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

As explained in this Article, individuals have relationships to citizenship, and citizenship has its own relationship with individuals. It shapes who people are, what they do, how they perceive and how they are perceived. In
considering United States' involvement in post-September 11th torture and other state-sanctioned abuse of human rights, 1 how citizenship impacts us greatly depends upon [*412] our location.

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

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

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

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

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4 See supra note 1 and accompanying text.


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

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

I. THE TAINTED AMERICAN IMAGE ABROAD

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

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

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

12 Id.

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

A. The Tortured Law of Torture

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

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


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

Id. at 3-4.

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


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

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

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

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

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24 See id. at 1-3.

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

26 Id. at 46.


29 Id. at 1.

30 Id.

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

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

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

B. “Creative” Interpretation of International Law

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

32 See supra note 1; see also Kathleen Clark & Julie Mertus, Torturing the Law: The Justice Department’s Legal Contortions on Interrogation, WASH. POST, June 20, 2004, at B3.
37 Id. at P 51; see also CAT, supra note 27, art. I, P 1.
38 U.N. Guantanamo Report, supra note 34, PP 51-52.
39 Id. at P 52; DEP’T OF DEF., ARMY REGULATION 15-6: FINAL REPORT: INVESTIGATION INTO FBI ALLEGATIONS OF DETAINEE ABUSE AT GUANTANAMO BAY, CUBA DETENTION FACILITY 2 (amended June 9, 2005).
and CIA Director Porter Goss urged Congress to exempt the CIA from the McCain amendment, which banned torture of any detainee in U.S. custody. In the wake of publicized prisoner-abuse committed by the U.S. military in Afghanistan and Iraq, the energetic lobbying effort led by Cheney and Goss heightened concerns among lawmakers and human rights groups about the treatment of detainees in the secretive CIA system. The Bush administration did little to alleviate suspicions when President Bush attached a "signing statement" to the McCain amendment, declaring that the President had the right at any point not to comply with the ban on cruel, inhumane, and degrading punishment. The executive branch, he declared, would interpret the Amendment "in a manner consistent with the constitutional authority of the President to supervise the unitary Executive Branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power." Vice President Cheney's office also voiced strong opposition to regulations of a new U.S. Army Field Manual, released September 6, 2006, that barred torture and upheld the Geneva Conventions. Their stiff opposition delayed the manual's publication for a year. At a morning briefing for the manual's release, Pentagon officials denounced the use of torture, pointing out its ineffectiveness in obtaining reliable intelligence. The bans against cruel and degrading treatment in the manual did not apply, however, to CIA officials. Indeed, any hopes that the briefing portended significant changes to the treatment of detainees in the so-called war on terror were summarily dashed by President Bush's speech that afternoon. In his address, he confirmed the existence of a secret CIA detention program, defended CIA officials' use of "alternative" interrogation methods, and called on Congress to pass proposed legislation on military commissions to try detainees at Guantanamo Bay. Included among its many problematic provisions, the legislation would permit trials in which secret evidence and statements secured under coercion could be used.

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

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


46 Lobe, supra note 45.


49 HRW, DETAINEE ABUSE, supra note 47.
would be sorely disappointed by the actions of the U.S. Congress. While some representatives and senators publicly denounced the administration's efforts to legalize its violations of detainees' rights, Congress ultimately acquiesced to President Bush's presumed prerogatives. In response to the Supreme Court's June 2006 ruling in *Hamdan v. Rumsfeld*, which upheld the Geneva Conventions and detainees' right to use habeas corpus, Congress, at the urging of the President, passed the Military Commissions Act (MCA). The MCA largely undid the protections established in *Hamdan*; detainees could not access their rights under the Geneva Conventions, and they would face trials with much lower standards of justice than U.S. courts provide. Military commissions with highly questionable impartiality will try detainees, secret evidence and coerced statements can be used, and U.S. officials are granted immunity from prosecution for past abuses of detainees.

