 U. S. 651 (1892).

n49. See Katharine Q. Seelye & Steven Erlanger, *U.S. Suspends the Transport of Terror Suspects to Cuba*, *N.Y. Times*, Jan. 24, 2002 at A1; Katharine Q. Seelye, *For America's Captives, Home Is a Camp in Cuba, With Goggles and a Koran*, *N.Y. Times*, Jan. 20, 2002, at A14; Katherine Q. Seelye, *A Nation Challenged: The Captives; On Defensive, General Says Prisoners Get Mats, Even Bagels*, *N.Y. Times*, Jan. 17, 2002, at A16. The Guantanamo Naval Station was established under a treaty signed in 1903 by President Theodore Roosevelt, and the U.S. government held Cuban and Haitian refugees there during the 1990s. See BBC News, *Destination Guantanamo Bay* (Dec. 28, 2001). The U.S. reportedly made recent preparations to use it again, to house as many as 50,000 intercepted Haitian refugees. See Alva James-Johnson and Tal Abbady, *Camp for Haitian Refugees Could Be Set Up at Guantanamo Bay*, *South Florida Sun-Sentinel* Feb. 12, 2004 (reporting that the U.S. Southern Command Headquarters had begun military exercises to intercept and detain Haitians). See also Alan Elsner, *U.S. Preparing Guantanamo Bay for Haitian Refugees*, *Reuters AlertNet*, Feb. 11, 2004, available at <http://www.alertnet.org/thenews/newsdesk/N11366483.htm> (visited Feb. 21, 2004).

n50. The U.S. military published the first photos of the detainees in handcuffs, blindfolds, earmuffs, and surgical masks. Initially, journalists were allowed to take pictures through chain-link fences. But after international outrage alleging mistreatment, the military began keeping the detainees away from the cameras. See Ivan Roman, *Critics: Guantanamo Example May Hurt POWs*, *Orlando Sentinel* Mar. 30, 2003. See also Secretary of Defense Donald H. Rumsfeld Roundtable Briefing with Radio Media (released by the Pentagon), *Fed. News Service*, Jan. 15, 2002 (quoting Rumsfeld: "I do not feel even the slightest concern about their treatment. They are being treated vastly better than they treated anybody else over the last several years and vastly better than was their

circumstance when they were found."). Notwithstanding religious tenets forbidding suicide, 21 detainees made 32 suicide attempts in the first two years since the September attacks. See Red Cross Blasts Guantanamo, Oct. 10, 2003 <http://news.bbc.co.uk/2/hi/americas/3179858.stm> (visited Mar. 9, 2004); and Scott Higham et al., Prison Represents a Problem That's Tough to Get Out Of, *Washington Post*, May 2, 2004, at A1. A brother of British detainee Tarek Dergoul, aged 26 when released in March 2004 after two years of detention, reported that the freed detainee was in poor physical shape and having difficulty in walking. See Last Three Guantanamo Men Freed, *BBC News* (Mar. 11, 2004) available at http://news.bbc.co.uk/2/hi/uk_news/3500156.stm (visited Mar. 11, 2004).

n51. See Kevin Anderson and Nick Childs, Guantanamo Families Ask for Justice, *BBC News*, Mar. 9, 2004 (reporting the view of U.S. religious groups and European families of the detainees held at the US military base at Guantanamo Bay) <http://news.bbc.co.uk/2/hi/americas/3545065.stm> (visited Mar. 11, 2004). They have lingered without charge or trial or judicial review; some are children and teens who have had no contact with their families or knowledge about what is going to happen to them. Sue Fleming, U.S. Still Holds Children at Guantanamo, *Reuters*, Jan. 16, 2004 (quoting Jo Becker, representative of Human Rights Watch, as stating that the internees "have been in detention since the early part of last year without any direct contact with their families"). Three of the youngest, reportedly between 13 and 15, were reportedly released in late January 2004. See John J. Lumpkin (Associated Press), Military Frees 3 Teens From Guantanamo Bay, *The Guardian*, Jan. 30, 2004.

n52. See *Gherebi v. Bush*, 352 F.3d 1278 (9th Cir. Cal., 2003).

n53. 352 F.3d 1280. An earlier ruling by a federal appeals court based in Washington had unequivocally supported the position that decisions on writs of habeas corpus pertaining to people interred at Guantanamo Bay was indeed beyond jurisdiction of any U.S. court. The case sprang from two proceedings filed on behalf of 16 British, Australian and Kuwaiti detainees whose relatives asked that they be given the right to petition U.S. courts for their freedom. See *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), cert. granted, 157 L. Ed. 2d 407, 2003 WL 22070725 (Nov. 10, 2003).

n54. Stay granted by *Bush v. Gherebi*, 124 S. Ct. 1197, 2004 U.S. LEXIS 998 (U.S., Feb. 5, 2004); see also *Gherebi v. Bush*, 2003 U.S. App. LEXIS 25928 (directing the *Gherebi* mandate held in abeyance pending issuance of *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), cert. granted, 157 L. Ed. 2d 407, 2003 WL 22070725 (Nov. 10, 2003)).

n55. *Rasul v. Bush*, No. 03-334, 321 F.3d 1134, reversed and remanded (Jun. 28, 2004). See Legal Information Institute Supreme Court Collection <<http://supct.law.cornell.edu/supct/html/03-334.ZS.html>> (visited Jul. 1, 2004). The Court specifically addressed the particular case of "two Australians and twelve Kuwaitis captured abroad during the hostilities [who] are being held in military custody at the Guantanamo Bay, Cuba, Naval Base... over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'" *Id.*

n56. *Id.*

n57. Stated the Court: "Whether and what further proceedings may become necessary after respondents respond to the merits of petitioners' claims are not here addressed." *Id.*

n58. Illustrating the vague quality of the administration's view, Michael O'Neill, former general counsel to the Republicans on the Senate Judiciary Committee, opined that terrorism falls somewhere on the spectrum between "shoplifting from Neiman Marcus" and "I declare war against the United States, and I'm a sovereign nation." Quoted in Gorman, *supra* note 1.

n59. See *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57833 1(a), (Nov. 13, 2001).

n60. For a description of the 2001 hijackings as a violation of international law, see Senate Judiciary Committee, "Review of the Military Terrorism Tribunals," Testimony of Scott L. Silliman, Executive Director for the Center on Law, Ethics and National Security at the Duke University School of Law, "On DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism" (Nov. 28, 2001). Yet the idea of the U.S. in an "armed conflict" with terrorists of various nationalities, wherever in the world they may be, would conjure up an idea of global theatre of war, and no legitimate entity with whom to negotiate peace. I leave the bizarre implications of that concept to international law scholars.

n61. The author is indebted to the late Professor Joan Fitzpatrick for this characterization of the administration's position. Although the rhetoric of the Department of Defense proposed a wartime setting ("This is not a law enforcement action. It is war."), it acknowledged simultaneously that "the terrorists who threaten us ...operate in dozens of countries - including the United States." See Rumsfeld & Wolfowitz testimony, *supra* note 10, at 2. An example of the unpredictability of this position appears in the administration's attitude regarding Hamdi, the Louisiana-born U.S. citizen who was flown from Guantanamo to a Naval brig in Norfolk, Virginia, while government lawyers tried to figure out what to do with him. *Id.* "There is a sense in which we were making this up as we went along," said one person, identified as "a top government attorney." *Id.* The lawyer added, "You have to remember we were dealing with a completely new paradigm: an open ended conflict, a stateless enemy, and a borderless battlefield." See Isikoff & Klaidman, *supra* note 24.

n62. As the last century ended, millennium doomsday fears provided a context for FBI agents to question a non-Arab Islamic fundraiser in California about whether she knew an Algerian arrested in Seattle allegedly trying to enter the United States with explosives: "Do they think ...that we Muslims have a terrorist in every family? Sometimes it just gets ridiculous." Teresa Watanabe & Eric Lichtblau, *FBI Accused of Terror Overreaction: Muslims Claim They Were Singled Out for Questioning in the Federal Effort to Squelch Millennium-Related Terrorism; Agents Deny Bias*, *The Los Angeles Times*, Jan. 10, 2000, at B1 (quoting Carol Brunetti). Beginning the day before New Year's Eve of 2000, FBI agents in at least seven states interviewed about 70 people across the country, resulting in some fruitless arrests. *Id.* In December 1999, Muslim leaders protested to the State Department to stop linking potential terrorist attacks with the holy season of Ramadan in its millennial warning alerts. *Id.* Bringing the point up to date, former hostage Terry Waite stated: "This continued detention of people in Guantanamo Bay is doing fundamental harm to the image of America overseas, and in fact, in my opinion, ... is likely to increase terrorism by sending more people to the extreme edges." See Kevin Anderson and Nick Childs, *Guantanamo Families Ask for Justice*, *supra* note 51.

n63. See, e.g., Don Van Natta Jr., *Threats and Responses: Interrogations: Questioning Terror Suspects In a Dark and Surreal World*, *N.Y. Times*, Mar. 9, 2003, at A1. The article indicates that a number of human rights groups have, over an extended time, pressed the Pentagon over "quietly embracing torture as an acceptable means of getting information in the global antiterrorism campaign" and quotes Holly Burkhalter, United States director of Physicians for Human Rights, as saying, "There is no specific policy that eschews torture." The C.I.A. is reported

to be operating its "Qaeda detention system" under a series of secret legal opinions by the agency's and Justice Department lawyers, according to James Risen et al., *Harsh Methods Cited in Top Al Qaeda Interrogations: CIA Uses Coercive Tactics*, N.Y. Times, May 12, 2004. Those opinions reportedly permit the use of harsh interrogation techniques, including "water-boarding," by which the person being interrogated is strapped down, pushed under water, and put in fear of drowning. *Id.* One set of legal memoranda reportedly advises government officials who contemplate procedures that may violate U.S. law or the Geneva Conventions that they might evade responsibility by arguing that the detainees are formally in the custody of another country. *Id.* "There was a debate after 9/11 about how to make people disappear," a former intelligence official said. *Id.* See also "Pentagon Concedes Interrogation Techniques Illegal," ABC News Online (May 14, 2004) <http://www.abc.net.au/news/newsitems/s1108214.html> (visited May 14, 2004) (reporting apparently contradictory answers from Pentagon officials regarding whether the prescribed treatment of U.S. prisoners violated international conventions and treaties); "Rumsfeld OK'd Harsh Treatment," USA Today (Jun. 22, 2004) (reporting that Donald Rumsfeld, in 2002, approved such interrogation tactics as "inducing stress by use of detainee's fears (e.g., dogs).") See also Duncan Campbell and Suzanne Goldenberg, *Afghan Detainees Routinely Tortured and Humiliated by U.S. Troops*, *The Observer*, Jun. 23, 2004 (discussing a pattern of severely inhumane treatment in Afghanistan and Iraq, sometimes taken to fatal extremes).

n64. Don Van Natta Jr., *Threats and Responses: Interrogations: Questioning Terror Suspects In a Dark and Surreal World*, *id.*; see also Dan Williams, "Torture Lite' Takes Hold in War on Terror," Reuters News Service, *Washington Post* (Mar. 3, 2004), reprinted at <http://www.washingtonpost.com/wp-dyn/articles/A25762-2004Mar3.html> (visited May 8, 2004); and David Rose, "Inside Guantanamo: How We Survived Jail Hell," *The Observer* (Mar. 14, 2004) available at http://observer.guardian.co.uk/uk_news/story/0,6903,1168937,00.html, continued at http://observer.guardian.co.uk/uk_news/story/0,6903,1169122,00.html (both visited May 8, 2004).

n65. Most of the detainees were in U.S. custody. See "US Extends Custody Deaths Probe," BBC News (May 22, 2004) at http://news.bbc.co.uk/2/hi/middle_east/3737787.stm (visited Sep. 24, 2004). Several prisoners were found to have died before or during interrogation, and ten of the deaths have been deemed homicides. *Id.* See also R. Jeffrey Smith and Dan Eggen, *New Papers Suggest Detainee Abuse Was Widespread*, *Washington Post* (Dec. 22, 2004) at A1 (detailing a release of documents detailing a "series of probes by Army criminal investigators into multiple cases of threatened executions of Iraqi detainees by U.S. soldiers, as well as of thefts of currency and other private property, physical assaults, and deadly shootings of detainees at detention camps in Iraq.").

n66. See Don Van Natta Jr., "Threats and Responses: Interrogations: Questioning Terror Suspects In a Dark and Surreal World," *supra* note 63.

n67. See *id.* (referring to Egypt, Jordan and Saudi Arabia); see also Williams, "'Torture Lite' Takes Hold in War on Terror," *supra* note 64. Since the September attacks, the CIA has used broad authority granted in a series of legal opinions and guidance from the Office of Legal Counsel and its own general counsel's office to transfer, interrogate and detain individuals suspected of terrorist activities at a series of undisclosed locations around the world. Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq: Practice Is Called Serious Breach of Geneva Conventions*, *Washington Post*, Oct. 24, 2004, at A1. According to current and former agency officials, the CIA has a rendition policy that has permitted the agency to transfer an unknown number of suspected terrorists captured in one country into the hands of security services in other countries whose record of human rights abuse is well documented. *Id.* These individuals, as well as those at CIA detention buildings, have no access to any recognized legal process or rights. *Id.* In November 2004, *The Sunday Times* would echo the earlier reports with a new account of U.S. agents hiring aircraft from Premier Executive Transport Services, a private company in Massachusetts, to take suspects to be tortured in foreign countries including Egypt, Syria, Jordan, and Uzbekistan. See Stephen Grey, *Private Jet Takes Men for 'Torture'*, *The (London) Sunday Times* (Nov. 14, 2004) <http://www.timesonline.co.uk/article/0,,2089->

1357699,00.html (visited Nov. 18, 2004).

n68. Dana Priest and Joe Stephens, Pentagon Approved Tougher Interrogations, *The WashinGton Post*, May 9, 2004, at A1. The techniques reportedly had the approval of the highest levels of the Pentagon and the Justice Department, and feature in the first publicly documented official policy permitting interrogators to use physically and psychologically stressful methods during questioning. *Id.*

n69. See "Hearing: Article 15-6 Investigation of the 800th Military Police Brigade," administrative review of the procedures at Abu Ghraib conducted by Major General Antonio M. Taguba [hereinafter "Taguba Report"] available at <http://www.globalsecurity.org/intell/library/reports/2004/800-mp-bde.htm> (last visited May 10, 2004).

n70. *Id.* The Taguba Report found a "systemic" pattern that included "numerous incidents of sadistic, blatant, and wanton criminal abuses" between October and December 2003, including rapes, use of attack dogs, and "taking photographs of dead Iraqi detainees." Implicated with soldiers are employees of at least two private companies, Virginia-based CACI International and California-based Titan Corp. *Id.*

n71. See Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 *Criminology* 449, 452 (1992), (describing the new penology as "markedly less concerned with responsibility, fault, moral sensibility, diagnosis, or intervention and treatment of the individual offender. Rather, it is concerned with techniques to identify, classify, and manage groupings sorted by dangerousness.") See *id.*

n72. *Id.* at 455.

n73. For an overview of the depersonalizing effects of the 1996 adjustments to the immigration law, including mandatory detention without examination of the individual circumstances of each case, see Jaya Ramji, *Legislating Away International Law: The Refugee Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 37 *Stan. J. Int'l L.* 117 (2001). For related commentary discussing how policies dehumanize the "other" - that is, groups deemed alien by the controlling social group - see generally Natsu Taylor Saito, *Symposium: Asserting Plenary Power Over the 'Other': Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs To Incorporate International Law*, 20 *Yale L. & Pol'y Rev.* 427 (2002).

n74. American-Arab Anti-Discrimination Committee President Ziad Asali called the "special registration" of certain groups in 2002-03 (discussed in notes 127, 244-64 *infra* and surrounding text) "antithetical to our American values of equal treatment under the law," adding that it "seems to be, in practice, a vehicle for incarcerating large numbers of people who pose no threat and who do not belong in jail." See American-Arab Anti-Discrimination Committee Press Release, "ADC Expresses Deep Concern about Widespread Detention of Immigrants," (Dec. 19, 2002), available at <www.adc.org/index.php?id=1489> (visited May 8, 2004).

n75. Geoffrey Fattah, *Provo INS Raid Sparks Ire: Friends, Family Say Workers Didn't Get to Show Citizenship*, *Deseret News* (Feb. 20, 2003), available at <http://deseretnews.com/dn/view/1%2C1249%2C460030017%2C00.html> (visited May 8, 2004).

n76. Id.

n77. Id.

n78. Mark Dow, *Common Sense and Fantasy in a Private Immigration Prison*, NTH Position, Jan. 4, 2004, available at <http://www.nthposition.com/commonsenseandfantasy.php> (last visited Sep. 21, 2004).

n79. Id. Aboyade continued working on his asylum appeal while denied access to the law library and submitted the appeal from segregation – via his CCA keepers – but it never reached the Board of Immigration Appeals. Aboyade would eventually be granted political asylum, and with it a delayed opportunity to make his case public in *Aboyade v. Corrections. Corporation of America*, No. cv-00-2067, (D.N.J. filed February 2000). Mark Dow, *American Gulag*, Ch. 7, n. 7 (2004), available at <http://www.ucpress.edu/books/pages/10041/10041.ch07.html> (last visited Sep. 23, 2004).

n80. Dow, *American Gulag*, id.

n81. Dow, *Common Sense and Fantasy in a Private Immigration Prison*, supra note 78.

n82. Id.

n83. Id.

n84. See Elizabeth Llorente, *Beating of Asylum Seeker Described*, Record (Hackensack, NJ), Apr. 19, 1999, at A01. Photos taken by the INS of Dafali on the same night confirmed the injury. Id.

n85. Dow, *Common Sense and Fantasy in a Private Immigration Prison*, supra note 78.

n86. Elizabeth Llorente, *Shackled on the Land of Hope; Asylum Seekers Live in Jail-like Conditions: FBI Studies Detainees' Complaints of Cruelty*, Record (Hackensack, NJ), Apr. 11, 1999, at A01 (quoting Elizabeth's Warden Karen Nicholson).

n87. See id.

n88. Dow, *American Gulag*, supra note 79.

n89. Dow, *Common Sense and Fantasy in a Private Immigration Prison*, *supra* note 78.

n90. *Id.* The government is apparently protecting this concern: A BICE public affairs officer reportedly refused to allow a journalist to tour Elizabeth, in violation of the agency's own media rules. *Id.*

n91. The government's report in the wake of the 1995 Elizabeth uprising acknowledges the use of "a systematic methodology" of mental and physical intimidation. See U.S. Immigration and Naturalization Serv., *The Elizabeth, New Jersey, Contract Detention Facility Operated by Esmor, Inc.: Interim Report*, (Jul. 20, 1995), cited in Human Rights Watch, *10 Locked Away: Immigration Detainees in Jails in the United States* n. 51, 52 (September 1998) at [http://www.hrw.org/reports98/us-immig/Ins 989-03.htm#P431 73018](http://www.hrw.org/reports98/us-immig/Ins%20989-03.htm#P43173018) (last visited Sep. 23, 2004) (internal citations omitted). This is not to say that all guards embrace authoritarian procedures. One guard confided to a reporter, "I think it's terrible the way they're held. It just doesn't seem right. Some of them are here so long. Of course, because of this, I have a job. Someone's got to do it, I guess. I don't think I'm doing something awful, because I bend the rules a bit to help them." See Llorente, *supra* note 86.

n92. Intelligence officers and civilian contractors who were conducting interrogations reportedly urged military police at Iraq's Abu Ghraib prison to "break" Iraqi prisoners, and some members of the military police complied. See T. Christian Miller, *Iraqi Prisoner Abuse Appears More Extensive*, *The Los Angeles Times*, May 2, 2004, at A1. One U.S. official said 50 to 100 out of an estimated 35,000 Iraqis detained in U.S. custody during the last year had died, in a variety of circumstances. *Id.* The *Times* quoted one U.S. official as saying, "There was a mentality that the people we're in charge of are not humans." *Id.* See also Julian Coman, *He Did Not Comprehend the Size of the Bomb that was Ticking*, *The Sunday Telegraph*, (London), May 9, 2004, at 22. Several of the first soldiers to be implicated in the scandal over treatment tantamount to torture have had careers in U.S. prisons that are among their home region's largest employers. See James Dao and Paul von Zielbauer, *The Struggle for Iraq: The Prison Guards; Abuse Charges Bring Anguish In Unit's Home*, *N.Y. Times*, May 6, 2004, at A1.

n93. *Prison Privatisation Report Int'l No. 45* (Jan. 2002) at <http://www.psir.org/justice/PPRI45.asp> (visited Jan. 30, 2004). For a discussion of related socio-economic influences, see Silja Talvi, *It Takes a Nation of Detention Facilities to Hold Us Back: Moral Panic and the Disaster Mentality of Immigration Policy*, *Lip Magazine*, Jan. 15, 2003, at [http://www.lipmagazine.org/articles/feattalvi 197.shtml](http://www.lipmagazine.org/articles/feattalvi%20197.shtml) (visited Feb. 1, 2004). In Talvi's interview, Professor Michael Welch states:

Correctional companies have to cut operational costs, and cutting operational costs is a code word for reducing labor costs. So they hire the fewest number of corrections officers and they compete against the fast food industry for workers. These are not professionally trained corrections officers who see themselves as career officers ... These are people who have a job for \$5.50-\$ 7.00 an hour. They think, "My job is to make sure that these guys don't leave and are kept in line." That's the economic environment in which these detainees are being placed.

Id. Similarly, according to a former military intelligence officer at Guantanamo Bay who moved to Abu Ghraib as a private contractor in 2003, private firms in Iraq have been so anxious to meet the demand for their services that they sent "cooks and truck drivers" to work as interrogators. *Insider Tells of 'Cooks, Truck Drivers' Used to Interrogate*, *The Age*, May 8, 2004, available at [http://www.theage.com.au/articles/2004/05/07/10839114034 37.html?from=storyrhs&oneclick=true#](http://www.theage.com.au/articles/2004/05/07/1083911403437.html?from=storyrhs&oneclick=true#) (last visited Sep. 29, 2004).

n94. See Llorente, *supra* note 86 (quoting Deputy Warden Chris Brogna at Elizabeth).

n95. Prison Privatisation Report Int'l No. 45 (Jan. 2002) *supra* note 93.

n96. *Id.* (citing "Private Line," CCA's employee newsletter). For more on the connection between the privatization of prison and of war, see Kahn, *supra* note 4, at 15, 20.

n97. See, e.g., Arnold Hamilton, Terror: Oklahoma City Car Bomb Kills at Least 31, *Dallas Morning News*, Apr. 20, 1995, at 1A (reporting that an unnamed security officer had said that "an FBI communique" was circulated that "suggested that the attack was carried out by the Islamic Jihad"). See also Richard Lacayo, Rushing to Bash Outsiders, *Time*, May 1, 1995, at 70. Lacayo's article observes:

For a while last week, something in the national mood appeared to be turning darkly against Arab Americans – at least for as long as it was supposed that the Oklahoma blast might be the work of Islamic terrorists. In a replay of the harassment they suffered during the Gulf War, mosques reported receiving telephone threats.

Id. Contrary to the implications of the magazine article's title combined with its text, Arab Americans are by no means completely or even mainly an immigrant group. For an in-depth discussion of this point, see District of Columbia, Maryland, and Virginia Advisory Committees to the U.S. Comm'n on Civil Rights, *Civil Rights Concerns in the Metropolitan Washington, D.C., Area in the Aftermath of the September 11, 2001, Tragedies*, Ch. 2: Background on Arab, South Asian, Muslim, and Sikh Communities in the United States, District of Columbia, Maryland, and Virginia Advisory Committees to the U.S. Commission on Civil Rights (June 2003) available at <http://www.usccr.gov/pubs/sac/dc0603/main.htm> (visited Mar. 10, 2004).

n98. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (hereinafter "AEDPA"). "I am gratified that the Senate has passed a sweeping, bipartisan antiterrorism bill, as I called for in the wake of the bombing in Oklahoma City. This legislation will give law enforcement the tools it needs to do everything possible to prevent this kind of tragedy from happening again." Presidential Statement on Senate Passage of Antiterrorism Legislation, 31 *Weekly Comp. Pres. Doc.* 993 (June 7, 1995).

n99. Passed on the heels of AEDPA, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter "IIRIRA") modified the Immigration and Nationality Act (INA), 66 Stat. 163, as amended, 8 U.S.C. 1101 et seq. to widen the categories of non-citizens subject to mandatory detention during removal proceedings and thereafter until physical departure. See the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996). 236(c) of the INA, codified at 8 U.S.C. 1226(c)(2), now requires the detention of non-citizens deemed removable on terrorist grounds, as well as of those convicted of crimes of moral turpitude, aggravated felonies, drug or firearms crimes, and "miscellaneous crimes." Non-citizens with convictions for aggravated felonies have found themselves entirely barred, no matter how compelling their individual circumstances, from discretionary relief that could free them from removal proceedings. See, e.g., INA 240A(a)(3), 240B(a)(1) codified in 8 U.S.C. 1229b(a)(3), 1229c(a)(1). IIRIRA amended the term to include all convictions for theft or burglary for which a term of imprisonment of at least one year is imposed (as opposed to five years before IIRIRA): compare 8 U.S.C. 1101(a)(43)(G) (Supp. V 1994) with 8 U.S.C. 1101(a)(43)(G) (Supp. V 1994). In addition, the term includes any "crime of violence" incurring a prison sentence of at least one year (as opposed to five years before IIRIRA), contrast 8 U.S.C. 1101(a)(43)(F) (Supp. V 1994) with 8 U.S.C. 1101(a)(43)(F) (1994).

n100. Outrage concerning the broad impact of INA mandatory detention policies peaked in 1997, with the

debut of "Liberty and Justice for All," a documentary produced and directed by Barbara Kopple, featuring the story of a 25-year legal permanent resident who had a family, ran a restaurant, and wound up in prolonged detention in 1997 for a misdemeanor – engaging in sex with a girlfriend when both were teens – which had already drawn a minor punishment in the criminal system in 1974. Videotape: *Liberty and Justice for All* (Alliance for Justice, Washington, D.C. and Cabin Creek Films, New York; 1997).

n101. In hearings before Immigration Judges – hearings deemed civil proceedings – Gideon's trumpet is largely silent. Although the right to legal representation is ostensibly guaranteed in removal proceedings (under 8 C.F.R. 287.3 (2002), an examining officer must advise a non-citizen of the right to counsel when the latter is arrested without a warrant and placed in removal proceedings), this provision comes with a significant condition. INA 292 provides:

In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government), by such counsel, authorized to practice in such proceedings, as he shall choose.

292. Those in removal proceedings, then, have no right to a government-paid lawyer; moreover, even those who can afford to hire lawyers face serious, if not insurmountable, obstacles when attempting to do so. See generally Margaret H. Taylor, *Promoting Legal Representation For Detained Aliens: Litigation and Administrative Reform*, 29 Conn. L. Rev. 1647 (1997). Detained persons are also pressured to abandon their search for legal assistance by INS officers and immigration judges who have, in turn, been pressured to process these cases quickly. *Id.* at 1651–52. A table of Executive Office of Immigration Review statistics, entitled "Immigration Judge Decisions in FY 96 by Custody and Representation Status," indicates that only 10.7% of detained noncitizens were represented by counsel in fiscal year 1996. See *id.* at 1665 n. 60. Margaret Taylor points to numerous published investigations of conditions of immigration detention – all of them describing problems with access to counsel and legal materials. *Id.* at 1667 n. 70. These obstacles recently came to public attention in the high-profile case of *Ali v. Ashcroft*, 213 F.R.D. 390 (W.D. Wash. 2003) in which U.S. District Judge Marsha Pechman observed: "The INS withheld detainees' names, moved them without notice to undisclosed districts, thereby making it difficult or impossible for them to develop and maintain access to groups that provide legal assistance." *Id.* The judge noted that the numbers of detainees in each district appeared to change, with detainees transferred out of districts where their cases were pending. *Id.* Judge Pechman observed: "Depending on charity and pro bono organizations to work around the country is not access to the court." *Id.*

n102. For those fleeing persecution – especially persecution by their government's officials – obtaining authentic travel documents may be an impossible task. Yet under current U.S. law, "expedited removal" provisions provide specific hurdles for undocumented persons arriving at the U.S. border. See INA 235(b)(1)(A)(i), codified at 8 U.S.C. 1225(b)(1)(A)(i), which refers in turn to 8 U.S.C. 1182(a)(6)(C) (inadmissibility ground for misrepresentation) and 8 U.S.C. 1182(a)(7)(A)(i)(I) (lack of documentation). The expedited removal procedure can also apply to certain non-citizens already present in the United States. See 8 U.S.C. 1225(b)(1)(A)(iii). In some cases, detainees have been held for months or years even after a judge's decision that their cases warrant protection from removal under the international Convention Against Torture. See Nina Bernstein, *Out of Repression, Into Jail*, N.Y. Times, Jan. 15, 2004, at B1. For further information about "expedited removal" detentions, including reports of such detentions lasting months, see Karen Musalo et al., *The Expedited Removal Study: Report on the First Year of Implementation*, 75 No. 27 Interpreter Releases 973, 976 (1998) (noting that, in 1997, this detention period ranged from an average of 44 days in the San Francisco prison to an average of 92 days for those detained at the John F. Kennedy International Airport in New York City. For an update on the average length of detention for asylum seekers, see Karen Musalo & J. Edward Taylor, *The Expedited Removal Study: An Update as the System Completes Its Second Year*, 76 Interpreter Releases 513 (1999). For further related information, see Ramji, *supra* note 73. But see David A. Martin, Comment, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 Va J. Int'l L. 673, 682 (2000) (arguing that the expedited removal procedures operate "as far less of a sieve than its strongest proponents expected" and are generally fair given the risks of fraud).

n103. See Videotape: Liberty and Justice for All, *supra* note 100 (presenting video footage of detention conditions, including the detention of a long-term U.S. permanent resident within the criminal convict population, and chronicling the impact on the detainee's family life and restaurant business).

n104. See INA 236(a). Release requires a finding that the person will not endanger persons or property and is likely to appear for the removal proceeding. 8 C.F.R. 236(c)(8) (2002). For related commentary, see generally Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 *Univ. of Miami Inter-American L. Rev.* 531 (1999); for a well-organized summary of recent exceptions to the discretionary element of the detention provisions, see Stephen H. Legomsky, 2003 Supplement to *Immigration and Refugee Law & Policy*, Ch. 8A, "Immigration and National Security," A, "The Detention of Noncitizens," 93-108 (2003).

n105. See AEDPA and IIRIRA, discussed at notes 98-99 *supra*, and surrounding text. AEDPA 303(a), for example, provided for ten-year sentences for giving material support to a designated terrorist organization. "Material support or resources" is defined as "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." *Id.*

n106. The various labels, used at times indiscriminately by the media and in popular discourse, have distinct meanings, as discussed, for example, in "Civil Rights Concerns in the Metropolitan Washington, D.C., Area in the Aftermath of the September 11, 2001, Tragedies," Chapter 2: "Background on Arab, South Asian, Muslim, and Sikh Communities in the United States," *supra* note 97.

n107. Under the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, *supra* note 98, numerous Arab and Muslim non-citizens have faced detentions based on secret evidence. See, e.g., *Kiareldeen v. Reno*, 71 F. Supp. 2d 402 (D.N.J. 1999) and Memorandum in Support of Petition for Habeas Corpus and Expedited Hearing on Request for Release, *Al Najjar v. Reno*, 97 F. Supp. 2d 1329 (S.D. Fla. 2000) (99-3458) available at http://www.aifl.org/lac/lac_briefarch_9912260720.htm (last visited Dec. 14, 2003). This practice has been decried by lawmakers as ideologically dissimilar as Edward Kennedy and Jesse Helms. See Susan Aschoff, *At Last Unveiled, Evidence Falls Short*, *St. Petersburg Times*, Oct. 4, 1998, at 1A. In a federal court of appeals in Miami in November 2001, observed David Cole, the government defended the use of secret evidence in immigration proceedings, arguing that it particularly needs the authority after September 11 to hold non-citizens by using evidence they cannot confront or rebut. See David Cole, *Comment: National Security State*, *The Nation*, Dec. 17, 2001 (discussing the case of *Najjar v. Ashcroft*, 273 F.3d 1330 (11th Cir., 2001), in which Professor Cole represented the non-citizen). Such "evidence" has been found in retrospect to be littered with ethnic stereotypes and fundamental factual errors. See Michael J. Whidden, *Note, Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 *Fordham L. Rev.* 2825 (2001); Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 *Geo. Immigr. L.J.* 83-84 (1999). Investigations with ethnic overtones are not limited to people of North African and Middle Eastern descent. See, e.g., Edward Liu, *Case of the Los Alamos Spy; Is Wen Ho Lee Guilty of Espionage or Ethnicity?*, *San Francisco Chronicle*, Mar. 22, 1999 (on the investigation, imprisonment, and solitary confinement of Wen Ho Lee, a U.S. scientist born in Taiwan). Invariably, however, secret evidences cases since AEDPA have targeted Arabs and Muslims. See Susan Aschoff, *At Last Unveiled, Evidence Falls Short*, *St. Petersburg Times*, Oct. 4, 1998, at 1A.

n108. See U.S. Department of Homeland Security, Press Kit: Operation Liberty Shield, at <http://www.dhs.gov/dhspublic/display> (last visited Apr. 2, 2004) (announcing policy of mandatory detention for asylum seekers from "nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated"); Press Release, U.S. Department of Homeland Security, Secretary Ridge Holds Press Briefing on Operation Liberty Shield (Mar. 18, 2003) available at <http://www.whitehouse.gov/news/releases/2003/03/20030318-6.html> (last visited Apr. 2, 2004). The first question in the press briefing was "Could you tell us more about the detentions of asylum seekers, how many you think will be detained and how many countries, and how long do you expect them to be detained?" *Id.* Secretary Ridge answered that the Department would "be looking, obviously scrutinizing all asylum seekers at this time. But there are countries who we believe are supportive of al Qaida or countries where we know there is an al Qaida network or other terrorist organizations and it will be those countries we are looking at specifically." *Id.* A follow-up question asked "...how many people do you know will be affected and for how long? And if you could elaborate a little bit more on what is the precedent for detaining people for whom we have no specific suspicion that they are terrorists, and why take that extreme act?" *Id.* Ridge responds: "This approach has been done in the past. Last year, I think in 2002, given the category of countries we're talking about, those who where we know there are known, existing terrorist organizations, al Qaida and others, I think there were about 600 people that were temporarily detained, and about I think 60 percent of them were Iraqis." *Id.* For a critique of this initiative see Anita Ramasastry, Operation Liberty Shield: A New Series of Interviews of Iraqi-Born Individuals in the U.S. Is The Latest Example of Dragnet Justice, *Findlaw's Writ*, Mar. 25, 2003, available at <http://writ.news.findlaw.com/ramasastry/20030325.html> (last visited Apr. 2, 2004).

n109. In *Demore v. Kim*, 538 U.S. 510 (2003), the government sought to remove a Korean immigrant who had been convicted of burglary and theft as a teen. Under the Anti-Drug Abuse Act of 1988, 102 Stat. 4469-4470, 1227(a)(2)(A)(iii), Congress specified that a non-citizen may be removed upon conviction for numerous offenses. The key provision is INA 101(a)(43), (codified at 8 U.S.C. 1101(a)(43)), which defines "aggravated felony" to include over 50 classes of crimes under federal or state law. It reaches convictions that were obtained before it was enacted, and even crimes under the laws of a foreign country for which imprisonment was completed within the prior fifteen years. See INA 101(a)(43)(U). Before *Demore v. Kim*, some circuit judges had begun to erode the effects of the mandatory detention provision on due process and equal protection grounds. One such case was *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001). A federal court also invalidated the no-bail provision of the INA as it applies to lawful permanent residents in *Hoang v. Comfort*, 282 F.3d 1247 (10th Cir. 2002) (concluding that "the government has failed to show special justifications for the mandatory detention provision contained in 236(c) which are sufficient to outweigh a lawful permanent resident alien's constitutionally protected interest in avoiding physical restraint without an individualized determination of flight risk or danger to the public." *Id.* at 1259.); accord *Kim v. Ziglar*, 276 F.3d 523, 535 (9th Cir. 2002). The Supreme Court has recently overturned those holdings, in *Demore v. Kim*, 538 U.S. 510, 730 (2003).

n110. Non-citizens so charged are not only removable, but also ineligible for discretionary relief from the proceedings. See, e.g., INA 240A(a)(3), 240B(a)(1) (codified at 8 U.S.C. 1229b(a)(3), 1229c(a)(1)).

n111. INA 101(a)(48)(A) (codified at 8 U.S.C. 1101(a)(48)(A)) provides that "conviction" means "a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge had ordered some form of punishment, penalty or restraint on the alien's liberty to be imposed." *Id.*

n112. While the term "aggravated felony" has always been defined expansively, it was broadened substantially by the IIRIRA; thus the term now includes any "crime of violence" incurring a prison sentence of at least one year (in contrast to five years before IIRIRA). See *supra* note 114. The phrase "crime of violence" is broadly defined

under 18 U.S.C. 16 ("An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.*). The Immigration Courts' appeals board in *In re Malta*, stated:

A stalking offense for harassing conduct in violation of section 646.9(b) of the California Penal Code, which proscribes stalking when there is a temporary restraining order, injunction, or any other court order in effect prohibiting the stalking behavior, is a crime of violence under 18 U.S.C. 16(b) (2000), and is therefore an aggravated felony under section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(F) (2000). In *Malta*, 23 I&N Dec. 656 (BIA 2004). Case displayed by the Department of Justice at <http://www.usdoj.gov/eoir/vll/intdec/lib/vol23idxnet.html> (last visited Mar. 13, 2004).