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

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52 **126 S. Ct. 2749 (2006).**

53 **Id. at 2756-57.**


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


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

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


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

During wartime, CAT called on the United States to close all secret detention centers; hold accountable senior military and civilian officials who authorized, acquiesced or consented to acts of torture committed by their subordinates; and end its practice of transferring detainees to countries with no "diplomatic assurance" that detainees will not be subject to torture. It also specifically criticized the indefinite detention of prisoners in Guantanamo Bay and called for its closure. In its attempt to avoid culpability for its interrogation practices, the Bush administration uses another tactic known as "extraordinary renditions" -- also referred to as "outsourcing torture." Substantial evidence exists that the United States has been covertly transferring terrorism suspects to other countries--notably Jordan, Egypt, and Syria--which are known for employing coercive interrogation methods. The United States' involvement in these transfers serves as a poor example to other states and comprises an additional violation of international law and human rights protections.

In September 2006, the Bush administration finally admitted to the existence of secret CIA prisons across the globe, the indications of which had been reported months prior in mainstream news. While the Bush administration denied using torture, CIA interrogators are permitted to use agency-approved "Enhanced Interrogation Techniques." These techniques include actions in violation of both United States' Military Law and the United Nations' Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the United States is a signatory.

62 Id. at PP 14 & 15.  
63 Id. at PP 17, 19, 21.  
64 Id. at P 22.  
70 CAT, supra note 27.  
71 Ross & Esposito describe the process of "waterboarding":

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

72 Ross & Esposito, supra note 69. E.g., Carol D. Leonnig & Eric Rich, U.S. Seeks Silence on CIA Prisons-Court Is Asked to
Though it claims that the CIA does not use torture, the Bush administration still moved in November 2006 to bar detainees from talking to anyone, even their lawyers, about the “alternative interrogation methods” they underwent at the secret CIA prisons. 73 The administration argued that under the new Military Commissions Act, these detainees have no right to speak to a lawyer because the Act negates their access to the U.S. criminal court system. 74

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

II. TAINTED CITIZENSHIP GUARANTEES AT HOME

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

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

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

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

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

74 See id.


77 Id.


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

80 Id. at Part IVA. See also MICHAEL RATNER, CTR. FOR CONSTITUTIONAL RIGHTS, MAKING US LESS FREE: WAR ON TERRORISM OR WAR ON LIBERTY?,
an increasingly chilly attitude toward [*425] foreigners since September 11th. 81 Although asylum seekers and economic migrants still flock to the United States, they have good reason to be skeptical that American citizenship will provide the kind of legal safeguards that they need. 82

A. Targeting Ethnic Minorities

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

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


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


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


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

As Human Rights Watch testified before the United Nations:

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

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

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

Although the arrests and detentions were described as part of the government's anti-terrorism offensive, many of the detained were held for weeks only to then be charged with immigration violations. They were deported under non-criminal charges of over-staying a visa or working more hours than permitted on a student visa. The majority through interviews with current and former detainees and their attorneys). See RATNER, MAKING US LESS FREE, supra note 80, at 5; Anita Ramasastry, A Fawed Report Card: How DOJ Mishandled the Post-September 11 Detention Process, FINDLAW, Aug. 1, 2003, http://writ.news.findlaw.com/ramasastry/20030801.html (last visited Oct. 16, 2007).

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


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

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

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

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

96 A YEAR OF LOSS, supra note 81, at 14.
of those detained were long-term residents, business owners, and taxpayers; many were married to U.S. citizens and had children who are U.S. citizens. 97 "In Liberty's Shadow," a report recently released by Human Rights First, provides evidence that in many parts of the country—including California, Illinois, Louisiana, Michigan, Minnesota, New York, New Jersey, Texas, and Washington, D.C.—parole from detention is rarely granted to asylum seekers. 98 In fact, as Amnesty International has documented, “[t]he INS may jail them for months (in one case recorded in this report for over a year) after they are granted asylum, while INS attorneys (from the same jurisdiction that jails them) appeal against the granting of asylum.” 99 Moreover, INS officials "may refuse to release asylum-seekers even though an Immigration Judge has determined that they meet the definition of a refugee, a person the USA is bound by treaty to protect." 100

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

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

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

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

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97 Id.
100 Id.
102 Id.
103 See A YEAR OF LOSS, supra note 81, at 18.
104 See generally HRW, PRESUMPTION OF GUILT, supra note 88
105 Id. at 4, 10.
106 For the debate on preventive detention, see Whitney D. Frazier, Note, The Constitutionality of Detainment in the Wake of September 11th, 90 KY. L.J. 1089, 1118-23 (2001-2002).
107 See HRW, PRESUMPTION OF GUILT, supra note 88, at 4.
Bedford, Massachusetts factory where a large population of undocumented Latino immigrants worked, arresting workers while their children [^429] were in childcare. 109 Worried family members were left calling local community organizations to try and find out information about their loved ones. 110 This case is just one illustration of how fear and anti-immigrant sentiment is tearing apart entire communities.