Through this case, the Board of Immigration Appeals has loosened the standard for what constitutes a "crime of violence" to include, as here, harassment, which under the California statute could be nothing more than "annoying" someone. The author thanks Dan Kowalski for this observation.

n113. As noted by Justice Souter (joined by Justice Stevens and Justice Ginsburg), concurring in part and dissenting in part in *Demore v. Kim*, 538 U.S. 510, 557 (2003) (citing *Michel v. INS*, 206 F.3d 253, 256 (2d Cir. 2000)).

n114. An example of such a case involves Olufolake Olaleye, who immigrated legally to the United States from Nigeria in 1984 and became a legal permanent resident in 1990. See Patrick Smikle, *Immigrants Face Deportation for Minor Offenses*, *Inter press Service*, Apr. 29, 1999. Olaleye worked at a filling station to support her two U.S. citizen children. *Id.* In 1996 she applied for citizenship. In 1993, Olaleye was charged with shoplifting \$14.99 of merchandise when, she explains, she tried to return some baby clothes without a receipt. *Id.* She did not think she needed a lawyer when she went to court, and was persuaded to plead guilty in exchange for a suspended sentence. *Id.* Four years later AEDPA's aggravated felony definition – combined with an expanded list of deportable crimes in the subsequent IIRIRA – retroactively designated Olaleye an "aggravated felon" with no recourse to the courts. Adrienne R. Bellino, *Notes & Comments, Changing Immigration for Arabs with Anti-Terrorism Legislation: September 11th Was Not the Catalyst*, 16 *Temp. Int'l & Comp. L.J.* 123, 134 (2002). Olaleye was denied citizenship and ordered deported, with no opportunity for an immigration judge to consider hardship to the children, and no recourse to the federal courts. *Id.*

n115. See *Kim v. Ziglar*, 276 F.3d 523, 535 (9th Cir. 2002) (deciding, in *Kim's* case, that "the government has not provided a 'special justification' for no-bail civil detention sufficient to overcome a lawful permanent resident alien's liberty interest in an individualized determination of flight risk and dangerousness." *Id.*). The appellate court had affirmed a district court's ruling that 236(c) of the INA, codified at 8 U.S.C.S. 1226 (c), was unconstitutional as violative of both substantive and procedural due process – a decision with wide significance given that, at the beginning of 2001, approximately 5000 people lingered in INS detention pending removal from the U.S. See Lise Olsen, *Seattle 'Lifer' Has His Day in Highest Court*, *Seattle Post-Intelligencer*, Feb. 20, 2001, at A1.

n116. In September 2001, the Third Circuit had held that mandating detention of those found subject to removal, but not yet ordered removed because they are pursuing their administrative remedies, violates their rights unless they have been afforded the opportunity for a hearing at which they can show that they as individuals do not pose a flight risk or danger to the community. *Patel v. Zemski*, 275 F.3d 299, 315 (2001) (overruled in part by *Demore v. Kim*, 538 U.S. 510 (2003)). *Patel's* successful case for habeas corpus, which involved mandatory detention for those deemed aggravated felons under the immigration laws, was a constitutional decision rather than one about statutory construction, thus faulting Congress for over-reaching its bounds. *Patel* convinced the 3rd Circuit to apply strict scrutiny, shining the spotlight on his fundamental right to liberty. *Id.* at 310. Although the protection of the

Due Process Clause can be denied to people seeking admission to the United States, people who have entered the country are entitled to it, "for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); see also *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (holding that due process applies to all people in the United States, even those whose presence is "unlawful, involuntary, or transitory"). Acknowledging the "critical liberty interest implicated by immigration detention" the *Patel* court urged "special care...so that the confinement does not continue beyond the time when the original justifications for custody are no longer tenable." *Patel*, 275 F.3d at 311 (citing the statement of Senator Spencer Abraham which mentions mandatory detention as one of a system of reforms designed to expedite deportation of criminal aliens).

n117. See the Supreme Court transcript of Attorney Rabinowitz's oral argument in *Demore v. Kim*, 538 U.S. 510 (2003), at 35 at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/01-1491.pdf (last visited Jan. 28 2004). In *Patel*, the Third Circuit noted that a report from the Senate Committee on Governmental Affairs placed the percentage who evade at twenty percent. *Patel*, 275 F.3d at 312. "However," the court stated, "even if the ninety percent figure [in a study cited by the government] were correct, [INA] 236(c) requires the imprisonment of the ten percent of aliens who would dutifully report" and their treatment under the provision fell short of Constitutional requirements. *Id.* at 313. Cf. *Craig v. Boren*, 429 U.S. 190, 200-03 (1976) (noting that "proving broad sociological propositions by statistics is a dubious business").

n118. See *Demore v. Kim*, 538 U.S. 710 (2003). Usually, preventive detention is held constitutional only in strictly limited circumstances, where there is a demonstrated need for the detention - because of current dangerousness or risk of flight - and only where adequate procedural safeguards ensure a prompt and fair adjudication of whether detention is necessary. See also *Foucha v. La.*, 504 U.S. 71, 80-81 (1992) (holding civil commitment to be constitutional only where individual is mentally ill and poses a danger to the community and adequate procedural protections are provided); *U.S. v. Salerno*, 481 U.S. 739, 751-55 (1987) (upholding preventive detention only where there is a showing of threat to others or risk of flight, the detention is limited in time, and adequate procedural safeguards are provided); *In re Patel*, 15 I. & N. Dec. 666 (BIA 1976) (parallel standard in the immigration context). Hyung Joon Kim was determined not to represent a flight risk or a danger. Indeed, Kim had been released on \$5,000 bond, went to work and attended college without incident for three and a half years. See the Supreme Court transcript of oral arguments in *Demore v. Kim*, 538 U.S. 510 (2003) at 51, at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/01-1491.pdf (last visited Jan. 27, 2004).

n119. In *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), the Supreme Court held that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem." *Zadvydas's* holding was tempered by its confinement to statutory construction, however; and the attacks of September 2001 resulted in new antiterrorism legislation and administrative regulations that appear to permit the indefinite detention of certain non-citizens. See the *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; see also 66 Fed. Reg. 48334-35 (Sep. 20, 2001) (codified at 8 C.F.R. 287.3 (2002)). The USA-PATRIOT Act, at 412(a)(3), (amending 8 U.S.C. 1226A(a) (2001); codified in INA 236A(a)(3) and (a)(6), under "Detention of terrorist aliens") requires detention for non-citizens whom the Attorney General certifies as threats to national security. Detention could be indefinite upon a determination that an individual threatens national security, or the safety of the community or any person - as long as the case is reviewed at least once every six months. *Id.* 236A(a)(6). The Attorney General must charge aliens with criminal or immigration violations within seven days and must detain the persons until they are removed or deemed to no longer pose a threat. The Act does not require that those who are detained indefinitely be deemed terrorists. The Court in *Zadvydas* reserved for another day the legality of indefinite detention of a deportable person where applied narrowly to "a small segment of particularly dangerous individuals," *Zadvydas*, 533 U.S. at 691 (citation omitted). But, as Professor Cole observes, "the PATRIOT Act's definition of who may be detained is not

limited to a narrow, 'small segment of dangerous individuals,' the Zadvydas Court contemplated, but applies to garden-variety criminals, barroom brawlers, and those who have supported no violent activity whatsoever, but have merely provided humanitarian support to a disfavored group." See David Cole, "In Aid of Removal: Due Process Limits on Immigration Detention," 51 Emory L. J. 1003, 1028, n.108 (2002).

n120. See *Demore*, 538 U.S. 690-91. 8 U.S.C. 1231(a)(1)(A) provides that the Attorney General must remove a non-citizen who has been ordered removed within a 90-day removal period. 1231(a)(6) authorizes further detention of certain non-citizens who are inadmissible, or who are removable for security reasons or criminal violations. In *Zadvydas*, the Supreme Court construed the post-removal-period detention provision in INA 236A(a)(6), codified at 1231(a)(6), as containing "an implicit 'reasonable time' limitation." *Zadvydas*, 533 U.S. at 682. *Zadvydas* permits confinement until a determination that there is no significant likelihood of removal in the reasonably foreseeable future. The Court deemed six months a reasonable period to effect removal. *Id.*

n121. See A Review of Department of Justice Immigration Detention Policies: Hearing Before the Subcommittee on Immigration and Claims Judiciary Committee, House of Representatives (Dec. 19, 2001) (Testimony of Professor Margaret H. Taylor), available at http://www.house.gov/judiciary/taylor_121901.htm (last visited Apr. 9, 2002).

n122. In February 2002, John Ashcroft published a new regulation in order to restructure the Board of Immigration Appeals. The so-called BIA reform introduced one-judge review, streamlined procedures, and a reduction of the Board itself to 11 members (from the previous complement of 21 judges). See 67 Fed. Reg. 7309 (Feb. 19, 2002).

n123. This augmentation builds on a trend that was already visible before the attacks. Over 15,600 people were notified to appear for immigration violations in 2000, compared with 6,605 in 1996, as calculated by the Bureau of Justice Statistics in *Immigration Offenders in the Federal Criminal Justice System, 2000*, available at www.ojp.usdoj.gov/bjs/abstract/iofcjs00.htm (last visited Sep. 23, 2004).

n124. General Accounting Office report 02-168T, *Immigration And Naturalization Service: Overview of Recurring Management Challenges* (Oct. 17, 2001), available at <http://www.gao.gov/new.items/d02168t.pdf> (visited Sep. 24, 2004).

n125. Editorial: *INS Still a Mess*, *The Augusta Chronicle*, Mar. 20, 2002, at A4.

n126. See Mae M. Cheng, *Budget Would Increase INS Funds 24%*, *New York Newsday*, Feb. 6, 2002, at A34 (observing that the fiscal year 2003 budget plan's increase over that of 2002 would mean that "about \$712 million of the \$1.2 billion in additional funding would go to enforcement efforts at U.S. borders"); see also *Increased Border Stops Increase Arrests of Illegal Aliens and Drug Smugglers*, *Border Alert*, Aug. 2002 (reporting a 45% rise in arrests along the northern U.S. border and a stepped-up checking of documents at various public places), at <http://www.usbc.org/info/newslet/august2002.pdf> (last visited Apr. 2, 2004). The administration also proposed to allocate \$380 million of the total 2003 budget to implement an entry-exit system that would track the arrival and departure of non-citizens. *Id.* The system was mandated by Congress in the 1996 law changes, and has attracted more attention since September 2001, especially with regard to the selectivity with which its enforcement began. See *INS Special Registration: What Does it Mean?* American-Arab Anti-Discrimination Committee (ADC)

transcript (Statement of Janna Evans, acting director of community relations, INS), at [http://adc.org/PDF/INS Special Registration Panel.pdf](http://adc.org/PDF/INS_Special_Registration_Panel.pdf) (last visited Feb. 4, 2004). The panel discussion was hosted on January 7, 2003 by Georgetown University in co-ordination with the Georgetown Center for Contemporary Arab Studies.

n127. Melissa Block and John Burnett, *All Things Considered: Halliburton's Military Contract Connections Before and After the Tenure of Dick Cheney as CEO* (National Public Radio broadcast, Dec. 23, 2003). See also Peter Carlson, *Profitable Connections Of Halliburton; The New Yorker Examines How Cheney's Old Firm Cashed In on War*, *The Washington Post* (Feb. 10, 2004) at C4 (stating that "the Navy hired Halliburton to build prison camps for terrorists in Guantanamo Bay for \$37 million").

n128. Vice President Cheney announced in late 2003 that he had severed financial interests – a claim that Cheney's political competitors questioned. See Press Release, *Lautenberg Releases CRS Report that Confirms that Cheney Deferred Salary and Stock Options Constitute a 'Financial Interest' in Halliburton* (Sept. 25, 2004) at <http://lautenberg.senate.gov/lautenberg/press/2003/01/2003925A22.html> (last visited Mar. 11, 2004).

n129. Wackenhut Services, Inc. is the largest supplier of contract security services to U.S. federal agencies. Contract parties include the Nevada Test Site, the Oak Ridge complex in Tennessee, the Savannah River Site in South Carolina, the Rocky Flats Environmental Technology Site in Colorado, the Nonproliferation and Nuclear Security Institute in New Mexico, and several U.S. Department of Defense agencies. Wackenhut also provides operations and management services for government installations for the National Aeronautics and Space Administration and the U.S. Air Force. Press Release, *Wackenhut Receives Federal Contracts with Combined Annual Value of \$23.8 Million* (Mar. 21, 2002), available at http://www.wackenhut.com/investor/pr/twc_fedcon.htm (last visited Jan. 22, 2004). Effective on the 25th of November 2003, Wackenhut's detention service changed its corporate name from "Wackenhut Corrections Corporation" to "The GEO Group, Inc." ("GEO"). See *Wackenhut Corrections Corporation Announces Name Change to The GEO Group, Inc.*, PR Newswire, (Dec. 1, 2003).

n130. See Public Services International Research Unit (PSIRU) of the University of Greenwich, London, *Prison Privatisation Report Int'l No. 58* (Oct. 2003), at <http://www.psiru.org/justice/PPRI58.asp> (last visited Oct. 13, 2004).

n131. In 1999, about 60% of the Immigration and Naturalization Service's detainees were confined in local jails. David Firestone, *Local Jails Deal with Federal Dilemma on Deportation*, *N.Y. Times*, (Dec. 17, 1999) at A22 (quoting Russ Bergeron, then chief spokesperson for the INS). More on the situation specific to county jails will appear *infra* Part III, Section C.

n132. Underscoring that role is the background of Asa Hutchinson, a former prosecutor in Arkansas, appointed by President George W. Bush to direct the Drug Enforcement Administration in August 2001, and to the post of Undersecretary of Border and Transportation Security at the new U.S. Department of Homeland Security in January 2003. See U.S. Senator John McCain Holds Hearing on the Nomination of Asa Hutchinson to Be Undersecretary of Homeland Security for Borders and Transportation, Senate Commerce Subcommittee of the Science and Transportation Committee, *FDCH Political Transcripts* (Jan. 22, 2003). See also Press Release, *Department of Homeland Security, Department of Homeland Security Announces Arizona Border Control Initiative*, (Mar. 16, 2004), at <http://www.dhs.gov/dhspublic/display?theme=24&content=3355> (last visited May 14, 2004) (announcing that an initiative named "Operation ICE Storm" has resulted in "more than 2,059 criminal and administrative arrests, 162 indictments" between October 2003 and March 2004).

n133. See, e.g., U.S. Gen. Accounting Office, *Private and Public Prisons: Studies Comparing Operational Costs and/or Quality of Service* (Aug. 1996), available at [http://www.gao.gov/archive/1996/gg96158 .pdf](http://www.gao.gov/archive/1996/gg96158.pdf) (last visited Mar. 11, 2004); Dep't of Justice, Bureau of Justice Assistance, *Emerging Issues on Privatized Prisons*, available at <http://www.ncjrs.org/pdffiles1/bja/181249.pdf> (last visited Mar. 11, 2004) (observing that "there is no consensus among academics and professionals in the field" on the issue of cost savings. *Id.* at 22 (pagination in the Portable Document Format varies from that of the original). Nevertheless, as the National Catholic Reporter observed: "Growth of the worldwide private prison industry, whose specialized product is inmates, 'has been explosive, from about \$650 million in 1996 to about \$1 billion in 1997,' according to a 1998 study done for Congress." Kathryn Casa, *Prisons: The New Growth Industry*, National Catholic Reporter, (Jul. 2, 1999).

n134. *Good Jobs First, Jail Breaks: Economic Development Subsidies Given to Private Prisons* (Oct. 2001), available at www.goodjobsfirst.org/jbrelease.htm (last visited Jan. 18, 2004). See also Betsy Russell, *Big House will be No Fun House*, *The Spokane-Spokesman-Review*, (May 23, 1999) at A1 (discussing a private prison in Washington state costing state taxpayers \$105 million).

n135. Public Services International Research Unit (PSIRU) of the University of Greenwich, London, *Prison Privatisation Report Int'l No. 44* (Nov. 2001) at <http://www.psiru.org/justice/PPRI44.asp> (last visited Feb. 2, 2004).

n136. See Edwin Bender, *A Contributing Influence: The Private-Prison Industry and Political Giving in the South*, *The Nat'l Inst. on Money in State Politics* (Apr. 28, 2002) available at <http://www.followthemoney.org/press/ZZ/20020430.pdf> (last visited Sep. 24, 2004).

n137. See Deirdre Shesgreen, *Prison Firm Locked Up Clout*, *Legal Times*, Aug. 18, 1997, at 4. In a 1998 election study, the top contributor was Corrections Corp. of America. See Edwin Bender, *Private Prisons, Politics & Profits*, *The Nat'l Inst. on Money in State Politics* (Jul. 1, 2000) available at <http://www.followthemoney.org/press/ZZ/20000701.phtml> (last visited May 9, 2004). A 1996 audit by the Texas Department of Corrections found that corrections contractors paid for lobbyists and campaign contributions with taxpayer dollars, and, during this time - when George W. Bush was the state's governor - even funded Christmas gifts for judges. See Bruce Shapiro, *Prison politics*, *Salon.com* (Aug. 29, 2000) at <http://archive.salon.com/politics/feature/2000/08/29/texas/index1.html> (last visited May 9, 2004). The attraction of the Texas corrections appropriation is difficult to overstate; \$4.59 billion was allocated for the 2000-2001 biennium. *Statistical Summary, FY 2000*, Texas Department of Criminal Justice. Bender, *supra* note 140, at 30.

n138. For example, private-prison companies contributed more than a million dollars to over 800 candidates in 14 key states during the 2000 election cycle. See Bender, *supra* note 136.

n139. ALEC, a public-policy organization that supports conservative legislators, was founded in 1973 by Paul Weyrich, who also helped to start the Heritage Foundation. Of the more than 6,000 state legislators in the United States, nearly 3,000 are members of ALEC. See Bender, *supra* note 136, n. 1. Corrections Corporation of America (CCA) business development director Brad Wiggins, together with Brian Nairin of the National Association of Bail Insurance Companies, would co-chair ALEC's Criminal Justice Task Force, which proposes crime legislation. See Richard Locker, *Foes Sharpen Focus on Lamar's Finances*, *The Commercial Appeal*, Feb. 18, 1996, A1. By 1998 ALEC's budget had grown to more than \$6 million, with 68 percent coming from donations from corporations such

as CCA and Wackenhut Corrections Corporation (WCC). See Brigitte Sarabi & Edwin Bender, *The Prison Payoff: The Role of Politics and Private Prisons in the Incarceration Boom*, p. 4, n. 12, Western States Center & Western Prison Project (2000) (citing "Inside ALEC," Vol. 1, No 5 (Sept. 1999)), available at <http://www.westernstatesscenter.org/archive/ppayoff.pdf> (last visited Mar. 11, 2004).

n140. ALEC's "Report Card on Crime" provided "Ten Legislative Actions to Fighting Crime in Pennsylvania." See Press Release, ALEC, *Every Ten Minutes, A Pennsylvanian Falls Victim to a Violent Crime* (Jan. 28, 1994) (cited in Bender, *supra* note 136, n. 16).

n141. *New PA State Police Tool Gives Public Instant Access to Crime Data, First-Of-Its-Kind Web-Based UCR System to Improve Access, Accuracy Of Crime Statistics; Enables Police Departments to File Crime Information Electronically*, PR Newswire, (Apr. 5, 2001); *Pennsylvania Gov. Ridge Releases \$87 Million for Expansion of Prison and Juvenile Detention Facilities*, PR Newswire (Oct. 30, 1995). Also in 1995, ALEC promoted its successes in its "ALEC 1995 Model Legislation Scorecard." See Bender, *supra* note 136, n. 19-20 and surrounding text. The busiest Task Force was Criminal Justice, and the crime legislation with the most enactments was the Truth in Sentencing Act (obliging inmates to serve at least 85 percent of their sentences), which became law in 25 states. *Id.*

n142. See Bender, *supra* note 136, n. 17-18 and surrounding text.

n143. The system, funded through the Governor's budget and through grants totaling about \$800,000 from the Pennsylvania Commission on Crime and Delinquency, included Creation of a State Police DNA computer database capable of linking to a national database. See *New PA State Police Tool Gives Public Instant Access to Crime Data, First-Of-Its-Kind Web-Based UCR System to Improve Access, Accuracy Of Crime Statistics; Enables Police Departments to File Crime Information Electronically*, *supra* note 141. The State Police Bureau of Research and Development, assisted by Pennsylvania-based companies Electronic Data Systems and Information Builders, computerized the system. *Id.*

n144. Tom Ridge was appointed as the first secretary of the Department of Homeland Security on January 24, 2003. Prior to his appointment as secretary, he served as the Bush administration's first director of the Office of Homeland Security, which was created in response to the terrorist acts of September 2001. See *Hearing of the House Judiciary Committee on the Deadline for Biometric Passports*, Federal News Service (April 21, 2004).

n145. See Editorial: *False Economies*, *The St. Petersburg Times*, Jan. 21, 2001, at 2D.

n146. *Id.*

n147. George M. Anderson, *Prisons for Profit: Some Ethical and Practical Problems*, 183 *America* No. 16, 12, 14 (Nov. 18, 2000). Senator Hobson observed that Oklahoma's 2001 corrections budget exceeded \$100 million for spending on the state's private detention halls - whereas only five years before, the amount was barely three million. See *id.*

n148. Prison Privatisation Report Int'l No. 58, *supra* note 130. Opportunities for international expansion also seem "barely scratched." The United States comprises under 5% of the human population, yet its prisons contain about 25% of the worldwide prison population. J. Ziedenberg and V. Schiraldi, *The Punishing Decade: Prison and Jail Estimates at the Millennium*, Justice Policy Institute (May 2000) (revised estimates). Under the current law's "expedited removal" provision, pleas of undocumented persons arriving at the U.S. border are summarily rejected. See Michael Welch, *Detained: Immigration Laws and the Expanding I.N.S. Jail Complex* 152 (2002). Already, Iraq has become a holding pen for U.S. detainees from 21 countries, according to a report from the international campaign group Human Rights Watch. See Andrew Buncombe and Kim Sengupta, *Secret U.S. Jails Hold 10,000*, *New Zealand Herald*, May 13, 2004, at [http://www.nzherald.co.nz/storydisplay.cfm?storyID=3566058&the section=news&thesubsection=world&thesecondsubsection=&reportID=61564](http://www.nzherald.co.nz/storydisplay.cfm?storyID=3566058&the%20section=news&thesubsection=world&thesecondsubsection=&reportID=61564) (last visited May 13, 2004).

n149. *Id.*

n150. See Talvi, *supra* note 93.

n151. See Prison Privatisation Report Int'l No. 45, *supra* note 93; David Ruppe, *Five Air Force F-16s Crashed in July*, *ABC News.com*, Aug. 7, 2001, available at <http://abcnews.go.com/US/story?id=92679&page=1> (last visited Feb. 7, 2004).

n152. See Prison Privatisation Report Int'l No. 45, *supra* note 93.

n153. See Gorman, *supra* note 1. U.S. prison systems extend these live impressions abroad. The writings of a South African writer illustrate this by describing Wackenhut's international expansion as part of a societal trend blending "rampant neo-liberalism with the shrinking and shirking of state responsibilities and the escalating numbers of the poor, and especially black youth, denied education and employment – and all too often being destined for a violent life in prison or the fields of war." The author adds that "post Cold War Africa is no longer targeted for modernisation but rather fear, a source of terror, disease, crime and drugs. This generates in turn a profitable opportunity: the construction of an overlapping set of prisons, detention centres and security check points." See William G. Martin, *South Africa: Privatising the Prison System*, 14 *Southern African Political Economy Monthly*, No. 5 (2001) (examining the introduction of U.S.-based private prisons into South Africa).

n154. At the same time, independent lawyer Azar Abasi Menhaji of Paterson, New Jersey points out that U.S. tourism has already suffered enormously: "Middle Easterners have changed their holiday plans and gone to Euro-Disney, and Canada just received a medical student client of mine with open arms – in contrast, the U.S. detained him for three months. The U.S. has inevitably begun to feel the losses in dollars and jobs." Personal telephone interview with Azar Abasi Menhaji, Attorney, Paterson, NJ (Apr. 21, 2004). The observation raises the possibility that certain segments of the economy will assert pressure that may counteract the detention industry. The U.S. Department of Commerce has begun an unprecedented \$50 million public relations effort to promote U.S. tourism in concert with the State Department and the Office of Homeland Security. See Wendy Melillo, *U.S. to the World: Come See Our Sights*, *Adweek*, Sep. 1, 2003, available at [http://www.adweek.com/aw/magazine/article display.jsp?vnu content id=1967318](http://www.adweek.com/aw/magazine/article%20display.jsp?vnu%20content%20id=1967318) (last visited Sep. 24, 2004). According to Commerce Department surveys, the United States hosted 52 million visitors in 2000, but only 42 million in 2002. *Id.* A recent report issued by the Travel Industry Association of America indicated that regaining 1 percent of the market share would protect \$2 billion in federal, state and local taxes. *Id.*

n155. Kahn, *supra* note 4, states:

The U.S. Justice Department began to privatize the immigration prison system at the same time the Reagan White House privatized the war against Nicaragua. The Laredo prison opened in March 1985 on a contract with the Corrections Corporation of America. It was the first U.S. immigration prison built to imprison infants and children - "with the cribs right in the cells," the INS district director said. All prisoners, including babies, had their body cavities searched before and after each meeting with a legal representative. The only way to avoid being strip-searched was not to ask to see a lawyer.

Id. at 15 (quoting INS San Antonio District Director Ricardo Casillas). The overlap between private business and policy-making has influenced CCA from its early days. One of the company's co-founders, Tom Beasley, had formerly chaired the Tennessee Republican Party, which partly explains why CCA attempted in 1996 to make Tennessee the first state in the country with a prison system run entirely by a private company. See Bender, *supra* note 136.

n156. See Shesgreen, *supra* note 137. Senator Cal Hobson described how the Oklahoma governor arranged for Quinlan to examine the classification system for Oklahoma inmates, a move Hobson called "a blatant case of conflict of interest." See Anderson, *supra* note 147. Quinlan's evaluation moved several thousand inmates up the classification ladder; with each upgrade came an increased level of the state's payment to CCA. See *id.* Norman Carlson, another former director of the federal Bureau of Prisons, would also go on to become a director of Wackenhut. See *id.*

n157. Eric Bates, *Private Prisons*, *The Nation*, Jan. 5, 1998 (citing the Cabot Market Letter). Corrections Corporation of America has approximately 50% of the U.S. private detention market, followed by Wackenhut Corrections Corporation (approximately 20%), Management & Training Corporation (approximately 9%), Cornell Companies (approximately 8%), Correctional Services Corporation (approximately 7%), with others controlling the remainder at approximately 6%. See Public Services International Research Unit (PSIRU) of the University of Greenwich, London, *Prison Privatisation Report Int'l No. 55* (May 2001), at <http://www.psiru.org/justice/PPRI55.1.htm> (last visited Jan. 30, 2004).

n158. See John Sullivan and Matthew Purdy, *A Prison Empire: How It Grew; Parlaying the Detentions Business Into Profit*, *N.Y. Times*, July 23, 1995, at A1 [hereinafter "A Prison Empire"] (quoting Steven Banks, a New York Legal Aid Society attorney who sued the city over the dilapidated conditions of welfare hotels). In 1989, New York City officials cited the Brooklyn Arms with 600 housing code violations. *Id.*

n159. In 1991, Esmor received a contract from the Federal Bureau of Prisons to open an 84-bed halfway house at the LeMarquis Hotel in Manhattan. See *id.* LeMarquis would soon be cited by the Bureau for numerous hazards and staffing shortages. *Id.* Managers conceded that there were often 30 meals available to feed 100; thus inmates often had to compete violently for food. *Id.* Yet Esmor paid one lobbyist a salary of \$222,000 in 1993 and \$238,000 in 1994. *Id.*

n160. See *id.*

n161. See *id.* (noting that Esmor's bid of \$54 million to run the jail in Elizabeth was \$20 million below the

competing bid submitted by the Wackenhut Corrections Corporation, who complained that Esmor's proposed pay for guards materially increased "the risk to the contracting agency of nonperformance"). Immigration officials released a report in July 1995 on the Elizabeth uprising that confirmed Wackenhut's warning: "It appears that the level of salary was not realistic and could not, in the area where Esmor is located, insure the availability of well-qualified applicants." *Id.* (quoting U.S. Immigration and Naturalization Serv., *supra* note 91).

n162. See John Sullivan and Matthew Purdy, "A Prison Empire," *id.* Notably, Esmor's Senior Vice President is Richard P. Staley, former acting director of the central INS office in Washington. Stuart M. Gerson, who was the Acting Attorney General under George H.W. Bush and William J. Clinton, became an Esmor board member. See *id.* Esmor would change its name to Correctional Services Corporation (CSC) in 1994; Gerson replaced James Slattery as the company's chair in 1995. The company stated that Gerson's lengthy experience with government contracts "will enable him to assist in the monitoring of the company's relationships with the agencies that are its clients." See Prison Privatisation Report Int'l No. 44, *supra* note 135. In February 2003, CSC agreed to pay a record \$300,000 fine by the New York Lobbying Commission for failure to disclose gifts it made to politicians who helped the company obtain millions of dollars worth of business. See Prison Privatisation Report Int'l No. 58, *supra* note 130; see also Prison Privatisation Report Int'l No. 55, *supra* note 157.

n163. See John Sullivan and Matthew Purdy, "A Prison Empire," *id.*

n164. See U.S. Immigration and Naturalization Serv., *supra* note 91.

n165. *Id.* (concluding that "detainees were subjected to harassment, verbal abuse, and other degrading actions perpetrated by some Esmor guards." The report called the abusive treatment "part of a systematic methodology designed...to control the general detainee population and to intimidate and discipline obstreperous detainees through use of corporal punishment").

n166. See *id.*

n167. Llorente, *supra* note 86. Guards have reported fearing the loss of their jobs if they report mistreatment, even though the Elizabeth Detention Center has seven on-site INS officers charged with monitoring compliance. *Id.*

n168. *Id.*

n169. *Id.*

n170. See U.S. Immigration and Naturalization Serv., *supra* note 91.

n171. See Human Rights Watch, 10 Locked Away: Immigration Detainees in Jails in the United States n. 47 (September 1998) at http://www.hrw.org/reports98/us-immig/Ins989-03.htm#P421_71227 (last visited Sep. 23,

2004) (internal citations omitted).

n172. See Welch, *supra* note 148, at 104 (internal citations omitted).

n173. Human Rights Watch, *10 Locked Away: Immigration Detainees in Jails in the United States* (September 1998) at <http://www.hrw.org/reports98/us-immig/Ins989-03.htm#P42171227> (last visited Sep. 23, 2004) (internal citations omitted).

n174. Sullivan and Purdy, *supra* note 158 (quoting Carl Frick, Esmor's first warden in Elizabeth).

n175. Under new management, Elizabeth has evidently retained its old ways. See Dow, *American Gulag*, *supra* note 79; see also Matthew Purdy and Celia W. Dugger, *Legacy of Immigrants' Uprising: New Jail Operator, Little Change*, *New York Times* (Jul. 7, 1996) at A1. Today, Elizabeth's 95,000-square-foot converted warehouse contains 300 beds for non-citizen detainees, and 225 are for asylum seekers. See Llorente, *supra* note 86. Interviewed for a 1999 article in the *Bergen County Daily Record*, immigration officials reported that most of these asylum seekers had been locked up longer than 90 days and some terms ran into years. See *id.* Other asylum seekers have spent years inside a windowless former warehouse in Queens, New York, run by the GEO Group (formerly Wackenhut). See Bernstein, *supra* note 102.

n176. See Dep't of Justice, *supra* note 133 (observing, in the Executive Summary, p. xi, that "the recent flurry of well-publicized disturbances" in private prisons is likely to slow the corporations' access to the high-security market, but unlikely to impede their successfully gaining contracts involving low-security inmate populations).

n177. See Firestone, *supra* note 131.

n178. See Alisa Solomon, *The Worst Prison System in America*, *Village Voice*, Aug. 8, 1995, at 25-30.

n179. Jim Lynch, *County Trying to Settle INS Dispute by Tax Time*, *York Daily Record*, Jan. 10, 2003.

n180. Associated Press, *McHenry Near INS Jail Deal: Federal Agency Backs County's Bid to House Prisoners*, *Chi. Trib.*, Jan. 10, 2003.

n181. *Id.*

n182. Monsy Alvarado, *Bergen Jail Will Take in 85 More INS Detainees: Agreement Helps Offset Operating Costs*, *The Record* (Hackensack, NJ), Jan. 10, 2003, at L1.

n183. See Shannon D. Harrington, *Jail May House More INS Detainees; Bergen Discussing Expanded Agreement*, *The Record* (Hackensack, NJ), Sep. 25, 2001, at L1.

n184. *Id.* The jail's capacity was expected to rise from 650 inmates to 1,127 after the new construction. See Alvarado, *supra* note 182.

n185. Harrington, *supra* note 183 (quoting Dan Quinonez).

n186. Alvarado, *supra* note 182. Joel Trella, who at that point had been elected as Sheriff, said: "We are very pleased to have reached an agreement with the INS to take these 85 new detainees and to use our state-of-the-art jail to generate significant revenue to help offset the costs of running the jail." *Id.* See also Raghuram Vadarevu, "Human Error" Led to Jail Mix-up; Officer Reprimanded in Detainee's Release, *The Record*, (Hackensack, NJ), Dec. 3, 2003, at L1.

n187. Alvarado, *supra* note 182.

n188. Alex Chadwick and Greg Allen, *Morning Addition: Muslims in America Feel Subjected to Double Standard of Justice Since September 11 Terrorist Attacks* (National Public Radio broadcast, Apr. 8, 2002). See also *Terrorism News: Two Terror Suspects In NJ Await Court Decision*, *The Bulletin's Frontrunner*, Jun. 21, 2002. Sheriff Trella has requested budget expansions to hire 80 new guards and reduce "dangerous and morale-breaking" overtime work; Trella aimed to offset the additional payroll by per diem payments for the non-citizens. Shannon D. Harrington, U.S., *Bergen Sign Deal on Jail Beds; 150 Spaces Reserved for Immigration Detainees*, *The (Bergen County) The Record* (May 13, 2003) at L1; and Shannon D. Harrington, "Sheriff Wants \$1.7M More for Hires; Cites Jail Expansion, Gaps Left by Predecessor," *The Record* (Hackensack, NJ), Mar. 8, 2002, at A1.

n189. "Where do we start? How do we reclaim a proper relationship to the world?" asked Alice Walker after the terrorist attacks. Alice Walker, *Sent by Earth 27* (2001). Walker continues:

It is said that in the Babemba tribe of South Africa, when a person acts irresponsibly or unjustly, he is placed in the center of the village, alone and unfettered... Then each person in the tribe speaks to the accused, one at a time, about all the good things the person in the center of the circle has done in his lifetime. Every incident, every experience that can be recalled with any detail and accuracy is recounted. All his positive attributes, good deeds, strengths and kindnesses are recited carefully and at length. The tribal ceremony often lasts several days. At the end, the tribal circle is broken, a joyous celebration takes place, and the person is symbolically and literally welcomed back into the tribe.

This will not be the fate of Osama bin Laden, accused of masterminding the attack on North America. ... In his mind, he is fighting a holy war against the United States. To die in battle against it would be an honor. He has been quoted as saying he would like to make the United States into a shadow of itself as he helped make the Soviet Union, which lost the war in Afghanistan, become a shadow of itself. In fact, he appears to take credit for helping the Soviet Union disintegrate. I personally would like him to understand that the shadow he wishes upon us, of poverty, fear, an almost constant state of terror, is merely the America too many of us already know. It is certainly the shadow my ancestors lived with for several hundred years.

But what would happen to his cool armor if he could be reminded of all the good, non-violent things he has done? Further, what would happen to him if he could be brought to understand the preciousness of the lives he has

destroyed? This is not as simple a question as it might appear. I firmly believe the only punishment that works is love. Or, as the Buddha said: Hatred will never cease by hatred. By love alone is it healed.