B. Eroding Civil Liberties

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

A general blanket of secrecy and information suppression now [^430] covers a vast and growing array of government documents. The Bush administration classified 15.6 million documents in fiscal year 2004, which is 81% more than were classified in the year before September 11, 2001. 116 The administration also made information more difficult to obtain under the Freedom of Information Act (FOIA) by devoting fewer federal resources to processing such requests. 117 In October 2001, Attorney General appointee John Ashcroft, in a reversal of President Clinton's directive on FOIA requests, instructed federal agencies to withhold information whenever legally possible. 118 Indeed, the Information Security Oversight Office (ISOO) reports a marked


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decrease in information available to the public. 119 Also, the administration has invoked "state secrets" privileges—which allow the President to withhold documents from the courts, Congress, and the public—twenty-three times between September 2001 and May 2006. 120 "State secrets" privileges were used only four times between 1953 and 1976, 121 a twenty-three year period recognized as "[a]t the height of the Cold War." 122 The "state secret" privilege has been invoked about twice as many times since 2001. 123 The public has no way of knowing the full extent of document classification by this administration, 124 nor if all these suppressed documents have any bearing on "security."

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

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

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

119 See SECRECY REPORT CARD, supra note 116, at 3.
121 SECRECY REPORT CARD, supra note 116, at 1.
122 Id.
123 Id. (noting the use of "state secrets" privilege at least seven times since 2001).
124 See, e.g., Michelle Chen, Cheney's Office Declares Exemption from Secrecy Oversight, THE NEW STANDARD, June 7, 2006, http://newstandardnews.net/content/index.cfm/ items/3261 (noting that Vice President Cheney's office has refused to provide even basic and quantitative information about how it classifies documents, defying annual reporting requirements).
125 Id.
126 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (to be codified in 18 U.S.C. §§ 215(a)(1); 505(a)(2)-(3); 505(b)(2); 505(c)(1)(B), (2)(B), (3)(B)).
128 USA PATRIOT Act, supra note 126, § 215.
129 50 U.S.C. § 1862(b) (2) (B) (2000) (records at common carriers, public accommodation facilities, physical storage facilities, or vehicle rental facilities); 18 U.S.C. § 2709 (b) (1) (B) (2000) (subscriber information, billing information, and electronic transaction and communication information from wire or electronic communications service providers); see also 12
dropped this requirement of individualized suspicion. With little or no judicial oversight, commercial service providers may be compelled to produce these records solely on the basis of a declaration from the FBI that the information is for an investigation "to protect against international terrorism or clandestine intelligence activities." In addition, the USA PATRIOT Act makes it a crime to reveal that the FBI has "sought or obtained" such information. Furthermore, under Section 213 of the Act, the government can delay notice of a search if it can show "reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result." As long as the low standard of 'reasonable cause' or 'reasonable necessity' is met, police officers can secretly enter a person's home or office while they are away and search through and seize private belongings. These new powers are not limited to anti-terrorism investigations, but rather apply to all federal investigations, including routine criminal cases. Furthermore, Congress did not create a sunset provision for this section. This means that, unlike some other powers granted in the Act, the Section 213 powers are permanent. Also under new regulations issued by the Attorney General, the FBI can now carry out surveillance on any religious, civic, or political organization in the United States without even the slightest suspicion of wrongdoing. By casting fear among the very groups that monitor government abuses of citizens, the U.S. government has only furthered its own ability to violate civil liberties with impunity.

III. CONCLUSION: RECLAIMING CITIZENSHIP?

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


130 USA PATRIOT Act, supra note 126.
131 Id.
132 Id. § 215.
133 § 213(2).
134 Id. See also A YEAR OF LOSS, supra note 81, at 10.
135 A YEAR OF LOSS, supra note 81, at 7.
136 Id. at 17; USA PATRIOT Act § 224(a).
137 A YEAR OF LOSS, supra note 81, at 10.
United States now finds itself lumped with other flagrant human rights violators, such as Sudan and China. 140 The lesson the United States is teaching the world is a dangerous one: profess to believe in human rights universalism while carving out exceptions to the application of human rights norms.

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

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

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

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