Id. at 27-29.

n190. Although intensified in the current environment of fear, this is by no means a novel phenomenon. See Kevin R. Johnson, 'Aliens' and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 Univ. of Miami Inter-Am. L. Rev. 263 (1996-97).

n191. See Omer Farooq, Indian Terror Suspects 'To Sue U.S.,' BBC News, Feb. 10, 2003. Azmath disputed the official account of the circumstances of the arrest, stating: "They were not catching anyone - they were catching people making sandwiches. I was arrested because I am a Muslim." See Brian Donohue, From a Terrorist Suspect to an Illegal ... To India, N.J. Star-Ledger, Jan. 21, 2003.

n192. See id.

n193. See Farooq, supra note 191. A report issued in June of 2003 had indicated questionable confinement decisions on the part of the Federal Bureau of Investigation as well as systematic abusive treatment by guards at the Metropolitan Detention Center and the Passaic County Jail in New Jersey. See 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 (June 2003), Ch. 7 and Ch. 8, at <http://www.usdoj.gov/oig/special/0306/index.htm> (last visited May 10, 2004). In July 2003, the Office of the Inspector General outlined allegations of physical and verbal abuse of Arab and Muslim prisoners held by the federal Bureau of Prisons. See U.S. Dep't of Justice, Office of the Inspector General, Report to Congress on Implementation of Section 1001 of the USA-PATRIOT Act 6 (July 17, 2003) at <http://www.usdoj.gov/oig/special/0307/final.pdf> (last visited May 10, 2004). The July 2003 Report, which covered the six-month period ending June 15, 2003, identified a "pattern of verbal and physical abuse" by prison guards at the Metropolitan Detention Center in Brooklyn, New York (operated by the federal Bureau of Prisons). Id. at 14. A follow-up paper concludes that guards had "illegally recorded detainees meetings with their attorneys," used strip searches as punishment, kept detainees restrained during recreation periods, and "slammed and bounced detainees into the walls". See U.S. Dep't of Justice, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (Dec. 2003) at <http://www.fas.org/irp/agency/doj/oig/detainees1203.pdf> (last visited May 10, 2004).

n194. See Farooq, supra note 191.

n195. See Donohue, supra note 191. Despite the high profile of the case, Azmath reported having had no access to an attorney for 92 days. Id.

n196. A number of reports currently appear at an Internet site of the Office of the Inspector General <http://www.usdoj.gov/oig/igspeccr1.htm>, including the reports cited supra, notes 2 and 193.

n197. Videotapes show non-citizens at the Metropolitan Detention Center in Brooklyn, New York, which is run by the U.S. Bureau of Prisons, being systematically restrained, forced to strip, and otherwise abused by guards. Dan Eggen, Tapes Show Abuse of 9/11 Detainees: Justice Department Examines Videos Prison Officials Said Were Destroyed, *The Washington Post*, Dec. 19, 2003, at A1. Warden Michael Zenk had earlier told investigators that the video recordings had been destroyed as part of a prison recycling policy. See Office of the Inspector General, *supra* note 193 at ch. 7. Visible on a wall is a U.S. flag T-shirt with the slogan "These colors don't run" - stained with blood, evidently from detainees who were slammed into the wall. Eggen, *supra*.

n198. A Bureau of Prisons regulation passed in the aftermath of the September hijackings authorizes prison officials to monitor detainee-attorney conversations under specified circumstances - sometimes secretly - so inmates can never assume that they can safely speak freely with their attorneys. See 66 Fed. Reg. 55062-66 (Oct. 31, 2001), amending 28 CFR 501.3(d). Problems involving access to counsel as a general matter were acknowledged by the Department of Justice, which stated, "We found that the BOP's decision to house September 11 detainees in the most restrictive confinement conditions possible severely limited the detainees' ability to obtain, and communicate with, legal counsel." See Office of the Inspector General, *supra* note 193 at ch. 7. Similar access problems have plagued non-citizen detainees for decades. See, e.g., Kahn, *supra* note 4 (noting that during the 1980s, detainees in California would not receive lists of telephone numbers, and those detained in Texas would receive a list of lawyers who would not accept reverse charges for telephone calls, yet the prison telephones only worked for telephone calls charged to the recipient party).

n199. See Donohue, *supra* note 191.

n200. See Farooq, *supra* note 191 (stating: "Both men were kept in solitary confinement for the first 12 months of their detention.").

n201. See Indian-Americans Rally for Terrorism Fight, CNN.com, Sept. 30, 2001, at <http://www.cnn.com/2001/US/09/30/rec.1> (last visited Feb. 4, 2004).

n202. Nina Bernstein, Two Men Charge Abuse in Arrests After 9/11 Terror Attack, *N.Y. Times*, May 3, 2004, at B1. The lawsuit names as defendants Attorney General John Ashcroft; Kathleen Hawk Sawyer, the former head of the Bureau of Prisons; the warden Michael Zenk; more than a dozen correction officers and supervisors; and a jail doctor. *Id.* at B6.

n203. *Id.* at B6.

n204. *Id.*

n205. *Id.* Elmaghraby and Iqbal eventually pleaded guilty to minor federal criminal charges unrelated to terrorism, they maintain, only to escape the torment they had faced for the better part of a year. They were deported after serving prison terms. *Id.*

n206. Id.

n207. Id.

n208. Id.

n209. Government lawyers argued that terrorists could glean details of the U.S. anti-terrorism strategy by putting together seemingly innocuous pieces of information as though constructing a mosaic to justify the wholesale withholding of names and basic information about detainees. See, e.g., *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94, 103 (D.C. Cir. 2002); *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 923 (D.C. Cir. 2003), cert. denied, 2004 U.S. LEXIS 46 (U.S., 2004).

n210. In October 2001, the FBI began to use a boilerplate memo to oppose bond in all "special interest" cases—those in which the government has claimed a special interest after the attacks in New York and Virginia. The memo, foreshadowing the "mosaic" argument, states:

The FBI is gathering and culling information that may corroborate or diminish our current suspicions of the individuals who have been detained...the FBI has been unable to rule out the possibility that respondent is somehow linked to, or possesses knowledge of, the terrorist attacks. ...

Human Rights First, *A Chronology of the Government's Restrictions on Civil Liberties*, at <http://www.humanrightsfirst.org/uslaw/loss/timeline/oct01.htm>, (last visited Apr. 2, 2004) (quoting Memorandum from Michael E. Rolince, Section Chief, International Terrorism Operations Section, Counterterrorism Division, Federal Bureau of Investigation, to U.S. Department of Justice, Executive Office for Immigration Review, Immigration Court (Oct. 4, 2001). For a specific description of the "mosaic" theory as implemented by the FBI and applied to an individual case, see Testimony of Ali Al-Maqtari Before the Committee on the Judiciary of the United States Senate, 106th Cong. (Dec. 4, 2001).

n211. Christopher Drew & Judith Miller, *A Nation Challenged: The Detainees; Though Not Linked to Terrorism, Many Detainees Cannot Go Home*, N.Y. Times, Feb. 18, 2002, at A1.

n212. Testimony of Ali Al-Maqtari Before the Committee on the Judiciary of the United States Senate, 106th Cong. (Dec. 4, 2001) [hereinafter "Testimony of Ali Al-Maqtari"].

n213. Id.

n214. Id.

n215. See David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953, 963 (2002).

n216. Testimony of Ali Al-Maqtari, *supra* note 212.

n217. To charges that the Attorney General was urging discrimination, John Ashcroft's legal counsel Adam Ciongoli responded, "We can't detain everyone. You use your prosecutorial discretion. Would the criticisms stop if we said, OK, we're going to lock up everyone – all 8 million illegal immigrants?" See Gorman, *supra* note 1. But the choice is not a matter of whether to lock up subgroups or whole groups. The critics of detention are not demanding the incarceration of greater numbers of people; they are, rather, warning us against it.

n218. Duncan Campbell & Oliver Burkeman, *Rough Justice for Many in U.S. Mood of Mistrust*, *The Guardian*, Sep. 9, 2002. See also Beth P. Krane, *Detainee in Terro Scare Talks of Profiling*, *Fed. Sun Sentinel*, Aug. 7, 2004, http://www.sun-sentinel.com/news/local/palmbeach/sfl-pmohammad_07aug07,0,3347238.story (last visited Aug. 11, 2004) (reporting that police in Riviera Beach, Florida, along with federal law enforcement officials, detained Mohammad Suid, 30, of the U.S. Virgin Islands, for hours and shut down the surrounding community after stopping Suid for speeding and finding his name on a national watch list. Officials later said it was a case of mistaken identity. See *id.*

n219. In July 2002, Attorney General John Ashcroft ordered enforcement of the address notification provision of the immigration statutes, requiring non-citizens to notify the government of any changes of address within ten days; a "willful" failure to submit timely written notice is a criminal violation. This attention increases the likelihood for in absentia orders to be issued against non-citizens who fail to report an address change. See 67 Fed. Reg. at 48354 (Jul. 26, 2002). The National Asian Pacific American Legal Consortium commented:

For years, the INS took the public position that the INS would not exercise the option of pursuing people who failed to file an address change under Section 265 of the INA. When the Justice Department announced that the INS would begin to enforce Section 265 of the INA, and when the media reported that the INS attempted to remove lawful permanent resident Thar Abdel-Jaber for failure to report an address change, legal immigrants nationwide were seized with fear and apprehension. Many people had fallen out of the habit of providing this administrative update or were unaware of the requirement. Innocent persons who would not willfully violate the law suddenly found themselves and their families faced with the tremendous uncertainty of possible prosecution and deportation.

See "Comments to Proposed Rule Titled 'Address Notification To Be Filed With Designated Applications' INS No. 2198-02; AG Order No. 2603-2002; RIN 1115-AG61 (July 26, 2002)," addressed to the Director of the Regulations & Forms Services Division of the Immigration and Naturalization Service (Aug. 26, 2002) from the National Asian Pacific American Legal Consortium, [www.napalc.org/programs/immigration/resources/pdf/Final%20Comments 67Fed Reg%2048818.pdf](http://www.napalc.org/programs/immigration/resources/pdf/Final%20Comments%2067Fed%2048818.pdf) (last visited Jan. 23, 2004).

n220. Mark Sappenfield, *Focus of U.S. Fear: A Legal Refugee is Recast as Enemy*, *Christian Science Monitor*, Sep. 5, 2002. The FBI cleared Sadeq of terrorist links; but when releasing Sadeq, the INS demanded an admission that he'd violated his status by helping the other former refugee try to convince a friend to break immigration rules. *Id.*

n221. *Id.*

n222. See Sam Howe Verhovek, *A Nation Challenged: Civil Liberties; Americans Give in to Race Profiling*, *N.Y. Times*, Sept. 23, 2001, at A1 (citing nearly 60 percent in support). A poll of Michigan residents found that while 70 percent generally opposed racial profiling, 70 percent nevertheless responded that "authorities should take

extra precautions in screening people of Arab descent when flying." Gregg Krupa, Most in State Support Screening of Arabs, *Detroit News*, Feb. 28, 2002, at A1. Whether these polls are more effective at gauging the public mood than creating it is an important question, but beyond the capacity of this article to resolve.

n223. John Ashcroft initiated the Student and Exchange Visitor Information System, or SEVIS – mandatory for all covered schools on January 30, 2003. The new system requires details of student matriculation, drops below full course load, disciplinary action by school, early graduation, and other changes. See 67 Fed. Reg. 34862 (May 16, 2002).

n224. Somini Sengupta, *A Nation Challenged; Immigration: Ill-Fated Path to America, Jail and Death*, *N.Y. Times*, Nov. 5, 2001, at A1 (reporting the sequence listed in documents obtained from the INS under the Freedom of Information Act).

n225. *Id.*

n226. *Id.*

n227. *Id.* See also Richard A. Serrano, "Response to Terror: Detainee Dies Lonely Death in a N.J. Jail," *Los Angeles Times* (Oct. 25, 2001) at A3 (quoting Russ Bergeron, an INS spokesperson, as stating: "He didn't have a hearing. He waived his hearing."). The state of New Jersey has housed the majority of the post-September detainees. See Geov Parrish, "American Gulag: Hundreds of 9/11 Detainees Remain Behind Bars, Shrouded in Secrecy," *In These Times* (Jun. 21, 2002). Thus, in a state in which racial profiling by law enforcement has rightly been rendered obsolete, numerous detainees have lingered who, but for profiling, would be free. The Bush Administration has issued a policy against profiling, but the policy, which has been criticized by civil liberties groups for stopping short of mandating actual legislation, exempts work that authorities deem relevant to national security or border security. See "Bush Orders Racial Profiling Ban," *CBS News* (Jun. 18, 2003), available at <http://www.cbsnews.com/stories/2003/06/26/politics/main560558.shtml> (last visited Feb. 5, 2004). Racial profiling by police gained national attention in 1998 when two New Jersey state troopers admitted shooting at a van occupied by four minority men in an incident that state officials later acknowledged as racial profiling. *Id.*

n228. Somini Sengupta, "A Nation Challenged; Immigration: Ill-Fated Path to America, Jail and Death," *supra* note 224.

n229. See *id.* INS officials contend that they were awaiting travel documents from the Pakistani Consulate, whose officials reported knowing nothing until after Butt's death. See *id.* A one-day investigation into the death by the local prosecutor concluded that no foul play had been involved. See *id.* Butt died on the 23rd of October; on the 27th Butt's body was shipped from New York's Kennedy Airport to his family in Pakistan. *Id.*

n230. As explained in note 2, *supra*, official reticence has shrouded the subject of how many people have been detained, where, and on what charges, and how many have been released, and when. David Cole would write: "Never in our history has the government engaged in such a blanket practice of secret incarceration." See David Cole, "Comment: National Security State," *supra* note 107.

n231. Released detainees have reported being stigmatized or worse upon their arrival abroad. See, e.g., David Rohde, U.S.–Deported Pakistanis: Outcasts in Two Lands, *N.Y. Times* (Jan. 20, 2003). Maher Arar, a Canadian who also holds a Syrian passport, was deported to Syria by U.S. agents in 2002 after being arrested in transit in New York on a return trip to Canada. "Canadian Deported by U.S. to Syria Says was Tortured," *Reuters* (Nov. 4, 2003). Arar said in November 2003 that he had been beaten with shredded cables and forced to sign false confessions during the year spent in a Damascus jail. *Id.* In *Ali v. Ashcroft*, 213 F.R.D. 390, 2003 U.S. Dist. LEXIS 2042 (W.D. Wash., 2003) (14 Jan 2003), U.S. District Judge Marsha Pechman enjoined the removal of 2,747 Somalis with deportation orders across the country, stating, "The government appears to have no idea of what happened to persons previously deported. It's as if they've fallen into a black hole." *Id.* Since 1997, although Somalia has lacked a functioning government, the INS had acknowledged having deported 196 Somali nationals, the majority for visa irregularities. *Id.* On appeal, a panel of the 9th Circuit in *Ali v. Ashcroft*, 346 F.3d 873, 2003 U.S. App. LEXIS 19213 (2003) acknowledged that the Somalis were vulnerable to torture after removal, stating: "It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." 346 F.3d 873 (citing United States Policy with Respect to the Involuntary Return of Persons in Danger of Subjection to Torture, Pub. L. No. 105-277, 2242(a), 112 Stat. 2681, 2681-822 (1998), reprinted in 8 U.S.C. 1231). The 8th U.S. Circuit Appeals Court in *St. Louis* had countenanced removal of Somalis in *Jama v. INS*, 329 F.3d 630 (8th Cir. 2003); however, in *Jama v. Ashcroft*, Civil No. 01-1172, U.S. Dist. Ct. for the Dist. Of Minnesota, 2004 U.S. Dist. LEXIS 445 (Jan.12, 2004), the petitioner was released – after three years.

n232. The American Civil Liberties Union (ACLU) reported a government response to its request under the Freedom of Information Act, received in January 2002, then indicating 725 detainees in "heavily redacted papers." See ACLU press release "Rights Groups Seek to Question Govt. Officials on 'Incomplete and Inaccurate' Records of Detainees," dated Jan. 23, 2002, <http://www.aclu.org/ImmigrantsRights/ImmigrantsRights.cfm?ID=9712&c=95> (last visited Jan. 20, 2004).

After being sued for the information under a New Jersey state right-to-know laws in early 2002, the Administration barred the public release of details about non-citizen detainees by non-federal providers of detention services and clarifying that all such requests for information be directed to the INS. See *Fed. Reg.* Vol. 67, No. 77 (Apr. 22, 2002), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2002_register&docid=02-9863-filed (last visited Feb. 3, 2004).

n233. Exacerbating the difficulties related to ascertaining accurate counts and records connected to detainees, many procedures have been carried out in secret. On September 21, 2001, Chief Immigration Judge Michael Creppy issued a memo overriding the Immigration Judge's discretion by stating that "the Attorney General has implemented additional security procedures for certain cases in the Immigration Court" that required closing the hearings to the public. Judge Creppy further stated that these procedures "require" the judges to close the courtrooms. See "Memorandum from Chief Immigration Judge Michael Creppy to All Immigration Judges re: Cases Requiring Special Procedures" (Sept. 21, 2001). In an effort to assure fair treatment for persons in removal proceedings, the INA sets forth sets forth procedures to be followed at a deportation hearing. 8 U.S.C. 1252; but those procedures have been amended as applied "against number of non-citizens following September 11, 2001, and the government's decision to close those proceedings to the press and public". *Id.*, under "Interpretive Notes and Decisions," n. 64. As early as 29 May 2002, 611 "special interest" cases detained by immigration officials were reported to have had at least one closed hearing. See Tamara Audi, "U.S. held 600 Detainees for Secret Rulings," *Detroit Free Press* (Jul. 18, 2002) (citing the 2-page letter dated Jul. 3, 2002 and sent from Assistant Attorney General Daniel Bryant to U.S. Senator Carl Levin of Michigan, after the latter pointed out apparent discrepancies in the official numbers of various detainee totals issued by the Justice Department).

n234. See Neil A. Lewis & Don Van Natta, Jr., *A Nation Challenged: The Investigation; Ashcroft Offers Accounting of 641 Charged or Held*, N.Y. Times, Nov. 28, 2001, at A1. About fifty were held on federal criminal charges. The government refused to disclose how many were being held on state or local charges, and refused to reveal the identities of any of the immigration or material witness detainees. *Id.* Under an interim regulation that took effect three days before it was published, the Department of Justice now allows detention without charges for 48 hours or "an additional reasonable period of time" in the event of an "emergency or other extraordinary circumstance." See 66 Fed. Reg. 48334-35 (Sep. 20, 2001), revising 8 C.F.R. 287.3(d) (2002). Before September 2001, immigration authorities had only 24 hours from the time of arrest to determine whether to charge the arrested person as removable and whether to continue the person's detention or grant release, normally on bond. 8 C.F.R. 287.3(d) (2002); so the interim rule doubled the amount of time the INS can hold a person without charge even when there exists no emergency or extraordinary circumstance or suspicion of terrorist activity or support. The "special interest" detainees at the Metropolitan Detention Center in New York reportedly waited an average of 15 days to receive the notices to appear (NTAs) which outlined the charges against them. See "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," Office of the Inspector General (June 2003), *supra* note 2, at Ch. 3 <http://www.usdoj.gov/oig/special/0306/chapter3.htm#IB> (last visited May 12, 2004). A subsequent government review would find that some of the detainees were held without legal counsel weeks "or more than a month after being arrested" before receiving notice of the charges against them. See "U.S. Dept. of Justice, Office of the Inspector General, Report to Congress on Implementation of Section 1001 of the USA-PATRIOT Act," *supra* note 193.

n235. See *supra* note 233.

n236. *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 948 (E.D. Mich. Apr. 3, 2002) (concluding that the court did have jurisdiction to hear Haddad's challenge to the Creppy Directive after the public and press and members of Haddad's family were turned away from Haddad's hearing in removal proceedings for a visa overstay). See *id.* at 950. See *supra* note 233 for more information on Judge Creppy's memorandum.

n237. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002). The outcome in Michigan was criticized in *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002). *North Jersey Media Group* split the circuits by emphasizing the lack of explicit legislation on the matter of access to removal hearings, stating that "we find that there has never been a fundamental right of access to all government proceedings." *Id.* at 201. The Supreme Court denied certiorari in *North Jersey Media Group v. Ashcroft*, 538 U.S. 1056 (2003). On May 28, 2002, John Ashcroft issued an interim regulation authorizing immigration judges to issue protective orders and seal records relating to law enforcement or national security information. The rule, applicable to immigration court proceedings, took effect May 21, 2002, a week prior to publication. See 67 Fed. Reg. 36799 (May 28, 2002). When sued for information regarding people being held indefinitely in county jails under state right-to-know laws in early 2002, the Administration had responded by barring the public release of information on INS detainees by non-federal providers of detention services and clarifying that all such requests be directed to the INS. See 67 Fed. Reg. 19508-11 (Apr. 22, 2002).

n238. This litigation began when civil liberties and human rights organizations, along with representatives of the media and the immigration law community, filed a Freedom of Information Act in late 2001 requesting the names, citizenship status and location of those arrested, the charges on which they were being held, and related information; bases for the plaintiffs' claims included the First Amendment right to freedom of speech and freedom of the press, and legal questions under the federal Freedom of Information Act. See *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94, 97 (D.C. Cir. 2002) and *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 922 (D.C. Cir. 2003). The denouncement came in January of 2004, when the Supreme Court turned

down a request to review the Bush administration's withholding of names and other details about the detainees. See *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 124 S. Ct. 1041 (2004). A menu of court documents relevant to the latter case as it wound its way through the D.C. circuit is available at the Center for Nat'l Security Studies website, <http://www.cnss.org/> (last visited Feb. 7, 2004).

n239. The Attorney General issued a memo ordering law enforcement agents across the country to "interview" more than 5,000 men, ages 18-33, who came from countries where al Qaeda has a "terrorist presence or activity." The memo stated that "officers conducting these interviews may discover information which leads them to suspect that specific aliens on the list are unlawfully present or in violation of their immigration status" and directs the INS to provide agents to respond to requests from state and local officers involved in the interviews. Memorandum from Michael A. Pearson, INS Executive Associate Commissioner, Office of Field Operations to Regional Directors (Nov. 23, 2001) available at http://www.aifl.org/lac/lac_otherresources_execbranchactions.asp. U.S. Attorneys in Detroit "issued a letter stating that the interviews are voluntary, but that we need to hear from you by December 4." Letter from U.S. Attorney, Eastern District of Michigan, signed by Jeffrey Collins and Robert Cares (Nov. 26, 2001) available at http://www.aifl.org/lac/lac_otherresources_execbranchactions.asp.

In February of 2002, the Department issued a report on these interviews, stating that 2,261 of those on the list were interviewed. Most of these were charged with immigration violations; three were arrested on criminal charges. See Memorandum entitled "Final Report on Interview Project" from Kenneth L. Wainstein to the Attorney General (Feb. 26, 2002) available at http://www.aifl.org/lac/lac_otherresources_execbranchactions.asp (sites last visited Sep. 24, 2004).

n240. Interviewing Muslims and Arabs based on supposed associations is not a new practice, and it did not prevent the terrorism of September 2001. An association between terror and Muslims became ingrained in 1979, when, after 66 U.S. hostages were taken in the U.S. Embassy in Tehran, "all the elements of the United States government were mobilized, due to the intense personal interest and commitment of President Carter." Don Oberdorfer, *Why the Hostage Crisis Held Us All Hostage*, *Wash. Post*, Feb. 1, 1981, at C1. Although the hostages were rarely viewed, "the networks trained their cameras day after day on the shouting, fist-shaking mobs on the street just outside." *Id.* A study by Associate Professor David L. Altheide of Arizona State University reported that the U.S. evening news networks, in ten sample periods over eight months, showed Iranian crowds and demonstrations on 60 occasions, compared to only three interviews with non-demonstrating Iranians who might have explained what the crowds were screaming about. See *id.* The stage was also set for the "war on terror": Ronald Reagan suggested that those in the captured embassy could be better considered "prisoners of war" than hostages. See *id.* Questioning of Arabs and Muslims went on throughout the 1980s and 1990s. For a chronicle of this activity see Whidden, *supra* note 107.

n241. Office of Deputy Attorney General, *Guidance for Absconder Apprehension Initiative* (Jan. 25, 2002) at <http://news.findlaw.com/hdocs/docs/doj/abscondr012502mem.pdf> (last visited Feb. 27, 2004). The Department of Justice used country, age, and sex identifications to prioritize the selective enforcement, with 6,000 people "from countries in which there has been al Qaeda terrorist presence or activity" slated as the first entrants in the National Crime Information Center database. *Id.* This followed quickly on the heels of Attorney General Ashcroft's promotion of the "S" visa to reward those who provide information relating to the investigation into terrorism (Attorney General Directive on Cooperators Program, Nov. 29, 2001). An immediate rejoinder to the promotion for the visa came from a member of Congress who stated:

This news is no news at all. Current law allows for people to be rewarded with entry and residency

assistance if they provide critical information on terrorist activity. After having already burned its bridges with the Arab American community by secretly detaining hundreds of individuals engaging in racial and ethnic profiling and pressuring young men to submit to intimidating interviews and allowing the Government to spy on attorney-client conversations, the Department is now seeking their help. Offering a reward to the very people it has alienated

is unlikely to yield any positive result.

See Press Release, Congressman John Conyers, Jr., Ranking Member, Committee on the Judiciary, Conyers Dismisses Ashcroft's Visa Offer to Terror Informants (Nov. 29, 2001), available at <http://www.house.gov/judiciary/democrats/terrorinformantspr112901.pdf> (last visited Feb. 3, 2004). When this author took an informal electronic survey of approximately 50 lawyers in the New York and New Jersey area, not one had come into contact with any potential clients interested in using the "S" visa in connection with the government's post-September investigations. One lawyer interviewed for this article stated: "I do know of a Palestinian federal informant. He got re-arrested and removed. I don't think he is going to be winning any popularity contests in the Gaza strip." Interview with Regis Fernandez, Attorney (Jan. 31, 2004).

n242. Susan Sachs, *Traces of Terror: The Detainees; Cost of Vigilance: This Broken Home*, N.Y. Times, Jun. 4, 2002, at A15. "What I meant by the weakest link is that with each anti-terrorism initiative, government agencies announce and promote new legal concepts to facilitate the quick effective removal of groups of aliens that have nothing to do with national security or the Middle East." Interview with Regis Fernandez, Attorney (Jan. 31, 2004). Adding to the stigma already adhering to middle-easterners, in mid-November of 2001 the following message began to appear when individuals born in certain countries attempted to make an appointment through the on-line Visa Appointment Reservation System: "Effective immediately, the State Department has introduced a 20-day waiting period for men from certain countries, ages 16-45, applying for visas into the United States." See American Immigration Lawyers Association, *Boiling the Frog Slowly: Executive Branch Actions Since September 11, 2001*, 7 *Bender's Immigr. Bull.* 1237 (Oct. 15, 2002). People who received the message were born in Afghanistan, Algeria, Bahrain, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, or Yemen. Id. Attorneys with a Middle Eastern clientele began to face waits of six months to a year for immigration visas. Explained one lawyer: "With regards to visa appointments, in my experience the waits for Arab men security checks at consulates have added 6-12 months to the delay - making it necessary many times to redo all the paperwork and medicals." Interview with Regis Fernandez, Attorney (Jan. 31, 2004).

n243. The Special Call-In Registration required nonimmigrant visitors to appear before, register with, and provide information to the U.S. government. See 8 C.F.R. 264.1; 67 Fed. Reg. 67766-68 (Nov. 6, 2002); 67 Fed. Reg. 70526-28 (Nov. 22, 2002); 67 Fed. Reg. 77642-44 (Dec. 18, 2002); 68 Fed. Reg. 2363-66 (Jan. 16, 2003).

n244. See The Smith (or "Alien Registration") Act, 18 U.S.C. 2385 (1940). Discussing the more recent registration calls, Timothy Edgar, Legislative Counsel with the American Civil Liberties Union (ACLU), stated: "This policy was not decided by Congress and the law. There is no law that said that you should select out particular countries and do fingerprinting and registration based on intelligence information. Attorney General John Ashcroft made the decision." See *INS Special Registration: What Does it Mean?*, supra note 126.

n245. The special rule obliged the selected groups to register at entry, at 30 days after entry, at one-year intervals thereafter, and at exit, or suffer criminal penalties. See 67 Fed. Reg. 40581 (Jun. 13, 2002). Attorney General John Ashcroft supplemented the regulation with a statement indicating that local police would be expected to check the names of any persons they encounter against the National Crime Information Center data base, and arrest and detain anyone who failed to register or has apparently overstayed a visa. Id. On the 24th of December 2002, the American-Arab Anti-Discrimination Committee and the Council on American-Islamic Relations filed a class action lawsuit against the INS and Attorney General John Ashcroft over the selective enforcement policy. See Anwar Iqbal, *Registration Plan Nets Six Terror Suspects*, United Press Int'l, Feb. 4, 2003, at <http://www.upi.com/view.cfm?StoryID=20030203-065528-6128r> (last visited Dec. 16, 2003).

n246. See Testimony of Carol F. Khawly, Legal Advisor to the American-Arab Anti-Discrimination Committee (ADC), Before the Congressional Asian Pacific American Caucus 5-6 (Nov. 4, 2003) (on file with the Rutgers Race and the Law Review).

n247. See Press Release, U.S. Dep't of Justice, Attorney General Ashcroft Announces Implementation of the First Phase of the National Security Entry-Exit Registration System (Aug. 12, 2002) available at http://www.usdoj.gov/opa/pr/2002/August/02_ag_466.htm (last visited May 12, 2004).

n248. See *id.*

n249. This group registered in November and December of 2002. See Dan Eggen and Nurith C. Aizenman, Registration Stirs Panic, Worry: Some Muslim Foreign Nationals Risk Arrest to Meet INS Deadline, *Wash. Post*, Jan. 10, 2003, at A1. No specific criteria were given for this selection; the registration requirements would be applied to members of selected nationalities already within the U.S. upon the Attorney General's direction. See Registration and Monitoring of Certain Nonimmigrants, 8 C.F.R. 264 (2004).

n250. Male visitors from Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, or Yemen were required to register with INS in December 2002 and January 2003. The deadline for registration was in January of 2003, but due to confusion about the requirement, the government put out another call for nationals from the first two lists of selected countries with a February deadline. See U.S. Detains Nearly 1,200 During Registry, *Wash. Post*, Jan. 17, 2003, at A14. Ashcroft subsequently added a third group of countries, including Saudi Arabia and Pakistan, with a late February deadline, and finally, in January 2003, added five more countries: Bangladesh, Egypt, Indonesia, Jordan, and Kuwait). The deadline for the fourth wave of registrations was in late March of 2003. See 8 C.F.R. 264 (2004).

n251. Duncan Campbell and Oliver Burkeman, Rough Justice for Many in U.S. Mood of Mistrust, *supra* note 218.

n252. David Brunnstrom, Pakistan Wants Exemption from U.S. Registration Plan, *Reuters*, Jan. 17, 2003 http://www.alertnet.org/thenews/newsdesk/ISL_224090 (last visited Jan. 20, 2003). INS officials estimated that 15,000-20,000 Pakistanis might need to register; the Pakistan Embassy said the figure would be the largest of any selected group and could be as many as five times the government's estimate. See Anwar Iqbal, Registration Plan Nets Six Terror Suspects, *United Press Int'l*, Feb. 4, 2003.

n253. Muklis Ali, Indonesia Decries U.S. Visitor-Registration Move, *Reuters*, Jan. 17, 2003.

n254. See Armenian National Committee of America Press Release, "Bush Administration Revises I.N.S. Policy on Requiring Registration of Armenian Nationals in the United States: Grassroots Campaign Generates Over 10,000 ANCA WebFaxes in 24 Hours" available at <http://www.anca.org/pressrel.asp?prid=274&pressregion=anca> (last visited Oct. 4, 2004) (stating: "The ANCA, along with a broad-based coalition of Armenian American groups, worked to resolve this issue with senior Administration officials, Armenian Americans with close ties to the White House, the Congressional Armenian Caucus, and key foreign policy figures.") *Id.*

n255. Violent networks can recruit, moreover, from any country. For related commentary, see Niels W. Frenzen, Op-Ed: INS Misses Mark in Nationwide Arrests, *The Los Angeles Times*, Dec. 24, 2002.

n256. As Michael Welch put the point, "When you tell law enforcement agencies that they have to round up this many people rather than honing their investigation, they're going to spend a lot of time dealing with people with minor visa violations who are not a threat to the community." See Talvi, *supra* note 93. Professor Welch's logic has been borne out, as government officials have been obliged to admit. See Chris Strohm, *New Border Tracking*

Program Has Yet to Net Terrorists, *Daily Briefing, Government Executive Magazine*, Jan. 29, 2004. <http://www.govexec.com/dailyfed/0104/012904c1.htm> (last visited Feb. 4, 2004) (quoting Asa Hutchinson, undersecretary of border and transportation security for the Homeland Security Department, with an acknowledgment that U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) has increased the rate of arrests, yet failed to apprehend anyone on terrorism-related charges).

n257. Although their cases are not detailed at length here, it bears mentioning that students are particularly vulnerable to innocently falling afoul of the requirements, because they can have expired visas in their passport and still be in lawful status. See INA 214.2(f)(5)(iv), providing that students who have completed their course of study have a 60-day grace period after the term of their student status. See also Associated Press Newswires, *Student Arrested in INS Registration*, Jan. 10, 2003; Caryle Murphy &

Nurith C. Aizenman, *Foreign Students Navigate Labyrinth of New Laws*, *The Washington Post*, Jun. 9, 2003 at B1 (reporting the histories of several students arrested and held for months due to innocent filing mistakes).

n258. See Testimony of Carol F. Khawly Before the Congressional Asian Pacific American Caucus, *supra* note 246.

n259. See *id.* See also "Special Registration: Case Examples," posted on AILA InfoNet at Doc. No. 04031065 (Mar. 10, 2004) <http://www.aila.org/content/Viewer.aspx?bc=16,4634,4968> (last visited Mar. 12, 2004).

n260. Robert Polner, *Seeking a Reprieve: Bangladeshi Immigrants Who Came Here So Their 8-Year-Old Deaf Daughter Could Learn to Communicate May be Forced to Leave the U.S.*, *Newsday*, Mar. 11, 2004 at A3; Robert Polner, *Deaf Girl is Likely to Stay in U.S.*, *Newsday*, Mar. 26, 2004.

n261. Telephonic interview with independent lawyer Azar Abasi Menhaji of Paterson, New Jersey (May 14, 2004). The non-citizen's spouse lives at home to care for Tara. *Id.*

n262. See Testimony of Carol F. Khawly Before the Congressional Asian Pacific American Caucus, *supra* note 246.

n263. See *id.*

n264. See U.S. Detains Nearly 1,200 During Registry, *The Washington Post* (from news services and staff reports) Jan. 17, 2003, at A14. The article observed that the total was nearly twice that which the government had previously acknowledged. *Id.*

n265. *Id.* (quoting "a senior Justice Department official"). The arrests sparked angry protests in Los Angeles. See article with photo in *Mass Arrests*

of Muslims in L.A., *BBC News* (Dec. 19, 2002) <http://news.bbc.co.uk/1/hi/world/americas/2589317.stm> (last visited Feb. 4, 2004).

n266. See transcript of the January 2003 the American-Arab Anti-Discrimination Committee panel discussion, "INS Special Registration - What Does It Mean?", *supra* note 126 (statement of Kareem Shora regarding the New York City INS office located at 26 Federal Plaza).

n267. See "Interview Report," Memorandum from U.S. Department of Justice, Executive Office for U.S. Attorneys, to all U.S. Attorneys from Kenneth L. Wainstein, Director (dated Mar. 19, 2003).

n268. John Conyers, Jr., Ranking Member of the House Judiciary Committee, stated:

It is now clear why the Attorney General is afraid to let the American people see how he is running the war on terrorism; it is because his Justice Department is waging war on the rights of law-abiding residents. Because the Attorney General would not tell the public about his efforts, Sen. Russ Feingold (D-WI) and I were forced to ask the GAO [General Accounting Office] to investigate the Justice Department's interviews of 7,000 law-abiding immigrants... The Justice Department could not provide any evidence that the interviews had led to any useful information about terrorist attacks on the United States. The Department's guidelines say the interviewees were to be sources of information, not suspects, but the questions asked include: where the person has traveled, why they are in the United States, what they are studying, addresses of family members, what cities and landmarks they have visited in the United States, if they have ever been to Afghanistan, and what access they have to explosives. Law enforcement officials said that the interviews negatively affected relations with the Arab community.

See John Conyers, Jr. (Ranking Member, Committee on the Judiciary), "Press Release: Conyers: DOJ Immigrant Interviews Produce 'Not One Shred of Evidence'" (May 9, 2003), available at <http://www.house.gov/judiciary/democrats/gaoimmigrantstudypr5903.pdf> (last visited Feb. 3, 2004). Conyers's statement refers to the U.S. General Accounting Office, Report to Congressional Committees, Homeland Security - Justice Department's Project to Interview Aliens After September 11, 2001, No. GAO-03-459 (April 2003).

n269. See "Registration and Monitoring of Certain Nonimmigrants (Final Rule)," *supra* note 249. Chuck Roth of The Midwest Immigrant & Human Rights Center has observed that the Justice Department arguably violates INA 264(b) by using information gathered from special registration for enforcement purposes. The provision states: "All registration and fingerprint records made under the provisions of this title shall be confidential, and shall be made available only (1) pursuant to 287(f)(2) [referring to inter-governmental sharing arrangements, and permitting sharing "upon request"], and (2) to such persons or agencies as may be designated by the Attorney General." John Ashcroft implemented the registration scheme without designating any agency or persons for receipt of this information in the Federal Register. The scheme was also implemented without the notice and comment required when an agency engages in formulating legislative rules that have the force of law. See Administrative Procedure Act (APA), 5 U.S.C. 551 et seq. (requiring an agency to publish the notice of a proposed release in the Federal

Register and allowing for a comment period before final adoption. Id.,553(b). A final rule issued by the Department of Justice, "Powers of State or Local Law Enforcement Officers To Exercise Federal Immigration Enforcement," implements INA 103(a)(8), which allows the Attorney General to authorize any state or local law enforcement officer, with the "consent of the head of the department whose geographic boundary the officer is serving", to exercise and enforce immigration laws during the period of a declared "mass influx of aliens." The final rule took effect in August 2002. See 67 Fed. Reg. 48354 (Jul. 24, 2002). For a thorough critique of Attorney General John Ashcroft's position that state and local police have "inherent authority" to enforce immigration laws, see Huyen Pham, "The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Law Violates the Constitution," Florida State University L. Rev. (Vol. 31; forthcoming 2004).

n270. See 8 C.F.R. 214.1(f) and INA 237(a)(1)(c)(I). A separate removal provision under 237(a)(3)(a) applies to non-citizens unable to demonstrate to the attorney general that the failure was reasonably excusable or was not willful.

n271. INA 212(a)(3)(a)(ii).

n272. See Jessie Mangaliman, "Role in Registration Worries Ethnic Media," San Jose Mercury News (Jan. 20, 2003).

n273. Nurith C. Aizenman, "A Register of Immigrants' Fears: For Many, Worries Over Deportation Clash With Anti-Terrorism Effort," The Washington Post (Jan. 20 2003) (describing a five-hour family meeting of a Moroccan limousine driver, which concluded at about 2 a.m. on the date of his deadline, when the driver announced: "I'm not going to register.")

n274. Patrick J. McDonnell, "INS Vows to Improve on Registration," Los Angeles Times (Jan. 10, 2003) (quoting Salam al-Marayati).

n275. In January 2003, a U.S. District Judge in Santa Ana declined to issue an order blocking implementation of the registration in response to a lawsuit calling the selective registration discriminatory. See id.

n276. Stephen Dinan, Bill Stops Funding for Security Registration, The Washington Times (Jan. 29, 2003). On December 1, 2003, the Department of Homeland Security issued a press release announcing a suspension of the formal requirements for registered individuals, and the initiative was folded into the broad-based U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT) system. See Press Release issued by the Department of Homeland Security (Dec. 1, 2003) (explaining that when the new system, US-VISIT, is fully implemented by the end of 2004, it would collect information and biometric identifiers from most visitors to the United States, and record their departure). See also Nihal Kaneria, Terrorism Fears Spur a Bio-metric Revolution, Gulf News (Jan. 10, 2004), available at <http://www.gulfnews.com/Articles/print.asp?ArticleID=107593> (last visited Feb 5, 2004) (positing that, in addition to security fears, a key impulse behind US-VISIT is the knowledge that U.S. companies stand to benefit substantially from the worldwide implementation of the biometric technology, whose market they substantially control).

n277. See Editorial: INS' Iron Fist Tarnishes American Ideals, San Jose Mercury News (Dec. 29, 2002); Jill Serjeant, Calif. Muslims Detained in Crowded, Cold Centers, Reuters (Dec. 19, 2002) (noting attorneys' beliefs that most of those arrested, mainly residents of Southern California, had legitimate pending applications for residency that have been delayed by chronic INS backlogs).

n278. See Editorial: INS Iron First Tarnishes American Ideals, *id.*

n279. See transcript of the January 2003 the American-Arab Anti-Discrimination Committee panel discussion, "INS Special Registration - What Does It Mean?", *supra* note 126 (statement of Janna Evans, Acting Director of Community Programs at the Immigration and Naturalization Service).

n280. Asian American Legal Defense and Education Fund Media Release, "Asian American Civil Rights Group Releases Report Proving Special Registration Discriminatory, Ineffective" (Nov. 13, 2003).

n281. *Id.*

n282. Through September 30, 2003, the government reported the total number of registrations at 290,526 (including repeated registrations for the same individual; the total number of registrants was 177,260). See "Changes to National Security Entry/Exit Registration System (NSEERS)," Department of Homeland Security Fact Sheet (Dec. 1, 2003), available at www.ice.gov/graphics/news/newsrel/articles/NSEERSfactsheet120103.pdf (last visited Feb. 27, 2004).

n283. See *id.* (reporting a figure of 2,870 detained).

n284. See Dennis Wagner, Some Muslims Think Ethnic, Religious Profiling Still Being Used, Arizona Republic, Aug. 11, 2004 available at <http://www.azcentral.com/news/articles/0810muslims10-ON.html> (last visited Aug. 11, 2004) (reporting that FBI headquarters in Washington, D.C., has confirmed the launch of a new round of intelligence-gathering interviews, primarily directed at Middle Easterners). See also Brandon Sprague, Talk at Mosque BBQ: Possible FBI Targeting, Seattle Times Aug. 9, 2004 available at http://seattletimes.nwsourc.com/html/localnews/2002000263_mosqu_e09m.html (last visited Aug. 11, 2004) (discussing "worries that the FBI may be targeting Seattle's small Muslim community" and reporting that "Attorney General John Ashcroft recently said law-enforcement officials are stepping up efforts to contact Muslims and Arab Americans because of information that terrorists are planning a major attack.") According to Kareem Shora, Director of Legal Policy for the American-Arab Anti-Discrimination Committee (ADC), the FBI confirmed directly to the ADC that FBI agents have been contacting Arab and Muslim Americans, including citizens, for what has again been described as voluntary interviews. See release entitled ADC Update: Know Your Rights Information (Sept. 30, 2004) (on file with Rutgers Race and the Law Review).

n285. For related commentary, see Talvi, *supra* note 93.

n286. See Campbell & Burkeman, *supra* note 218.

n287. The victim, Balbir Singh Sodhi, was in fact a Sikh of Indian descent. See Jim Walsh, *Roque Guilty in Sikh Murder*, *The Arizona Republic*, Oct. 1, 2003. Roque was also convicted of attempted murder, having fired on another filling station where the cashier was of Lebanese descent, and at the home of an Afghan family. Julian Borger, *September 11 Revenge Killer to Die for Shooting Sikh*, *The Guardian*, Oct. 11, 2003, Foreign Pages section, at 17. And in May 2003, another Sikh, Avtar Singh Cheira, was shot in in Arizona by a group of men in a pickup truck who shouted: "Go back to where you belong." *Id.*

n288. See Jim Walsh, "Roque Guilty in Sikh Murder," *id.* (citing as sources the Arab-American Anti-Discrimination Committee, Council of American-Islamic Relations, Sikh Coalition, and Sikhnet). Information regarding the people named here also appears electronically at The Sikh Network, "Who Are the Victims of Hate?" <http://www.sikhnet.com/s/OtherHCVictims> (last visited Mar. 13, 2004).

n289. See The Sikh Network, "Who Are the Victims of Hate?", <http://www.sikhnet.com/s/OtherHCVictims> (last visited Mar. 13, 2004). In the first three months after the New York and Washington terror attacks, a Intergroup Clearinghouse counted 1,700 incidents of reprisal against arabs, Muslims, south Asians, and Sikhs. See Julian Borger, "September 11 Revenge Killer to Die for Shooting Sikh," *supra* note 287.

n290. Anne Hart, "Islamic Center Fire was Arson; Savannah Mosque has had Prior Hate-Crime Incidents, Members Say," *The Augusta (Georgia) Chronicle* (Aug. 26, 2003) at B6.

n291. *Id.*

n292. See "Woman, 19, Charged with Harassing Muslims," *Buffalo News* (Aug. 9, 2004) <http://www.buffalonews.com/editorial> (last visited Aug. 11, 2004). The pattern shows no signs of abating. The Seattle office of the Council on American-Islamic Relations has pointed to a "growing Islamophobic prejudice" following an incident in which white crosses and "F U Arab" were painted inside a Middle Eastern grocery store in Washington state; the same store sustained \$90,000 worth of damage in an arson. See "Arsonist Torch Muslim Store in Washington," Council on American-Islamic Relations press release (Jul. 10, 2004).

n293. Wesley Pruden, "Pruden on Politics: A Campaign to Erase Stereotypes" *The Washington Times* (Feb. 3, 2004), available at <http://washingtontimes.com/national/20040203-123048-6788r.htm> (last visited Feb. 5, 2004).

n294. See, e.g., *Police Investigate Acts Against Islamic Sites*, *Miami Herald*, May 14, 2004, at <http://www.miami.com/mld/miamiherald/news/local/8662302.htm> (last visited May 14, 2004).

n295. Campbell and Burkeman, *supra* note 218.

n296. J. Grant Swank Jr., Teen Christian Girl Grabbed by Muslims, Mich. News, Jan. 26, 2004 (speaking on behalf of a pro-Bush evangelical group, International Christian Concerns), available at http://michnews.com/artman/publish/article_2404.shtml (last visited Mar. 13, 2004).

n297. A Conservative News Forum, FreeRepublic.com, at <http://209.157.64.200/focus/f-news/956036/posts> (last visited Oct. 30, 2003). The reader commentary focuses on Cahal Milmo, Mother Appeals for Son Held in Camp Delta to be Returned to Britain for Fair Trial, The Independent, Jan. 8, 2003. A disclaimer states: "Opinions posted on Free Republic are those of the individual posters and do not necessarily represent the opinion of Free Republic or its management. All materials posted herein are protected by copyright law and the exemption for fair use of copyrighted works." Id.

n298. Reader response published on A Conservative News Forum, FreeRepublic.com, at <http://209.157.64.200/focus/f-news/956036/posts> (last visited Oct. 30, 2003).

n299. Press Release, Council on American-Islamic Relations, Racist Note Left on AZ Muslim's Vandalized Car: GOP Leaders Urged to Condemn Anti-Muslim Prejudice, Stereotyping (Aug. 31, 2004).

n300. Id.

n301. Press Release, American-Arab Anti-Discrimination Committee, ADC Update: "Wack the Iraq" Shut Down, Protest Cancelled (Aug. 26, 2004).

n302. Shannon D. Harrington, Democrats Angry Over GOP 'Terrorist' Ads; Fliers Say Stance Puts Nation in Danger, The Record (Hackensack, NJ), Nov. 2, 2001, at A3. The initial agreement in May 2001 between the INS and Bergen County to house up non-citizen detainees was signed by Acting Sheriff Gordon Johnson, a Democrat, and Republicans supported the idea because of its promise of increased revenues. Id.

n303. See id.

n304. Cf. Peter Mares, *Borderline: Australia's Treatment of Refugees and Asylum Seekers* (2001), discussing the politics of Australia's treatment of asylum seekers and refugees, including under Wackenhut's operations in Australia, and noting that "performance measures linked to standard such as 'dignity' or 'privacy'" have been deleted from the publicly available version of the Detention Agreements "for commercial reasons"; the significance of this deletion is also discussed in Savitri Taylor, *Protecting the Human Rights of Immigration Detainees in Australia: An Evaluation of Current Accountability Mechanisms*, 22 Sydney L. Rev. 50, 59 (2000). Regarding the situation in the United States, Professor Michael Welch writes: "The INS responds to the market imperatives of the prison-industrial complex, an enterprise whereby lawbreakers and undocumented immigrants are commodified as raw materials for private profit." See Michael Welch, *The Role of the Immigration and Naturalization Service in the Prison Industrial Complex*, 27 Social Justice 73 (2000). To get the human raw material necessary to turn a profit, detention companies talk of importing inmates across state lines. See Peter Johnson, *Bill OK'ing Importation*

of Inmates Advances, Great Falls Trib., Apr. 10, 2003, at 1A (citing Rep. Norman Ballantyne's support for the importation of prisoners so that Montana's Shelby prison could reach its break-even point of 424 inmates, because the "Corrections Corporation of America has been a good neighbor, taxpayer and employer in an area 'that needs jobs'").

n305. Of course, those without strong U.S. ties may suffer unconstitutional harms from this practice. Although a decision to deny a person entry might not trigger due process – see *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) – a decision to detain a person entering the country deprives that person of physical liberty. "Freedom from imprisonment ... lies at the heart of the liberty that [the Due Process] Clause protects." *Zadvydas*, 121 S. Ct. at 2498; see also *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (observing that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection" (internal citations omitted)).

n306. See Bernstein, *supra* note 102 (citing a study from the Lawyers Committee for Human Rights). See also Stanley Mailman and Stephen Yale-Loehr, *Detaining and Criminalizing Asylum Seekers*, 8 *Bender's Immigr. Bull.* 764 (May 1, 2003). A printable version of the article, which addresses the ways in which anti-terrorism policy exacerbates the plight of Haitians fleeing political turmoil, appears at <http://www.twmlaw.com/site/resources/detandcrimasyllum.html> (last visited Mar. 13, 2004).

n307. See *Matter of D–J–*, 23 I. & N. Dec. 572 (Att'y Gen. 2003), a case in which an order for a Haitian asylum seeker to be held without bond was designated by Attorney General John Ashcroft designated as a precedent decision. Tension between U.S. policy and the international human rights community was underscored on the 20th of May 2004, when, in the wake of the ouster of Haiti's president Jean-Baptiste Aristide, the Inter-American Commission on Human Rights issued a statement affirming the fundamental right of all asylum seekers, including those interdicted in international waters, to seek and receive asylum, including the right to a hearing to determine their eligibility for refugee and asylum status. See <http://www.gbls.org/immigration/decision.pdf> (last visited May 30, 2004).

n308. Susan Sachs, *Threats and Responses: Detainees; Hunger Strike by 6 Immigrants Enters 2nd Week*, N.Y. Times, Jan. 22, 2003, at A9.

n309. *Id.*

n310. *Id.*

n311. Albor Ruiz, *200 Locked Away & Under the Radar*, Daily News (New York), Aug. 19, 2004, at 6.

n312. *Id.*

n313. Lauri Lebo, *Protest Attracts Support: Prison Rally May Draw Larger Crowd*, York Sunday News

(Pennsylvania), Nov. 30, 2003. In April 2002, Abdel-Muhti was apprehended in New York for a violation of a seven-year-old removal order, and arrested by the Absconder Task Force, a joint federal-state immigration enforcement unit which has primarily pursued males from the Middle East and Pakistan. One reporter wrote:

Although Abdel-Muhti may not be completely blameless, he is one of several Palestinian activists across the country who have found themselves in immigrant detention after protesting Israel's military operations in the West Bank and Gaza. The climate of fear following September 11 and the sweeping national security enhancements of the USA Patriot Act increased the vulnerability of immigrant activists pleading the Palestinian cause in the United States. These developments also coincided with the escalation of the Palestinian-Israeli conflict and with George W. Bush's markedly bellicose foreign policy.

Jordan Green, *Silencing Dissent: The Cases of Three Palestinian Activists Targeted by FBI Probes Show How Government Agencies May Use Immigration And Counterterrorism Measures to Crack Down on Political Activity - Enemies of the State*, *ColorLines Magazine: Race, Action Culture*, Summer 2003, at 17-20. The same article describes the detention of Amer Jubran, who came to Boston from Jordan in 1987 and, as a student at Northeastern University, became active in an international Palestinian student group monitored by the Federal Bureau of Investigation throughout the 1980s. "Jubran helped organize Boston ANSWER, part of the national anti-war coalition that has championed the Palestinian cause. Jubran's arrest by the INS followed several months of energetic political demonstrations in the Boston area." *Id.*

n314. Lebo, *id.* See also Tanya Weinberg, *Gun Charge Keeps Palestinian in U.S.: Sunrise Man Held in 9-11 Investigation is Indicted*, *South Florida Sun-Sentinel*, Jan. 14, 2004 (discussing the case of a Palestinian detainee who describes being held for a year and a half while more than 40 countries rejected his request for admittance).

n315. See *Abdel-Muhti v. Ashcroft*, CV-03-0927, available at <http://www.ccr-ny.org/v2/reports/docs/FINAL%20OPINION-%20Farouk.pdf> (last visited Apr. 22, 2004). Abdel-Muhti died three months after being released. See Deborah Bolling, *A Well Spent Last Breath*, *CityPaper.net*, Jul. 29 - Aug. 4, 2004 at <http://www.citypaper.net/articles/2004-07-29/cb.shtml> (last visited Sep. 24, 2004).

n316. In a particularly acerbic footnote, Judge Kane called the government's repeated demands for more information about his identity "a Kafkaesque exchange" that culminated with a last-minute government request that he submit the same type of Israeli visa request that Israel had rejected nearly 30 years ago. See *Abdel-Muhti*, *id.* at n. 9.

n317. *Zadvydas v. Davis*, 533 U.S. 678 (2001). 8 U.S.C. 1231(a)(1)(A) provides that the Attorney General has a 90-day removal period for a person ordered to leave the country. 1231(a)(6) authorizes further detention of certain non-citizens who are inadmissible or removable for security reasons or criminal violations. See *supra* note 125.

n318. 533 U.S. 690, stating that "freedom from imprisonment - from government custody, detention, or other forms of physical restraint - lies at the heart of the liberty that [the Due Process] Clause protects." *Id.* The *Zadvydas* Court held that INA 236A(a)(6), codified at 1231(a)(6), contains an implicit "reasonable time" limitation. 533 U.S. at 682. Thus, the Court construed the statute to limit post-removal-order detention to a period reasonably necessary to bring about removal, generally no more than six months. *Zadvydas*, *id.*, at 689-701.

n319. See the USA-PATRIOT Act, *supra* note 119, at 412(a)(3). The Act paves the way for a broader category of detentions, as it authorizes the Attorney General to confine non-citizens without a hearing or any obligation to

demonstrate that detention is warranted to prevent flight or danger to the community. See Cole, *supra* note 112. In October 2001 the Department of Justice issued an interim regulation that applies an automatic stay of Immigration Court bond decisions wherever the Department has ordered no bond or has set a bond of \$10,000 or more. For background on this regulation, see Sixth Public Hearing of the National Commission on Terrorist Attacks Upon the United States Before the Nat'l Comm'n on Terrorist Attacks Upon The U.S. (Dec. 8, 2003) (Statement of David Martin) at [http://www.9-11commission.gov/hearings/hearing6/witness martin.htm](http://www.9-11commission.gov/hearings/hearing6/witness%20martin.htm) (last visited Sept. 16, 2004).

n320. The INA defines "engage in terrorist activity" to encompass the use of, or threat to use, a weapon with intent to endanger person or property. See 8 U.S.C.S. 1182(a)(3)(B)(iii)(V)(b).

n321. Petition for Writ of Certiorari No. 02-1464, *Snyder v. Rosales-Garcia and Davis v. Carballo*, available at <http://www.usdoj.gov/osg/briefs/2002/2pet/7pet/2002-1464.pet.aa.pdf> (last visited Feb. 27, 2004). The Court will address the following consolidated cases in the U.S. Court of Appeals for the Sixth Circuit: *Rosales v. Holland*, No. 99-5683, and *Carballo v. Luttrell*, No. 99-5698 (March 5, 2003). These cases triggered a circuit split by applying a *Zadvydas* analysis to the Cubans (who are not lawful residents and were technically denied legal entry into the U.S.), to find that "excludable" non-citizens cannot be indefinitely detained without due process problems. *Rosales-Garcia* and *Carballo* were among about 120,000 Cubans who arrived in the United States, undocumented, as part of the Mariel boatlift in 1980. *Rosales* and *Carballo* served their sentences in U.S. prisons and have since been placed in removal proceedings. The Sixth Circuit issued its decision with the observation that "excludable aliens" might "be subjected to any government action without limit" if Due Process does not apply. *Id.*

n322. See *Welch*, *supra* note 148, at 95-96.

n323. See *id.* at 96.

n324. The administration's current view of the Eleventh Circuit's denial of habeas to Daniel Benitez, pitted against the Sixth Circuit's contrary view, presents a prominent example of this rhetoric. See *Benitez v. Wallis*, 124 S. Ct. 1143, cert. granted, Jan. 16, 2004; decision below at 337 F.3d 1289 (11th Cir. 2003). Solicitor General Theodore Olson warned the justices that a decision in support of the relevant detainees could create a "back door into the United States" for dangerous outsiders. See Gina Holland, *Jailed Immigrants Fate to be Decided: Justices Will Rule on Indefinite Detention for Cuban Criminals and Others who Cannot be Deported*, *The Philadelphia Inquirer*, Jan. 17, 2004, available at <http://www.philly.com/mld/inquirer/news/nation/7731071.htm> (visited Feb. 7, 2004). Daniel Benitez finished a criminal sentence in 2001, but has been in indefinite custody since then, under the 1996 mandatory detention provisions - also, as noted previously, passed in the midst of terrorism fears. *Id.* Benitez was among about 120,000 Cubans who arrived in the United States, undocumented, as part of the Mariel boatlift in 1980. *Id.* Benitez raises the question of whether the language in 8 U.S.C. 1231(a)(6), which does not distinguish in its application between officially admitted and non-admitted persons, may be interpreted differently for the two groups. See *Benitez*, 337 F.3d at 1298-1301.

n325. *Holland*, *supra* note 324.

n326. See *Matter of D-J-*, *supra* note 307. According to the Attorney General, an increasing number of boats arriving in the U.S. from Haiti and other parts of the Caribbean have put pressure on the U.S. Coast Guard, and if

the teen and others in similar situations were set free, their release would attract other Haitians, distracting the Coast Guard from responding to other national security concerns. See *id.* at 577–79. In addition, the attorney general cited State Department declarations stating that it had noticed an increase in the use of Haiti as a staging point for migration by other third country nationals, including Palestinians and Pakistanis. *Id.* at 579. Ashcroft's opinion ignores *In re Patel*, 15 I. & N. Dec. 666 (1976), the precedent decision in which the Board of Immigration Appeals found that release on bond is appropriate unless an individual presents a flight risk or a danger to the community.

n327. Susan Carroll, *Terror ties? No, But U.S. Detaining Brazilians*, *Arizona Republic*, Feb. 25, 2004, (citing concerns expressed by Victor Cerda, general counsel for the Bureau of Immigration and Customs Enforcement, or BICE). The article reports detentions of 227 Brazilians from October 2003 through January 2004 under a regulation issued in October of 2001, in which government attorneys can stay Immigration Judges' release orders by marking a box noting an intent to file an appeal, thus keeping people behind bars for an indefinite period, in cases for which the government has set the bond at \$10,000 or higher. See *supra* note 319; see also *Review of Custody Determinations*, Interim Rule, 66 Fed. Reg. 54909.

n328. For related commentary see Dep't of Justice, *supra* note 133, (observing that the most likely future market for private detention corporations involves low-security inmate populations). For the federal government's own prognosis, see Department of Justice FY 2004 Performance Plan, Strategic and Objective Annual Goal 6.2: Prison Capacity, at 13, at <http://www.usdoj.gov/ag/annualreports/pr2002/pdf/Section06.pdf> (last visited May 13, 2004). The recent series of reports issued from the Office of the Inspector General, *supra* notes 2 and 193, strengthened the resolve of relatives and advocates for detainees; in early April of 2004 Asa Hutchinson, the Homeland Security Department's undersecretary for border and transportation security, announced a new policy that would preclude indefinite detentions in terrorism investigations "without evidence." See Ricardo Alonso-Zaldivar, *Policy Altered on Terrorism Detentions*, *The Los Angeles Times*, Apr. 14, 2004, at A13. But the new policy, ostensibly intended to correct human rights abuses and create a system of "checks and balances," met with derision from Justice Department officials who "said that the policy was lawful and that authorities could not risk allowing any suspects to flee the country." *Id.*

n329. On the 19th of April, 1995, the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, U.S., was bombed.

n330. See AEDPA, *supra*, note 98. See also Presidential Statement on Senate Passage of Antiterrorism Legislation, 31 *Weekly Comp. Pres. Doc.* 993 (June 7, 1995) (stating "I am gratified that the Senate has passed a sweeping, bipartisan antiterrorism bill, as I called for in the wake of the bombing in Oklahoma City. This legislation will give law enforcement the tools it needs to do everything possible to prevent this kind of tragedy from happening again").

n331. For further discussion see, e.g., Nadine Strossen, *When and How: Criticisms of Federal Counter-Terrorism Laws*, 20 *Harv. J. L. & Pub. Pol'y* 531 (1997).

n332. Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 *Geo. Immigr. L.J.* 51, 72 (1999), pointedly observes:

Strangely enough, the INS has not prosecuted a single case under the special "alien terrorist" removal procedures authorized by AEDPA. Instead, acting on the perceived authority of these provisions, the INS began relying on a

particular pre-IIRIRA provision in the immigration regulations to imply that the agency is authorized to use secret evidence in ordinary deportation, exclusion, and removal proceedings. There are several obvious consequences of the INS circumventing the "alien terrorist" removal procedures and bringing the secret evidence cases under 8 CFR 240.33(c)(4) instead...if it brought these cases in alien terrorist removal proceedings, the INS would actually have to charge the aliens as "terrorists" and sustain its burden to prove that the aliens are "engaged in ... terrorist activity," rather than attempting to deport them for mere membership, fundraising for political or charitable purposes, or association with unpopular organizations.

Id. (internal citations omitted).

n333. INA 237(a)(4)(B), 8 U.S.C. 1227(a)(4)(B) (Supp. III 1998).

n334. See AEDPA 401 (codified at 8 U.S.C. 1531(1); 1227(a)(4)(B); 1182(a)(3)(B)(iii)).

n335. In contrast to the Immigration Courts, wherein both the prosecuting party and the judge hails from the Executive branch, the alien terrorist removal proceedings would be conducted by a federal judge, who would have the authority to address constitutional challenges to the use of classified evidence. See Memorandum in Support of Petition for Habeas Corpus and Expedited Hearing on Request for Release, *Najjar v. Reno*, 97 F. Supp. 2d 1329 (S.D. Fla. 1999) at <http://www.aifl.org/lac/lac/briefarch/9912260720.htm> (last visited Dec. 14, 2003).

n336. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). John Hart Ely has argued that non-citizens' diminished political influence makes them a "relatively easy case" of a "discrete and insular minority" deserving of heightened protection. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 161-62 (1980). Disenfranchisement of non-citizens, Professor Ely explains, "means that any representation they receive will be exclusively 'virtual,'" that aliens have been the subject of substantial prejudice throughout our history, and that "our legislatures are composed almost entirely of citizens who have always been such." Id. at 161. Cf. *Graham v. Richardson*, 403 U.S. 365, 372 (1971), stating that "aliens as a class are a prime example of a 'discrete and insular minority' for whom 'heightened judicial solicitude is appropriate.'"

n337. See *Scales v. United States*, 367 U.S. 203, 221-22 (1961) (construing Smith Act, which barred membership in organization advocating violent overthrow of government, to require prosecution to demonstrate "specific intent"); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966) (invalidating oath requiring state employees not to join Communist Party because "a law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms").

n338. Contrast the rational basis scrutiny in the case of an excluded Belgian Marxist economist in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), with the traditional test for First Amendment protection of political speech developed in *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

n339. In 1990, Congress repealed the immigration law provisions that made aliens deportable for associating with groups advocating communism. See Immigration and Nationality Act of 1990, 8 U.S.C. 1182(a)(3)(C), *American-Arab Anti-Discrimination Comm. v. Thornburgh*, 970 F.2d 501 (9th Cir. 1992) (noting that "communism" and other advocacy grounds had been repealed; dismissing case as non-justiciable).

n340. See David Cole, "Enemy Aliens," *supra* note 215, at 986.

n341. *Reno v. American-Arab Anti-Discrimination Comm.*, No. 97-1252 (U.S.), Joint Appendix at 152 (Declaration of INS District Director Ernest Gustafson), cited in David Cole, "Enemy Aliens," *supra* note 220, at 999 (2002).

n342. See David Cole, "Enemy Aliens," *supra* note 215, at 986.

n343. See *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1998). Also in 1996, AEDPA 303(a) (codified at 18 U.S.C. 2339B and 8 U.S.C. 1189) provided for ten-year sentences for giving material support to a designated terrorist organization. See generally *Humanitarian Law Project, Inc. v. Reno*, 205 F.3d 1130 (9th Cir. 2000). Prior law required the government to show some connection between the support and the terrorist activity. Foreshadowing the USA-PATRIOT Act, the 1996 statute obviated the need for the government to prove such a connection for criminal prosecutions. For related discussion and debate, see Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment after Reno v. AADC*, 14 *Geo. Immigr. L. J.* 313 (2000) (arguing that the holding of the Supreme Court in *Reno v. American-Arab Anti-Discrimination Comm.* should be narrowly construed); David Cole, *Damage Control? A Comment on Professor Neuman's Reading of Reno v. AADC*, 4 *Geo. Immigr. L. J.* 347 (2000) (arguing that even a narrow interpretation of the Court's language does violence to traditional First Amendment jurisprudence).

n344. See Peter Carlson, *Washington Book Bash; Author Sends His Tome on the Patriot Act Into The Ring and Waits for the Right Jabs to Land*, *The Wash. Post*, Oct. 2, 2003, at C1 (quoting Professor David Cole).

n345. See the USA-PATRIOT Act, note 119 *supra*, at 411. The Act defines as a deportable offense the solicitation of members or funds for, or the provision of material support to, any group the government sees fit to designate as terrorist – even if the support was meant for benevolent purposes. *Id.*

n346. The Act closes the borders to those who "endorse or espouse terrorist activity" or "persuade others to support terrorist activity or a terrorist organization" in ways determined by the Secretary of State to conflict with U.S. efforts to combat terrorism. USA-PATRIOT Act, *supra* note 119, at 411. In addition, the law can issue a notice to appear for removal proceedings for certain non-citizens who support groups which are not on the list, if the group has engaged in or threatened violence. *Id.* "Terrorist activity" encompasses even threats to use a weapon, and a "terrorist organization" is any group of two or more persons that has used or threatened to use a weapon. See Cole, *supra* note 215, at 966-67.

n347. *Brandenburg v. Ohio*, 395 U.S. 444, 47-49 (1969), quoting *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937). The Court pointed out that "the mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Id.* at 448 (internal citations omitted).

n348. See 50 U.S.C.S. 1801(a)(5) (defining "foreign power" to include "a foreign-based political organization, not substantially composed of United States persons"); 50 U.S.C.S. 1801(b)(1)(A) (2002) (defining an "agent of a foreign power" to include "any person other than a United States person, who ... acts in the United States as an officer or employee of a foreign power").

n349. See USA-PATRIOT Act, *supra* note 119, at 215; and see generally Cole, *supra* note 215.

n350. See Abul Rashid al-Khattib, "Conference Urges International Body For Zakah," IslamOnline.Net (Dec. 31, 2003), <http://www.islam-online.net/English/News/2003-12/31/article02.shtml> (last visited Feb. 4, 2004). The Treasury Department has taken control of the property and funds of two U.S.-based charities, both with U.S. citizen board members. *Global Relief Foundation, Inc. v. O'Neill*, 1: 2002 CV 00674 (N.D. Ill. 2002); *Benevolence International Foundation, Inc. v. Ashcroft*, 1: 2002 CV 00763 (N.D. Ill. 2002). In March 2002, the government notified Global Relief Foundation that it will rely on a provision of the USA-PATRIOT Act to present secret evidence to the district court in which the seizure has been challenged. See 205 F.Supp.2d 885 (N.D. Ill. 2002); *aff'd in Global Relief Found., Inc. v. O'Neill*, 315 F.3d 748 (7th Cir. Ill., 2002); writ of certiorari denied, 124 S. Ct. 531 (2003). The government cited the provision's amendment to the International Emergency Economic Powers Act (FISA), 50 U.S.C.S. 1701 et seq., to block assets and present classified evidence to the district court in which the block has been challenged. See 205 F.Supp.2d 801. See also Allan Dodds Frank, "Islamic Charity Fights Asset Freeze," CNN.Com (Jan. 28, 2002), <http://www.cnn.com/2002/LAW/01/28/inv.charilty.lawsuit/> (last visited Feb. 27, 2004).

n351. See Abul Rashid al-Khattib, "Conference Urges International Body For Zakah," *id.*

n352. Glenn Kessler, "Charity Event May Have Terrorist Link; Pentagon Adviser Who Spoke at Function Thought Money Was for Quake Victims," *The Washington Post* (Jan. 29, 2004) at A8. The State Department has listed the MEK as a foreign terrorist organizations since 1997, and recently shut down its U.S. political offices. *Id.*

n353. *Id.*

n354. *Id.*

n355. *Id.*

n356. See, e.g., the draft of the Domestic Security Enhancement Act of 2003, or "PATRIOT Act II," published by the Center for Public Integrity and available electronically at <<http://public-i.org/dtaweb/report.asp?ReportID=502&L1=10&L2=10&L3=0&L4=0&L5=0>> (visited Feb. 2, 2004).

n357. The Department of Justice at that time released a memorandum from John Ashcroft to all federal prosecutors saying they "must charge and pursue the most serious, readily provable offenses supported by the facts." The memo tightens the exceptions in several areas, limiting the discretion of prosecutors to make

independent decisions on charging, pursue plea bargains, and permit downward departures under sentencing guidelines. See "Prepared Remarks of Attorney General John Ashcroft, International Association of Chiefs of Police (IACP), Philadelphia, Pennsylvania" (October 24, 2003) <http://www.usdoj.gov/ag/speeches/2003/102403iacp.htm> (last visited May 14, 2004). See also "Ashcroft's 'Get Tough' Memo Could Increase Populations," *Corrections Professional*, Vol. 9, No. 4 (Oct. 17, 2003).

n358. See Robyn Blumner, *Bush Is Determined to Undo More Liberty Under Patriot Act*, Salt Lake Trib., Oct. 31, 2003. H.R. 3040 was proposed in September of 2003.

n359. David Martin, *With a Whisper, Not a Bang: Bush Signs Parts of Patriot Act II into Law – Stealthily*, San Antonio Current, Dec. 24, 2003. <<http://www.sacurrent.com/site/news.cfm?newsid=10705756&BRD=2318&PAG=461&deptid=482778&rfti=6>> (visited Feb. 4, 2004).

n360. *Id.* But see Alexander Bolton, *Presidential Push Fails to Quell GOP Fear of PATRIOT Act*, Hill News, May 12, 2004, available at <http://www.hillnews.com/news/051204/patriot.aspx> (last visited May 13, 2004).

n361. Bruce Finley, *More Prison Beds for Migrants: Feds Seek Space to Accommodate Crackdown on Illegal Immigration*, Denver Post, Dec. 7, 2003 at A1.

n362. See "Department of Homeland Security Budget for Fiscal Year 2005," available at <http://www.whitehouse.gov/omb/budget> (last visited Feb. 27, 2004). By early 2004, more than 7,000 people had been detained in the context of the plan called Endgame, in which "fugitive teams" of immigration detectives hunt for more than 400,000 non-citizen "absconders" over ten years. See Alfonso Chardy, *U.S. Agents Trying to Find 400,000 for Deportation*, Miami Herald, Mar. 14, 2004; see also Nina Bernstein, *Old Deportation Orders Leading To Many Injustices, Critics Say*, N.Y. Times, Feb. 19, 2004 at B1. Documented backlogs in processing applications, misplaced records, wrong addresses and misspelled names that have, not infrequently, led to prolonged detentions of legal residents and people unaware that final deportation orders had been issued against them. *Id.* The government has explained the mistakes as results of data entry errors, incompatibilities between the systems, and the lack of a system for correcting data inconsistencies. See U.S. Department of Justice, Office of the Inspector General, "The Immigration and Naturalization Service's Removal of Aliens Issued Final Orders" (Feb. 2003, Report Number I-2003-004), available at <http://www.usdoj.gov/oig/inspection/INS/0304/exec.htm#1> (last visited Apr. 22, 2004).

n363. "U.S. 'May Hold Cleared Detainees'," BBC News (Feb. 26, 2004), available at <http://news.bbc.co.uk/2/hi/americas/34879> (last visited Jan. 27, 2004).

n364. See James Risen et al., *Harsh Methods Cited in Top Qaeda Interrogations*, N.Y. Times, May 13, 2004, at A1.

n365. Peter Singer, *Beyond the Law: The Abuse of Iraqi Prisoners by U.S. Personnel Shows that Outsourcing Military Jobs has Gone Too Far*, The Guardian, May 3, 2004, available at <http://www.guardian.co.uk/Iraq/Story/0,2763,1208259,00> (last visited May 14, 2004).

n366. Peter W. Singer, "Warriors for Hire in Iraq," Salon.com, Apr. 15, 2004, available at <http://archive.salon.com/news/feature/2004/04/15/warriors/index.html> (last visited Oct. 11, 2004).

n367. *Id.* Halliburton subsidiary Kellogg, Brown & Root has won construction contracts for the detention compounds in Guantanamo Bay, Cuba. See Robert Bryce and Julian Borger, Cheney is Still Paid by Pentagon Contractor, *The Guardian*, Mar. 12, 2003. See also <http://www.policemission.com/iraq.asp> (visited Apr. 22, 2004), where an international police information site advertises DynCorp jobs to experienced prison guards. The site publishes the electronic address cops.recruiting@dyncorp.com for the convenient submission of job applications. DynCorp plans to pay salaries as high as \$153,600, with minimum pay of \$75,076.92. See Jonathan Weisman and Anitha Reddy, Spending On Iraq Sets Off Gold Rush, *The Washington Post*, Oct 9, 2003, at A1.

n368. Peter W. Singer, "Warriors for Hire in Iraq," *supra* note 366. The firm has also employed DeLay's spouse. See *id.*

n369. See Jonathan Weisman and Anitha Reddy, "Spending On Iraq Sets Off Gold Rush," *supra* note 369.

n370. *Id.*

n371. Reuters, "U.S. Holding 200 Iraqi 'Mutineers'," *Sydney Morning Herald* (Apr. 18, 2004) <http://www.smh.com.au/articles/2004/04/18/82140098949.html> (last visited Apr. 22, 2004).

n372. See "Iraq Jail Attack Kills 22 Inmates," *BBC News* (Apr. 20, 2004).

n373. The U.S. does not release statistics, but Baghdad human rights groups estimate 6,000 to 8,000 so-called "security detainees" were still held at Abu Ghraib in March of 2004. Dan Murphy, "At Prison Gate, Iraqi Families Vent," *The Christian Science Monitor* (Mar. 26, 2004). In May of 2004, London's *Guardian* reported a figure of "40,000 people in U.S. custody since last year's invasion." See Luke Harding, "The Other Prisoners," *The Guardian* (May 20, 2004) at 10, Features Pages. A leading U.S. paper put the figure at 35,000. See T. Christian Miller, *Iraqi Prisoner Abuse Appears More Extensive*, note 92, *supra*. Several hundred people were released from Abu Ghraib in May 2004, in the midst of a growing scandal over heinous treatment of detainees there. *Id.*

n374. Daniel McGrory, Families Live in Fear of Midnight Call by U.S. Patrols, *The [London] Times* (Jul. 9, 2003). A recent report in Australia's *Sunday Herald* cited a June, 2004 Unicef report revealing that at least 100 Iraqi children, some as young as 10, are being detained "indefinitely in prisons including the notorious Abu Ghraib." Neil Mackay, "Revealed: Coalition Forces Imprison Iraqi Children," [*Sydney*] *Sunday Herald* (Aug. 1, 2004) <http://www.sundayherald.com/43773> (last visited Aug. 1, 2004). Between January and May of 2004, the International Committee for the Red Cross registered 107 juveniles being held in six different coalition jails. *Id.* A U.S. soldier who served at Abu Ghraib has also blown the whistle on the abuse of detained children. *Id.*

n375. Murphy, *At Prison Gate, Iraqi Families Vent*, supra note 373.

n376. Fox Butterfield, *The Struggle for Iraq: Prisoners; Mistreatment of Prisoners Is Called Routine in U.S.*, N.Y. Times, May 8, 2004, at A11.

n377. In 2003, the company, Management & Training Corporation, was criticized by the Justice Department and the New Mexico Department of Corrections for unsafe conditions and lack of medical care for inmates in its custody, but no further action was taken. *Id.*

n378. See Taguba Report, supra notes 69-70. General Taguba completed the report in February of 2004.

n379. The company, formed in 1962, announced record revenues for fiscal year 2003 of over \$843 million. See CACI International Inc. available at <http://www.caci.com/about/hist.shtml> (last visited May 14, 2004).

n380. See Taguba Report, supra notes 69-70. .

n381. See *id.* Former CIA Director James Woolsey, proponent of Ahmad Chalabi of the Iraqi National Congress, has served as a Titan director. See Seymour M. Hersh, *Annals Of National Security; Selective Intelligence; Donald Rumsfeld has his own special sources. Are they reliable?* The New Yorker (May 12, 2003) at 44; and *The Titan Corp; Proxy Report Excerpts*, San Diego Business Journal (Jun. 29, 1987) at 16 (reporting that Woolsey previously served as a director of Titan Systems from 1983 until the merger with Titan in 1985).

n382. See Singer, supra note 365.